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Note

BOOTH V. MARYLAND—DEATH KNELL FOR THE VICTIM IMPACT STATEMENT?

In Booth v. Maryland1 the Supreme Court of the United States held unconstitutional the use of victim impact statements in a capital sentencing proceeding. The Court determined that by introducing this information the State rendered the sentencing jury's death penalty decision impermissibly arbitrary and capricious. In reaching its conclusion, the Court did not engage in the traditional systemic examination typical of previous eighth amendment jurisprudence, but instead spoke broadly as to philosophic and procedural flaws perceived inherent in the use of victim impact evidence. By so doing, the Court not only forbade the use of such evidence in death penalty proceedings, but also raised serious questions as to the future of victim impact evidence in American criminal law.2

I. THE CASE

In 1983 Booth and an accomplice brutally murdered an elderly couple, Ira and Rose Bronstein, in their home.3 Booth was subsequently apprehended, charged, and convicted by a jury of two counts of first degree murder.4 The State requested the death

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2. The term "victim impact evidence," reflecting the type of information contained in the Maryland Victim Impact Statement (VIS), encompasses a broad range of factual, opinion, and documentary evidence. The Court in Booth identified several discrete categories of such information. See infra Part III. Some types of victim information arguably are immune from many of the flaws identified in the Court's opinion and this note. For example, a medical report detailing a victim's physical injuries often is relevant and probative evidence that can be characterized even under a relatively narrow definition as a circumstance of the crime, and thus admissible under the rationale of Booth. In this note, "victim impact evidence" will be used to refer to the more objectionable types of victim impact evidence identified by the Court, i.e., personal characteristics of the victim, physical and emotional effects on the victim's family, and the family member's opinions of the crime.
3. The murderers entered the home intending to rob it. Booth was a neighbor of the Bronsteins and knew they could identify him. Booth and his accomplice bound and gagged the victims, and then repeatedly stabbed each in the chest with a kitchen knife. 107 S. Ct. at 2530. The criminals then left the home, but returned several hours later to plunder it. Booth v. State, 306 Md. 172, 184, 507 A.2d 1098, 1104 (1986). The Bronstein's son discovered the bodies a few days later. 107 S. Ct. at 2530.
4. Booth also was convicted of two counts of robbery and conspiracy to commit robbery. 107 S. Ct. at 2530. Booth's accomplice, Willie Reid, was convicted and sen-
penalty.5

Booth elected to be sentenced by a jury.6 During the sentencing proceeding the State, as required by the Maryland death penalty statute, introduced into evidence a presentence report compiled by the Division of Probation and Parole (DPP).7 The report detailed Booth's background, education and employment history, and criminal record.8 Because the crime was a felony which caused physical injury, Maryland law also mandated that the report contain a victim impact statement (VIS), prepared by the DPP,9 describing the effect of the crime on the Bronstein family.10

In Booth's case the VIS was highly prejudicial. The DPP interviewed several members of the Bronsteins' family, including their son, daughter, son-in-law, and granddaughter. The report described the victims, their life together, and their personal relationships with members of the family. The victims' "outstanding" sentenced to death as a principal in the first degree to the murder of Rose Bronstein. Id. at 2530 n.1. See Reid v. State, 305 Md. 9, 501 A.2d 436 (1985).

5. 107 S. Ct. at 2530.
6. Id. See Md. ANN. CODE art. 27, § 413(b) (1987).
7. 107 S. Ct. at 2530-31. See Md. ANN. CODE art. 41, § 4-609(c) (1986).
8. 107 S. Ct. at 2530.
9. Md. ANN. CODE art. 41, § 124 (Supp. 1988) (now codified at art. 41, § 4-609 (1986)). See infra note 29. Although the VIS is compiled by the Division of Probation and Parole (DPP), the information is supplied by the victim or the victim's family. The VIS may be read to the jury during the sentencing phase or family members may be called to testify as to the relevant information. Md. ANN. CODE art. 41, § 4-609(c) (1986).
10. Md. ANN. CODE art. 41, § 4-609(c) (1986). A VIS shall:
   (i) Identify the victim of the offense;
   (ii) Itemize any economic loss suffered by the victim as a result of the offense;
   (iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
   (iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
   (v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
   (vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

Id. § 4-609(c)(3). The Booth Court noted that although the Maryland statute does not expressly permit evidence of a victim's character and community status, the Maryland Court of Appeals has indicated that such information may be included at the trial judge's discretion. 107 S. Ct. at 2535 n.9. See Reid v. State, 302 Md. 811, 820-21, 490 A.2d 1289, 1294 (1985) (no justification for limiting broad discretion of the judge regarding victim's role in sentencing). Previous VIS's have included this type of information. See Lodowski v. State, 302 Md. 691, 766, 490 A.2d 1228, 1266 (1985) (Cole, J., concurring) (quoting statement of victim's widow, who declared, "It hurts when I see other children with their fathers, knowing that my children don't have a father now who can love and hold them.").
personal qualities were emphasized, as was the immediate reaction of the family members to their murder. The report also related, in graphic and emotional detail, the impact the tragedy had on each of the family members' lives.\(^\text{11}\)

The son and daughter, for example, told of sleeplessness, depression, painful memories now permanently associated with familiar objects and locations, and a sense of fear coloring their lives. Both recounted an inability to carry out certain normal activities because of the association with their parents. Both also expressed horror at the crime and a keen desire for revenge.\(^\text{12}\) The granddaughter's comments were similar. Among other things she recounted how the murders had tainted the wedding of another family member several days later, and how depression and pain have ruined her own life.\(^\text{13}\)

\(^{11}\) 107 S. Ct. at 2536-39. An example includes the son stating that he can only think of his parents in the context of how he found them that day, and he can feel their fear and horror. It was 4:00 p.m. when he discovered their bodies and this stands out in his mind. He is always aware of when 4:00 p.m. comes each day, even when he is not near a clock. He also wakes up at 4:00 a.m. each morning . . . [H]e suffers from lack of sleep. He is unable to drive on the streets that pass near his parents' home. He also avoids driving past his father's favorite restaurant, the supermarket where his parents shopped, etc. He is constantly reminded of his parents. He sees his father coming out of synagogues, sees his parents' car, and feels very sad whenever he sees old people. . . . [H]e feels that his parents were not killed, but were butchered like animals.

\(^{12}\) Id. at 2537. Likewise, the daughter related that [she] and her husband didn't eat dinner for three days following the discovery of Mr. and Mrs. Bronstein's bodies. They cried together every day for four months and she still cries every day. . . . [S]he doesn't sleep through a single night and thinks a part of her died too when her parents were killed. She reports that she doesn't find much joy in anything and her powers of concentration aren't good. She feels as if her brain is on overload. . . . Wherever she goes she sees and hears her parents. This happens every day. She cannot look at kitchen knives without being reminded of the murders and she is never away from it. She . . . can't watch movies with bodies or stabbings in it [sic]. She can't tolerate any reminder of violence. [S]he used to be very trusting, but is not any longer. When the doorbell rings she tells her husband not to answer it. She is very suspicious of people and was never that way before . . . . [H]er parents were stabbed repeatedly with viciousness and she could never forgive anyone for killing them that way. She can't believe anybody could do that to someone . . . animals wouldn't do this . . . . She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this.

\(^{13}\) Id. at 2538. The entire VIS was reproduced as an appendix to the Court's opinion. Id. at 2536-39.

\(^{12}\) Id. at 2537-39. The son stated that "he is frightened by his own reaction of what he would do if someone hurt him or a family member." Id. at 2537-38.

\(^{13}\) Id. at 2538-39.
The VIS report concluded that the murder of the Bronsteins was "such a shocking, painful, and devastating memory" to the family that it "permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them." 14

Booth's counsel objected on eighth amendment grounds to the introduction of the VIS, alleging that the statement was irrelevant and inflammatory.15 Consequently, it could lead the jury to impose the death penalty in an arbitrary and capricious manner.16 The trial court admitted the VIS, but granted a defense request that it be read to the jury instead of introduced through live witnesses.17

The jury sentenced Booth to death for the murder of Irvin Bronstein.18 The Maryland Court of Appeals affirmed,19 noting that it had upheld the constitutionality of the VIS in Lodowski v. State.20 In Lodowski the court concluded that the VIS imparts to the sentencer important information concerning the full measure of harm caused by the defendant.21 In Booth the court found that the VIS was a "relatively straightforward and factual description of the effects of these murders on the Bronstein family."22 The Maryland court held that the use of the VIS did not render Booth's death sentence improper.

14. Id. at 2539.
15. Id. at 2532.
16. Id. See Gregg v. Georgia, 428 U.S. 153, 189 (1976) (finding that jury's discretion to impose death sentence must be "limited so as to minimize the risk of wholly arbitrary and capricious action").
17. 107 S. Ct. at 2532. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. See Robinson v. California, 370 U.S. 660, 666 (1962) (applying eighth amendment prohibitions to the states through the due process clause of the fourteenth amendment).
18. The jury also sentenced Booth to life imprisonment for the murder of Rose Bronstein. 107 S. Ct. at 2532.
20. 302 Md. 691, 490 A.2d 1228 (1985). The court held that "there is a reasonable nexus between the impact of the offense upon the victim or the victim's family and the facts and circumstances surrounding the crime especially as to the gravity or aggravating quality of the offense." Id. at 741-42, 490 A.2d at 1254.
21. Id. at 742, 490 A.2d at 1254.
22. Booth, 306 Md. at 223, 507 A.2d at 1124. Judge Cole dissented as to the use of the VIS in sentencing. Id. at 230, 507 A.2d at 1128.
II. BACKGROUND

The Supreme Court granted certiorari to consider the constitutional implications of the use of victim impact evidence in a capital proceeding. Indeed, Booth was the first occasion for the Court to consider the propriety of victim impact evidence in sentencing.

Booth’s situation was the latest manifestation of a victims’ rights movement that has been growing quickly since its inception in the 1970s. The main tenets of the victims’ rights movement involve dissatisfaction with the current state of criminal justice. Underlying this dissatisfaction is the perception that the criminal justice system devotes an inordinate amount of its time and resources to protecting the rights of the criminal defendant while the victim is ignored. The remedy for this preoccupation with the defendant, victims’ spokesmen advocate, is an enhanced role for the victim in the criminal process. One outgrowth of this movement has been the increasing popularity of various forms of victim restitution as an alternative in criminal sentencing. Another has been the introduction of victim impact evidence at the sentencing phase of criminal trials. As the Court in Booth noted, at least thirty-six

25. Justice Scalia, dissenting in Booth, pointed to the general frustration of the victims’ rights movement over sentencing procedures and the advent of evidence permitted in mitigation. 107 S. Ct. at 2542. See, e.g., Henderson, The Wrongs of Victim’s Rights, 37 STAN. L. REV. 937, 948 (1985) (“The ‘discovery’ of the crime victim provided an individual to substitute for the state on the side of the scales opposite the accused, thus making it appear that the balance was more ‘equal.’ ”); Aynes, The Right Not To Be A Victim, 11 PEPPERDINE L. REV. 63, 64 (1984) (Symposium Special Issue) (“[C]oncerns for victims appear to have originated in modern times as a result of the women’s rights movement and its efforts to protect the welfare of rape victims.”).
26. See Johnson, supra note 24. This role can take various forms: Currently, according to figures from the American Bar Association, seven states—New York, Kentucky, Michigan, Montana, South Carolina, South Dakota and West Virginia—have laws requiring consultations with the victim before a plea is presented to the court by the prosecution. Six other states, including Connecticut, say the victim has the right to be consulted before the plea is accepted by the judge. Three states give the victim a right to be informed, but not consulted, about a plea. Thirty-five states allow a victim to be heard, usually in writing, at the sentencing.
Id.
27. See generally Carrington & Nicholson, supra note 24; Johnson, supra note 24 (briefly describing the victims’ rights movement’s legislative efforts). The victims’ rights movement has spawned numerous proposals for legislative reform. See, e.g., AMERICAN
states now permit the use of some form of victim impact evidence in sentencing proceedings.28

In Maryland victim impact evidence is contained in a VIS.29 The

BAR ASSOCIATION, GUIDELINES FOR THE FAIR TREATMENT OF VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM (1983). ABA Guideline 11 provides that "prior to the sentencing of an offender in a serious case, victims or their representatives should have the opportunity to inform the sentencing body of the crime's physical, psychological, and financial repercussions on the victim's family." The guidelines list several alternative methods for such information to be considered, including written statements prepared by the victim and the victim's family, a statement prepared by a probation officer, or oral testimony.

Other reform efforts have focused on restitution for the crime victim, statutory requirements of notice to the victim at various stages of the criminal process, and preventing the enrichment of criminals at the expense of victims (Son of Sam Laws). See Hudson, THE CRIME VICTIM AND THE CRIMINAL JUSTICE SYSTEM: TIME FOR A CHANGE, 11 PEPPERDINE L. REV. 23, 47-51, 55-57 (1984) (Symposium Special Issue). Of all recent reform efforts, however, "none has been as quickly accepted as the use of 'victim impact statements.'" Id. at 51.

28. 107 S. Ct. at 2536 n.12. Many of the state victim impact schemes are similar to that enacted by Maryland. For a summary of state legislation codifying victim impact evidence, see the Appendix infra at 733.

Certain states guarantee the victim or immediate family the opportunity to personally address the sentencing court. See, e.g., CONN. GEN. STAT. ANN. § 54-91a(c) (1985) (crime victim has right to testify at the sentencing hearing); FLA. STAT. ANN. § 921.143 (1985) (victim, or next of kin if victim has died as a result of the crime, may make an oral or written statement to the court). Most of those states recognizing a sentencing role for victim impact evidence have statutory provisions requiring a victim impact statement or victim impact evidence to be submitted as part of the presentence report for criminal offenders. See, e.g., ALASKA STAT. § 12.55.022 (1984). Many of these state schemes allow the sentencing authority to consider the same broad categories of information as that included in the Maryland VIS. See, e.g., OHIO REV. CODE ANN. § 2947.051 (Supp. 1985). Indeed, several states have victim impact statements virtually identical to Maryland's. See, e.g., COLO. REV. STAT. § 16-11-102 (1986).

There are a number of procedural variations. Some states differentiate between felony and misdemeanor offenses, either limiting victim impact evidence to felony cases or requiring it for felonies and permitting it on an optional basis in misdemeanors. See, e.g., KAN. STAT. ANN. § 21-4604(2) (Supp. 1985) (presentence report, containing attitude of victim or complainant concerning the crime, required for felonies and optional for misdemeanors). Several states specifically exclude victim impact evidence from capital cases. See, e.g., MASS. ANN. LAWS ch. 279, § 4B (Supp. 1988). Most allow the specific content of the victim impact evidence to be determined by a parole department or similar agency. See, e.g., NEV. REV. STAT. § 176.145 (1986).

Further examples of state victim impact evidence legislation are provided in the Appendix. The federal government also has instituted reforms as a result of pressure from the victims' rights lobby. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

29. In 1982 the Maryland General Assembly enacted legislation requiring that presentence investigation reports include a victim impact statement if (1) the defendant, in committing a felony, caused physical, psychological, or economic injury; or (2) the defendant, in committing a misdemeanor, caused serious physical injury or death to the victim. MD. ANN. CODE art. 41, § 124 (Supp. 1984) (now codified at art. 41, § 4-609 (1986)).
VIS is a mandatory part of the presentence investigation in felonies that cause physical, psychological or economic injury, and in misdemeanors that cause serious physical injury or death. The VIS is compiled by the DPP based on interviews with the victim, family members, probation officer, and other concerned individuals. By statute, the DPP must report economic loss, physical injury, changes in personal and family situations, requests for psychiatric services by the victim or family members, and "any other information related to the impact of the offense upon the victim or the victim's family that the court requires."$^{31}$

Maryland law specifically requires that a VIS be prepared in capital cases. $^{32}$ Victim impact evidence is not listed as a statutory aggravating factor in the Maryland death penalty statute, $^{33}$ but it is mandatory that a presentence report, containing the VIS, be introduced for the sentencing authority's consideration. $^{34}$

The immediate question before the Supreme Court in Booth was whether the Constitution permits the consideration of victim impact evidence by a capital sentencing jury. Booth contended that considering this type of information would lead to arbitrary or capricious sentencing. This result would be unconstitutional. Since 1972, commencing with Furman v. Georgia, $^{35}$ the Court has required state death penalty schemes to conform to the dictates of the eighth amendment's prohibition against cruel and unusual punishment. A state must structure its capital sentencing process to ensure that the imposition of the state's ultimate punishment accords with society's "evolving standards of decency." $^{36}$ Thus, a state may no longer in-

30. Id.
32. In 1983 the Maryland General Assembly enacted the following provision:
In any case in which the death penalty is requested . . . a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole andProbation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted . . . .
Id. § 4-609(d).
33. For a defendant to qualify for capital punishment, the sentencing authority must find at least one statutory aggravating factor. The statutory aggravating factors are contained in Md. Ann. Code art. 27, § 413(d) (1987). Mitigating factors also are listed. Id. § 413(g). To impose a sentence of death, Maryland law requires that the sentencing authority find that the aggravating factors outweigh the mitigating ones. Id. § 413(h).
34. See supra note 32.
35. 408 U.S. 238 (1972). See Woodson v. North Carolina, 428 U.S. 280, 302 (1976) ("Central to the limited holding in Furman was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments.").
lict the death penalty in a freakish or wanton manner. Sentencing must "be, or appear to be, based on reason, rather than caprice or emotion." 37 Constitutionally, it cannot be arbitrary.

This rationale is particularly relevant when a jury sentences the defendant. The death penalty is the ultimate expression of a "society's moral outrage." 38 To properly measure this sentiment, the Court has spoken approvingly of the use of a jury as the sentencing authority in capital cases. 39 The jury is a direct representative of community values. 40 Yet crucial to the Court's evaluation of the constitutionality of a state statutory scheme is the requirement that a sentencing jury's discretion be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 41 The jury must reach an "individualized" decision based on the defendant's characteristics and the circumstances of the crime. 42 Consequently, although a typical sentencing authority has unrestricted access to a wide range of information, without regard to the evidentiary concerns of the guilt-or-innocence phase of a trial, 43 the information available to a capital sentencing jury may be constitutionally circumscribed. 44

40. See Gregg, 428 U.S. at 181, 190 ("[T]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved."); Witherspoon v. Illinois, 391 U.S. 510, 519 & n.15 (1968) (function of the sentencing jury is to "express the conscience of the community on the ultimate question of life or death," a "link between contemporary community values and the penal system"). Despite its perceived advantages, the Court has held that jury sentencing for capital crimes is not constitutionally required. Spaziano, 468 U.S. at 447. The Court also has maintained that "even if it is a jury that imposes the sentence, the 'community's voice' is not given free rein. The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined." Id. at 462.
41. Gregg, 428 U.S. at 189. See Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality) (opinion of Stevens, J.) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").
III. The Court's Decision

The Court in Booth found that the information contained in the VIS was irrelevant to a jury's "'individualized determination' of whether the defendant in question should be executed." The Court reached this conclusion by examining the intrinsic value of victim impact evidence, rejecting dissent and state arguments that such information can be classified, in reality, as a "circumstance of the crime."

The Court began by acknowledging deference to a legislative determination of proper sentencing considerations. Despite this deference, the legislative scheme must give way when constitutional concerns are implicated. The eighth amendment in particular was intended as a protective measure against the abuse of legislative power. As noted above, the Court has determined that the eighth amendment requires that a capital sentencing decision be an "individualized determination." Thus, judicial scrutiny is particularly needed when a state capital sentencing statute requires the consideration of factors not directly related to the individual defendant's "personal responsibility and moral guilt."

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this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.

45. 107 S. Ct. at 2532 (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983) (emphasis in original)).
46. Id.
47. Id. The dissent argued that such deference should be decisive. Id. at 2539 (White, J., dissenting) ("'[I]n a democratic society legislatures, not courts, are constituted to respond to the will of the people.' " (quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). See also Pennsylvania ex rel Sullivan v. Ashe, 302 U.S. 51, 55 (1937) ("[T]he comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [legislative] determination."). But see infra note 48.
48. As the plurality noted in Gregg: "Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." 428 U.S. at 174 n.19.
49. Id.
51. Enmund v. Florida, 458 U.S. 782, 801 (1982). The Court did note that it never has exclusively limited permissible sentencing factors to the defendant's characteristics, record, and the circumstances of the crime. 107 S. Ct. at 2532. Indeed, the Court has previously stated that "the Constitution does not require the jury to ignore other possible . . . factors" in capital sentencing decisions. Zant, 462 U.S. at 878. The Court's reasoning suggests, however, that any future departure from these capital sentencing fundamentals will be subjected to fairly strict scrutiny. The rigorousness of such an
The State argued that such scrutiny was unnecessary. The use of the VIS at capital sentencing, in the State's view, does not lead to an arbitrary or capricious death penalty decision. There is a "direct, foreseeable nexus" between the crime and the physical, emotional, and social harm inflicted upon the victims and their families. Knowledge of the full extent of the harm allows the jury to better assess the "'gravity or aggravating quality'" of the offense.

The Court rejected this generalized characterization of the VIS. Instead, it examined the specific nature of the information contained in the VIS to determine its relevancy to the capital sentencing decision. The Court divided the VIS into two types of information: (1) a description of the emotional trauma suffered by the family and the personal characteristics of the victims; and (2) the family members' opinions and characterizations of the crimes. Discussing each category in turn, the Court identified substantive and procedural flaws that rendered both types of evidence inadmissible for capital sentencing purposes.

A. Moral Culpability

The Court devoted the majority of its opinion to the first category of victim impact information. The State argued that this type of evidence—the personal characteristics of the victims and the trauma inflicted by their loss—is a relevant measure of the gravity of the offender's crime. The Court, however, rejected such a stan-

examination may even approach that reserved for suspect class equal protection analysis under the fourteenth amendment. See, e.g., Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (racial classifications are subject "to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling government interest").

52. 107 S. Ct. at 2533.

53. Brief for Respondent at 21 (quoting Lodowski v. State, 302 Md. 691, 741-42, 490 A.2d 1228, 1254 (1985)). By its characterization of victim impact evidence as indicative of the "aggravating quality" of the offense, the State offered an opportunity for defeating the Maryland statute on procedural grounds. Maryland arguably has limited the jury's consideration of major "aggravating" factors, or at least those bearing an official imprimatur, to those enumerated in the statute. By injecting an element that concededly is aggravating into the sentencing decision, in a form calculated to inspire deference on the part of the jury, yet without the defined role of the statutory aggravating factors, the State rendered the jury's decision unguided, undirected and, hence, unconstitutionally arbitrary. It should be noted that the statutory aggravating factors must be proved beyond a reasonable doubt. See Md. Ann. Code art. 27, § 413 (1987).

54. 107 S. Ct. at 2533.

55. Id. at 2533-35. The first type of information has an arguably closer connection to the State's circumstantial "nexus." The second type, evidently in the perception of both parties, has a far weaker legal foundation, and thus was accorded a proportionally smaller share of the argument.

56. Id. at 2533.
dard for capital sentencing purposes.\textsuperscript{57}

Initially the Court considered the constitutional basis of the capital sentencing process. To conform to the eighth amendment proscription of arbitrariness, the sentencing jury must consider all relevant information and render an "individualized" sentencing decision. The broad scope of such an examination does not, however, extend to evidence that is misleading or irrelevant. The fatal flaw of the VIS, according to the Court, was that the included information did not directly relate to the moral blameworthiness of the individual defendant.\textsuperscript{58}

By its very nature, the focus of the VIS is on the victim. The information it contains may be completely unknown or unanticipated at the time the defendant commits the crime. As the Court pointed out, "defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered."\textsuperscript{59} A defendant's culpability should depend on "circumstances over which he has control."\textsuperscript{60} It is generally accepted that the intended consequences of a defendant's act extend only to those results the defendant desires or is substantially certain will occur.\textsuperscript{61} These circumstances do not include the personal history and characteristics of the victim, or the amount of grief inflicted upon the victim's family.\textsuperscript{62} Thus, in most cases a VIS describes only the \textit{indirect} consequences of a crime.\textsuperscript{63} In the view of the Court, such a questionable extension of liability is impermissible in a capital sen-

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 2534. The Court stated that "[w]hile the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstances of a capital sentencing hearing." \textit{Id.} at 2533.

\textsuperscript{59} Id. at 2534.

\textsuperscript{60} Id. at 2534 n.7 (quoting People v. Levitt, 156 Cal. App. 3d 500, 516, 203 Cal. Rptr. 276, 287 (1984)). The Supreme Court endorsed the following quotation from \textit{Levitt}:

"We think it obvious that a defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he has control. A defendant may choose, or decline, to premeditate, to act callously, to attack a vulnerable victim, to commit a crime while on probation, or to amass a record of offenses . . . . In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement is relevant to damages in a civil action, but it has no relationship to the proper purposes of sentencing in a criminal case."

\textit{Id.} (quoting \textit{Levitt}, 156 Cal. App. 3d at 516-17, 203 Cal. Rptr. at 287-88).

\textsuperscript{61} W. LaFAVE & A. SCOTT, CRIMINAL \textit{LAw} § 28, at 196 (1972).

\textsuperscript{62} Id.

\textsuperscript{63} Indeed, equating victim impact evidence with the "circumstances of the crime"
Booth's offense was the taking of a human life. A capital sentencing decision is based on determining which defendants who commit that offense qualify for society's ultimate sanction. The defendants are distinguished by the amount of their individual moral blame. Each defendant's "punishment must be tailored to his personal responsibility and moral guilt." Information which is not probative to that decision is irrelevant. Its admission would defeat the constitutional mandate of guided sentencing discretion.

Justices White and Scalia dissented. They strongly disagreed with the majority's definition of the proper limits of sentencing considerations. Capital punishment is the ultimate sanction for an affront to humanity. This affront, they reasoned, is not limited to the victim; it includes repercussions on family, friends, and society as a whole. Thus, in the dissent's view, the full extent of the harm caused by Booth is germane to deciding his appropriate punishment.

After all, Justice White noted, if a motorist runs a stoplight and kills someone, the punishment is far greater than if the motorist merely had run the light without injury, yet the moral culpability is the same. In previous cases the Court has indicated that the harm caused by an offense may be the basis for punishment, even if the offender lacked specific intent. Indeed, as Justice Scalia pointed has been described as "pure sophistry." Moore v. Zant, 722 F.2d 640, 653 n.3 (11th Cir. 1983) (Kravitch, J., concurring in part and dissenting in part).


See, e.g., Henderson v. State, 234 Ga. 827, 828, 218 S.E.2d 612, 614 (1975) (holding that a murder victim's character generally is irrelevant and inadmissible in murder trial); People v. Jordan, 38 Ill. 2d 83, 91, 230 N.E.2d 161, 166 (1967) ("[E]vidence that a murder victim has left a spouse or children is inadmissible since it does not enlighten the trier of fact as to the guilt or innocence of the defendant or as to the punishment he should receive, but only serves to prejudice and inflame the jury"); Fisher v. State, 481 So. 2d 203, 225 (Miss. 1985) (en banc) (holding that a murder victim's character generally is irrelevant and inadmissible in a murder trial).

Justice White filed a dissenting opinion, which Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia joined. 107 S. Ct. at 2539. Justice Scalia also filed a dissenting opinion, which Chief Justice Rehnquist, Justice White, and Justice O'Connor joined. Id. at 2541.

Id. at 2539 (White, J., dissenting).

Id. at 2540.

Id. at 2540 n.1. Justice White cited as an example United States v. Feola, 420 U.S. 671 (1975), in which the Court held that conviction under 18 U.S.C. § 111 for assault upon a federal officer does not require proof that the defendant knew the vic-
out, when the intent is the same the amount of harm caused may bear on the extent of personal responsibility, as in the dichotomy between attempted murder and murder. The goal of truly "individualized" punishment thus should allow the State to include as a capital sentencing consideration the particularized harm caused by an individual murder.

In addition, the dissent identified a legitimate state interest in offsetting the mitigating evidence which the defendant is allowed to introduce, "to lay before the sentencing authority the full reality of human suffering the defendant has produced." To do otherwise would permit "a debate on the appropriateness of the capital penalty with one side muted."

Although there is some intuitive appeal to the dissent's position, it is philosophically flawed and unsupported by previous Supreme Court jurisprudence. It is a basic tenet of American criminal jurisprudence that the degree of criminal culpability depends on the degree of a defendant's moral guilt. Consequently, "[i]t is fundamental that 'causing harm intentionally [should] be punished more severely than causing the same harm unintentionally.'" Penalties have been invalidated as "unconstitutionally excessive in the absence of intentional wrongdoing." For example, it is unconstitutional to make narcotics addiction a crime. In addition, the Court has invalidated a capital punishment scheme based on the existence of an aggravating circumstance. Justice White's reliance on Feola is misplaced. The Court in Feola went to great lengths to determine that the victim's federal status was intended as a jurisdictional requirement, not an indicator of aggravation in the offense. Id. at 676-77. See Ex parte Murry, 455 So. 2d 72 (Ala. 1984) (declaring that to convict defendant of capital offense of killing a police officer, jury must find that defendant knew victim was a peace officer on duty). See also id. at 77-78 (collecting cases; of 32 states with similar statutes, only Missouri has ruled that no requirement of knowledge will be inferred).

1. Id. at 2541.
2. Id. at 2540. Such an argument is not new. See Enmund v. Florida, 458 U.S. 782, 815 (1982) (O'Connor, J., dissenting) (in reaching a capital sentencing decision, sentencing authority should look not only to the culpability of the defendant, but also to the degree of harm inflicted on the victim).
3. 107 S. Ct. at 2542 (Scalia, J., dissenting).
4. Id.
5. "American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of his criminal culpability.'" Enmund, 458 U.S. at 800 (quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)).
6. Id.
7. Id. at 798 (quoting H. Hart, Punishment and Responsibility 162 (1968)).
8. Id. at 800.
cumstance which did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." 80

The Court has continually maintained that the capital sentencing authority must consider the "relevant facets of the character and record of the individual offender." 81 In essence, the crucial question in the sentencing decision is the determination of the individual defendant's culpability. 82 In Enmund v. Florida, 83 for example, the Court invalidated the death penalty for a defendant, convicted under a felony murder provision, who did not kill or attempt to kill. 84

The ultimate moral issue for a defendant charged with murder is the killing of another human being. "Unintended physical, emotional and psychological after-effects" do not increase the defendant's moral blame "beyond the onus he already bears for committing the murder." 85 Such results are constitutionally irrelevant in the Court's view.

To some degree the physical and emotional havoc wrought by a particular offense lends greater weight to the societal need for punishment. 86 In most instances, however, these effects are a standard component of the sentencing calculus. The loss murder inflicts upon society is one of the reasons murder is accorded such a severe punishment. After all, "common sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members." 87 To move beyond this generic societal impact, however, requires the offender to answer for particularized consequences that are unanticipated and thus unrelated to any additional increment of blameworthiness.

That is not to say that certain consequences of a defendant's

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82. Sentencing schemes which materially limit this examination have been found constitutionally defective. For example, in Lockett v. Ohio, 438 U.S. 586 (1978), a plurality of the Court invalidated a capital sentencing scheme which provided too limited a range of mitigating factors, in particular excluding consideration of the amount of personal involvement in the crime.
84. Id. at 801. But see Tison v. Arizona, 107 S. Ct. 1676 (1987) (defendant still can receive death penalty if death is an easily foreseeable consequence of his actions).
85. Brief of Amicus Curiae NAACP Legal Defense and Education Fund, Inc. In Support of Petitioner at 17.
86. As Justice Scalia stated, this is "one of the reasons society deems his act worthy of the prescribed penalty." 107 S. Ct. at 2542 (Scalia, J., dissenting).
actions may not bear on the sentencing decision. In *Tison v. Arizona*,\(^8\) cited by both the majority and the dissent, the Court allowed the death sentence to stand for a defendant who participated in the prison breakout of his father, a known murderer. During the course of the escape, his father murdered three people whom the defendant had assisted in kidnapping. The Court held that a defendant's degree of knowledge of the probable consequences of his or her actions may increase moral culpability in a constitutionally significant manner.\(^9\)

In some instances, the information contained in the VIS may actually relate to culpability. For example, under the Federal Rules of Evidence, it is permissible to show the peaceable nature of the victim to rebut evidence offered by the defendant to prove that the victim was the aggressor.\(^9\)

In most cases, however, the VIS does not add to a reasoned sentencing decision. It plays no historically accepted role in the capital sentencing process. On the other hand, it is potentially misleading, imparting an aggravating character to factors which are irrelevant to that life or death decision. Consequently, the VIS should be excluded from the sentencing authority's consideration.

The Court’s death penalty jurisprudence, after all, has always centered around the proposition that “[t]here must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death.”\(^9\) It has been established that the principal goals of capital punishment are retribution and deterrence.\(^9\) Both are inextricably linked to the degree of a criminal's culpability.\(^9\) If a given punishment does not enhance a proper

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\(^8\) 107 S. Ct. 1676 (1987).

\(^9\) The Court distinguished the situation in *Tison* from *Enmund*, in which the defendant's participation in the subject murder was much more tangential. *Tison* does not, as the dissent implied, abandon the sentencing focus on moral culpability. Indeed, the Court stated that the “heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” *Tison*, 107 S. Ct. at 1683.

\(^9\) FED. R. EVID. 404(a)(2).


\(^9\) Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Rehabilitation and incapacitation, the two other accepted components of criminal sentencing, are not furthered by the imposition of the death penalty. *Spaziano*, 468 U.S. at 477-78 (Stevens, J., concurring in part and dissenting in part). Even if they were, these considerations depend even more intimately on an assessment of the defendant's individual culpability.

\(^9\) Though this is perhaps obvious in the case of deterrence, see, e.g., *Enmund*, 458 U.S. at 799 (“[I]f a person does not intend that life be taken . . . the possibility that the death penalty will be imposed . . . will not enter into the ‘cold calculus that precedes the
sentencing goal, "it is nothing more than the purposeless and needless infliction of pain and suffering."94 As such, it is constitutionally excessive, cruel and unusual punishment.95

Of course, the most compelling response to the arguments of the dissent and the State is that "death is a punishment different from all other sanctions in kind rather than degree."96 As such, the Court has recognized that there is a corresponding need for greater indicia of reliability in the death penalty decision.97 As Justice Blackmun has said, this need "is as firmly established as any in our Eighth Amendment jurisprudence."98 Indeed, the Court has gone
to "extraordinary measures" to ensure that the process does not permit the death penalty to be "imposed out of whim, passion, prejudice or mistake." 99

To guard against an arbitrary and capricious decision the Court has insisted that the discretion of the sentencing jury must be directed and channeled.100 Marginally relevant information that is overly prejudicial, inflammatory, or confusing may be eliminated. The Court thus has limited the jury's consideration to the characteristics and record of the defendant and the circumstances of the crime. In distinguishing murder from attempted murder, or vehicular manslaughter from a traffic violation, the harm caused is a direct, statutorily quantifiable circumstance of the crime, one that the jury easily can grasp. Even if victim impact information is tangentially related to the circumstances of the crime, its tenuous connection to the individual defendant's blameworthiness, and its inflammatory nature, compounded by the procedural problems noted below, do not comport with the stringent safeguards imposed by the Court on capital sentencing.

In *Booth* the principal "circumstances of the crime" were the brutal deaths of Irvin and Rose Bronstein, not the continuing emotional problems or the desire for vengeance of surviving family members, as compelling as they may be. Although such factors admitted are related to the crime, they are unquantifiable and do not enhance the ability of the sentencing authority to arrive at a considered judgment. As Judge Cole, of the Maryland Court of Appeals, said in his *Booth* opinion, the only function served by the testimony of the victim's family is to "'exacerbate the aggravating circumstances already established by the prosecution.'"101 The unguided and irrational emotional responses that victim impact evidence of


100. *See* Proffitt v. Florida, 428 U.S. 242, 258 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) "'[T]he requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.'" *See also* Godfrey v. Georgia, 446 U.S. 420, 427-29 (1980) (plurality) (reversing death sentence because the aggravating circumstance relied upon by the jury was not so tailored as to avoid arbitrary and capricious sentencing).

this sort is calculated to elicit are hard pressed to conform to any concept of heightened reliability in sentencing.

B. Evidentiary and Procedural Problems

The Court determined that the second flaw of victim impact evidence was the evidentiary and procedural problems connected with its use. As noted above, to ensure that capital sentencing is indeed imposed on the basis of "reason rather than caprice or emotion," the Court has not hesitated to invalidate "procedural rules that tended to diminish the reliability of the sentencing determination."102 In Booth the Court determined that the evidence contained in the VIS was not only unreliable, but irrelevant as well.

The Bronstein family was articulate, even eloquent, in expressing its grief. This will not always be the case. Some victims, as the Court noted, will have an inarticulate family or will not leave a family at all.103 The emotional impact of a death always is severe. A violent, unexpected death is particularly wrenching. In the Court's view, however, the ability of a family to express its grief is irrelevant to the sentencing decision.104

A potentially more serious issue is the amount of information encompassed by the dissent's expansive definition of harm. Widely disparate categories of information are contained in the VIS. Physical injury and psychological damage arguably may be connected to the actions of the defendant. But are the victim's personal characteristics proximately related to the defendant's crime?105 If indicative of "harm," the community is in essence classifying victims on a

103. 107 S. Ct. at 2534. The practical result is that the killer of a person with an educated family will be put to death, while the killer of a person with an uneducated family or no family at all may be spared. Booth, 306 Md. at 233, 507 A.2d at 1129 (Cole, J., concurring in part and dissenting in part).
104. Justice White in dissent attempted to refute this argument by comparing the differing abilities of any two prosecutors or any two witnesses. 107 S. Ct. at 2540-41 (White, J., dissenting). An institutional defect, however, does not need to be exacerbated.
105. Historically, the answer to such a question usually has been "no." See, e.g., Henderson v. State, 234 Ga. 827, 828, 218 S.E.2d 612, 614 (1975) (evidence of murder victim's family situation inadmissible); People v. Holman, 103 Ill. 2d 133, 167-68, 469 N.E.2d 119, 135, cert. denied, 469 U.S. 1220 (1984) (death sentence vacated when prosecution alluded to the "religious moral fiber" of the victim's mother as well as the accomplishments of the victim); People v. Ramirez, 98 Ill. 2d 439, 453, 457 N.E.2d 31, 37 (1983) (evidence of murder victim's family situation inadmissible); Fisher v. State, 482 So. 2d 203, 235 (Miss. 1985) (en banc) (murder victim's character generally irrelevant and inadmissible in a murder trial).
scale of societal worth. The logical extension of this view would require the death of a loving father or mother to be punished more severely than that of a homeless orphan. The real difficulty arises when any attempt is made to construct an outer limit to such evidence. Is economic information relevant? Are social position and class? The Court does not explore these alternatives, but instead rejects such information in toto as "a principled way to distinguish [cases] in which the death penalty should be imposed, from the many cases in which it was not."

This type of evidence also is plagued by procedural difficulties. The capital sentencing process almost invariably is adversarial in nature. Yet, the Court found, victim impact evidence is peculiarly unsusceptible to rebuttal. It would be "difficult—if not impossible" to

106. Justice Scalia, in dissent, implied that society can consider the victim's character and status as evidence of the amount of harm caused by the criminal acts of the defendant. 107 S. Ct. at 2541-42 (Scalia, J., dissenting). The Court, on the other hand, seemingly endorsed the reasoning of Judge Cole of the Maryland Court of Appeals, who stated that "the ultimate crime is the taking of a life, and there can be no further measurement as to the value of the life taken." Booth, 306 Md. at 233, 507 A.2d at 1129. Nevertheless, in Roberts v. Louisiana, 431 U.S. 633, 636 (1977), the Court declared that the fact that the murder victim was a peace officer performing his regular duties could be regarded as a proper aggravating circumstance in a capital sentencing scheme. The Louisiana statute at issue in Roberts, however, required a specific intent and knowledge of the victim's status. Id. at 639-40 (Blackmun, J., dissenting).

107. But see Grant v. State, 703 P.2d 943, 945-46 (Okla. Crim. App. 1985) (prosecutor's statement that the victim was survived by an 11-year-old daughter held error, but harmless).

108. And consider the logical but unmentionable extension of this line of evidence—the victim's sex and race. The State suggests that concerns about racial bias can be allayed by a more rigorous voir dire of the jury. Brief for the Respondent at 37. Such a remedy would appear inadequate, however, to preserve constitutional safeguards against discriminatory sentencing, particularly when the concerns are raised by the specific procedural process adopted by the State. See Zant v. Stephens, 462 U.S. 862, 885 (1983) (sentencing scheme would be invalid if a state "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant."); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) ("[D]eath penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.").

109. 107 S. Ct. at 2534 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (opinion of Stewart, J.). The Court noted that it was "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." 107 S. Ct. at 2534 n.8. Indeed, one of the principal purposes of controlling jury discretion is to prevent the discriminatory application of capital punishment. Gregg v. Georgia, 428 U.S. 153, 190 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974).
provide the defense a fair opportunity to contradict the information being offered by the state. Due process seemingly would afford the defense a right to cross-examine and introduce witnesses, but, the Court reasoned, these alternatives are hardly fair or palatable. Tactically, it is hard to imagine when cross-examining the victim’s family would not be counterproductive, evoking antipathy towards the defendant or counsel. Indeed, such measures may be futile. Rarely can it be shown that grieving family members have exaggerated emotional trauma, depression, fear, or anxiety.

The introduction of defense witnesses to impeach family members is perhaps even more odious. In addition to the strategic risks in attacking the victim’s character in front of the jury, the introduction of evidence of dubious morals or unpopularity can result in a “minitrial” on the victim’s character. As the Court noted, this is “more than simply unappealing”; it could distract the jury from constitutionally proper sentencing considerations—the background and record of the accused and the circumstances of the crime.

C. Family Member Opinion Testimony

The Court also found family members’ opinions and characterizations of the crime, the second category of information contained in the VIS, impermissibly distracting. It is arguable that such information is the legally weakest form of victim impact evidence, its connection to a dispassionate analysis of the effects of a crime the most tenuous. In this instance, the Bronsteins’ son and daughter expressed horror at the crime and a desire for revenge. The son, for example, stated that his parents were “butchered like animals” and that the defendant should not “get away with it.” The daughter expressed disbelief and stated that she “could never forgive anyone for killing [her parents] that way.” She continued, “[A]nimals wouldn’t do this. [They] didn’t have to kill because there was no one to stop them from looting . . . . The murders show the viciousness of the killers’ anger.” Moreover, “[s]he doesn’t feel that the

110. 107 S. Ct. at 2535.
112. 107 S. Ct. at 2535.
113. Id. Justice White, in the dissent’s sole reply to the procedural problems of rebuttal raised by the majority, labelled such concerns “speculative.” Id. at 2541. In reality it is speculative that such concerns would not arise, unless the victim was a social outcast, without family or position. The dissenters did not respond to overall questions of fundamental fairness and due process impliedly raised by the majority opinion.
114. Id. at 2535-36.
people who did this could ever be rehabilitated and she doesn’t want them to be able to do this again or put another family through this.’ 115

Although the Court acknowledged the family’s genuine grief and anger, it held that the formal presentation of such information can “serve no other purpose” than to inflame the jury and to divert its attention from the “relevant” evidence concerning the defendant and the crime.116

IV. THE ROLE OF THE VIS AFTER BOOTH

Booth stands for the proposition that victim impact evidence, at least in the form adopted within the Maryland sentencing statute, is a constitutionally impermissible consideration in a capital sentencing proceeding. The Court was undoubtedly correct in this determination. The entire thrust of eighth amendment jurisprudence has been to avoid the infliction of arbitrary or excessive penalties. To achieve this objective, capital sentencing authorities traditionally have focused on the background and record of the defendant and the circumstances of the crime.117 Any departure from this rule must be handled in such a manner that the sentencing authority’s discretion is suitably guided and directed.118 Otherwise, unfettered discretion, coupled with the consideration of information not di-

115. Id. at 2536 (quoting victim impact statement).
116. Id. at 2535-36. This view has been adopted elsewhere. See, e.g., People v. Free, 94 Ill. 2d 378, 436, 447 N.E.2d 218, 246 (1983) (Simon, J., concurring in part and dissenting in part) (“It would be difficult to find anything less relevant to the circumstances of this offense or the character of this defendant than testimony concerning the reactions of family members of his unfortunate victims.”); Fuselier v. State, 468 So. 2d 45 (Miss. 1985) (reversing death penalty conviction because victim’s daughter was permitted to sit near the prosecutor and openly display emotion).

Justice White confronted this argument by attacking the underlying proposition—that the loss which the survivors suffered is irrelevant to sentencing. Assuming arguendo that this information is relevant, the evidence remains overly inflammatory. See, e.g., Welty v. State, 402 So. 2d 1159, 1162 (Fla. 1981) (preference for nonfamily member testimony, whenever possible, to identify the deceased); Free, 94 Ill. 2d at 436, 447 N.E.2d at 254 (Simon, J., concurring in part and dissenting in part) (“An emotional rendition of the grief of a victim’s family, while understandable, can only distract the jury . . . .”); State v. Sprake, 637 S.W.2d 724, 727 (Mo. Ct. App. 1982) (error to call murder victim’s widow solely to engender jury sympathy and prejudice the defendant). In the ordinary course of a trial, otherwise relevant evidence often is excluded when its inflammatory and prejudicial effect outweighs its probative value.

117. Within these limits, however, the Court has indicated that it is desirable for the jury to have as much information as possible. Gregg v. Georgia, 428 U.S. at 153, 203-04 (1976).
118. Id. at 206-07.
directly related to the defendant and the offense, may result in arbitrary, capricious, constitutionally offensive sentencing.

The Maryland VIS places before the sentencing jury an almost open-ended invitation to consider a wide variety of prejudicial information, subject to no real checks or guidelines. Despite its clearly aggravating nature and formalistic mode of presentation, the VIS has not even been accorded the status of a statutory aggravating factor, subject to at least some legislative direction. Although the Court did not have to reach the issue, it is highly questionable whether this type of victim impact evidence, even if recast into a different statutory form, ever could function as a constitutionally acceptable aggravating factor. Such factors must narrow the class of those who are eligible to receive capital punishment and reasonably justify the imposition of a more severe sentence. The Court has previously invalidated sentencing schemes which feature aggravating factors that are subject to overbroad interpretation. Victim impact evidence contains these flaws to a marked degree. In any event, the use of victim impact evidence is fraught with evidentiary and procedural pitfalls, particularly when a jury is the sentencing authority. It has no place in the death penalty calculus.

A genuine question exists, however, as to what ramifications the Court's decision has on the use of victim impact evidence in general.

119. As the Court noted, there is a very real danger that a VIS prepared by the DPP will be construed by the jury as representing the views of the State. 107 S. Ct. at 2536 n.11. In addition, there is an inherent problem of accuracy when such information is filtered through the DPP; this is compounded when, as here, the writer of the report adds additional commentary. See id. ("[T]he writer concluded that the crimes had a 'shocking, painful and devast[ating]' effect on the family, and that '[i]t is doubtful that they will ever be able to fully recover."). Yet suggestions that victim impact statements be subjected to some form of corroboration have generally been rejected. See, e.g., People v. Bachman, 92 Ill. App. 3d 419, 425, 414 N.E.2d 1369, 1374 (1981) (dismissing defendant's claims that victim's statement concerning nightmares and other emotional trauma be corroborated by a physician).

120. 107 S. Ct. at 2533. See supra note 33.


122. See, e.g., Godfrey v. Georgia, 446 U.S. 420, 429 (1980) (plurality) (aggravating circumstance that the offense was "outrageously or wantonly vile, horrible or inhuman" invalidated as overbroad).

123. Victim impact evidence also poses capital sentencing problems beyond those considered by the Court. Many state capital sentencing schemes require appellate review of the proportional propriety of each death sentence award. In Maryland, for example, the Court of Appeals must determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Md. Code Ann. art. 27, § 413-14 (1987). The injection of such a highly arbitrary and ambiguous factor into the proportionality calculus, absent clear directions or guidelines, may render the review meaningless.
The Court was careful to note that its holding was "guided by the fact that death is a 'punishment different from all other sanctions.'"124 Sentencing considerations may be different in a noncapital context.125 Indeed, the opinion noted that the majority of states and Congress permit the use of victim impact evidence in some contexts.126 Facialiy, such noncapital sentencing schemes are unaffected by Booth.127

If Booth truly had turned on circumstances unique to capital sentencing, this conclusion would remain valid. The basis for the Court's opinion, and the methodology adopted to reach its conclusion, however, do not permit such a limited reading.

The Court identified very real procedural and evidentiary concerns in the use of victim impact evidence. These concerns arguably are valid in the noncapital situation and will be discussed below. But even if, arguendo, problems of strategic weakness, inflammatory and distracting nature, and unfairness are somehow "cured" by the normal noncapital situation of a judge performing the sentencing role,128 the valid philosophic objections voiced by the Court remain.

The Court did not approach the question of the use of the VIS in Booth with the same methodology it has used to tackle similar eighth amendment problems. In Gregg v. Georgia,129 the first of the


125. See id. at 2535 n.10.

126. Id. at 2536 n.12. See, e.g., FED. R. CRIM. P. 32(c)(2)(c). As noted above, however, the format and content of the victim impact evidence permitted by other states are very similar to Maryland's VIS. See supra note 28. For a synopsis of each state's victim impact legislation, see the Appendix infra at 733.

127. But as the Court itself previously has noted in an eighth amendment context, "a principle to be vital must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910). Nevertheless, those courts which have considered victim impact evidence since Booth have applied the holding narrowly. See, e.g., Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987) (not applicable when death sentence based on jury recommendation, not verdict); Tibbs v. State, 72 Md. App. 239, 258 n.6, 528 A.2d 510, 519 n.6 (1987) (only applicable in a capital context); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987) (finding that harmless error exists when prosecutor merely alludes to victim's and family's rights under the law); State v. Post, 32 Ohio St. 3d 380, 513 N.E.2d 754 (1987) (distinguishing Ohio statutory victim impact scheme); State v. Bell, 360 S.E.2d 706 (S.C. 1987) (relating the use of victim impact evidence in the situation at bar more directly to the circumstances of the crime). But see Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987) (using Booth to exclude evidence leading to arbitrariness offered by the defense).


A quartet of cases reinstating the death penalty after *Furman*, a plurality of the Court held that an evaluation of a given punishment's constitutionality under the "cruel and unusual" clause of the Eighth Amendment requires "an assessment of contemporary values concerning the infliction of a challenged sanction." This assessment then is compared to the subject punishment to determine whether it has been imposed in a way that offends "public perceptions of standards of decency." The Court traditionally has focused on "objective factors" as a clear indication of contemporary values, conducting a survey of state jurisdictions to properly evaluate the "unusualness" of a given practice or value. As a plurality of the Court noted in *Woodson v. North Carolina*, "legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency." In *Gregg*, for example, this type of examination permitted the Court to conclude that society still considered the death penalty a viable sentencing option. In *Coker v. Georgia* the Court used this jurisdictional survey to demonstrate the "unusualness" of the death penalty as a punishment for rape. These examinations have continued to be a hallmark of Supreme Court forays into multijurisdictional Eighth Amendment pronouncements. Most recently, in *Enmund* and *Tison*, the Court employed this mode of analysis in determining the constitutionality of capital sentencing for various permutations of felony murder.

In *Booth* the situation seemed ripe for such an examination. At least thirty-six states and the federal government have incorporated
victim impact evidence into their sentencing procedures. Yet only in a footnote at the end of its opinion did the Court acknowledge the widespread use of this type of evidence at sentencing. Even if the Court chose not to employ its traditional analysis, at the very least this legislative mandate argued compellingly for an opinion that did not reject victim impact information per se, but that was drawn narrowly within the confines of procedural concerns unique to the capital process. The Court, however, did not limit its rationale to the very real procedural flaws inherent when victim impact information is introduced to the capital sentencing jury. Instead, the Court leaped into an examination of the very nature of victim impact evidence. With this examination the Court implicitly asked whether victim impact evidence ever can properly reflect on a defendant’s culpability for the purposes of criminal punishment. The Court’s rejection of victim impact evidence may not be constitutionally determinative at noncapital proceedings; at the very least, however, it is philosophically damning.

V. VICTIM IMPACT EVIDENCE GENERALLY

The Booth opinion illustrates two types of flaws inherent in victim impact evidence. One of the flaws is substantive; the other is procedural. Both have application outside of the capital sphere; both have attendant constitutional concerns.

A. Substantive Problems

Substantively, Booth rejected the use in sentencing of evidence which is unrelated to the culpability of the defendant. More precisely, the Court excluded a crime’s ramifications upon the victim and his or her family, unforeseeable at the time of the offense, from the definition of the term “circumstances of the crime.” This excluded information does not relate to the moral culpability of the capital offender. It is illogical that it should relate to a greater degree to the moral culpability of the noncapital offender.

It is clear that in some respects capital and noncapital sentencing are dissimilar. The Court has spoken often and at length about the uniqueness of death and the heightened need for greater indicia of reliability in the sentencing process. The converse is not nec-

139. 107 S. Ct. at 2536 n.12.
140. Id.
essarily true, however. All indicia of reliability are not jettisoned in noncapital adjudication, nor are all questions of intent and moral culpability eliminated. If they were, the judicial system would be one of strict criminal liability. The differences between capital and noncapital procedures principally are questions of degree, not of integral values. The fundamental nature of the criminal process remains the same, whether the anticipated punishment is death or a less severe sentence. As the Court stated in Spaziano v. Florida, 142 "despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual." 143

Indeed, the Court continually draws on fundamentals of criminal law to interpret the constitutionality of capital sentencing schemes. 144 Although the "scrutiny" may be stricter in capital cases, the Court's identification of these essential individual elements of our criminal system nonetheless is valid. When this analysis speaks to core values and principles that are not unique to the capital process, the Court is highly persuasive. When the analysis pertains to constitutional safeguards protecting these principles, the Court is controlling.

Sentencing based on individual moral culpability is one of these fundamental values. The concept of "individualized" sentencing is not unique to capital proceedings and has long been accepted in this country. 145 Every sentencing decision not encompassing administrative or minor strict liability offenses involves the weighing of appropriate factors under the rubric of proper sentencing goals. Criminal sentencing, the Booth court implied, always will focus on the measure of moral blameworthiness of the defendant. That is what should trigger society's wrath, and that is precisely the type of analysis obfuscated by the majority of victim impact evidence.

This concern is highlighted, by negative inference, by the general thrust of the dissent's argument. Justice White's response to the procedural flaws perceived by the majority in the use of victim impact evidence was perfunctory. Justice Scalia did not address it.

143. Id. at 459.
Instead, both centered their arguments on the correlation of victim impact evidence to moral blame, for the majority's use of this line of reasoning dealt the fatal blow to the legal utility of the VIS. Procedural flaws can be remedied, new techniques devised, cases factually distinguished, legislative safe harbors provided. If moral culpability is the touchstone, if sentencing information must relate, however tangentially, to the "blackness" of the defendant's "soul," then the utility of the VIS in any context is suspect.

The focus of the VIS is undoubtedly on the victim, not the defendant. Submitting the information it contains to a sentencing authority can serve no other purpose than to act as an aggravating factor injected into the punishment calculus. If this type of information further defines the harm caused by the defendant, as the dissenters maintain, then the culpable consequences of a crime are extended beyond foreseeable limits and bear no relation to moral blame. In this situation, the punishment scale is calibrated by the victim, not the defendant. The amorphous nature of the various components of victim impact evidence ensures that such a scale is at best uncertain and unreliable. But perhaps the most potent indictment of victim impact evidence is evident in the Court's process of categorization. This produces the bottom line—what additional factors increase the defendant's punishment. Through the VIS, the state introduces a myriad of information into the sentencing system, each discrete item deemed relevant by legislative imprimatur, and each item potentially, even if only incrementally, an aggravating factor.

The personal characteristics of the victim are a prime example. Is injury to a rich, successful, loving head of a family more deserving of punishment than injury to a poor, vagrant orphan? Apart from the procedural difficulties associated with the introduction of such information, is this ever a principled sentencing distinction? The

146. See Burns, From Botany Bay to Booth: Defendants, Victims and Justice, 20 Md. Bar J. 2, 3 (1987) (the author was the Maryland assistant public defender who represented Booth before the Supreme Court).

147. That is not to say that the sentencing authority does not always consider, at least subjectively, victim impact information. Of course, by the same token a sentencing authority always will mentally entertain a variety of elements, including mercy. The subjective thought processes of the sentencing authority can be channeled to some extent—by sentencing guidelines, for example—without significantly jeopardizing the intuitive discretion that is the historical hallmark of the criminal sentencing system. When an expanded version of victim impact information is formalized and then submitted to the sentencing authority in a manner calculated to inspire deference, a new component is added to the process, tipping the previous subjective balance.

148. See supra Part III(B) and infra Part V(B).
Court has stated unequivocally that it is not.

A sliding scale of victim worth is offensive to our values as a society. It is no less offensive when applied in a non-capital context. "In a Nation committed to equal protection of the law, there is no permissible 'caste' aspect of law enforcement." 149 Sentencing under this rubric, judged by normal judicial standards, cannot help being arbitrary.

The question then becomes whether a legislature may ascribe an aggravating role to victim impact evidence in a noncapital punishment scheme when it concededly does not further an accepted sentencing goal and reflects victim distinctions that are offensive to the democratic norms of our society. As the Gregg plurality noted, a sanction cannot be so totally without penological justification that it results in the gratuitous infliction of suffering. 150 Although the Booth Court was careful to limit its opinion to capital sentencing situations, the reasoning employed by the Court leaves little doubt as to how, on policy grounds, it would answer the question.

Policy and philosophy, however persuasive when enunciated by the Nation's highest court, in the end do not control lower courts' decisions. The more compelling question is whether sentencing influenced by victim impact evidence is constitutionally offensive. Criminal sentencing, if conducted using unprincipled methods and conforming to no legitimate sentencing goal, is by its very definition arbitrary and capricious. In constitutional terms, such punishment may be "cruel and unusual," violating the eighth amendment. The historical background of the eighth amendment reveals particular concern over the establishment of safeguards against any arbitrary punishment. 151 Admittedly, the Court has been reluctant to expand eighth amendment jurisprudence beyond the confines of the death penalty. 152 Yet the eighth amendment takes its measure not from precedent, but from the "evolving standards of decency that mark

149. Furman v. Georgia, 408 U.S. 238, 255 (1972) (Douglas, J., concurring). Discussing the discriminatory application of the death penalty, Justice Douglas drew an analogy to ancient Hindu law, where punishment increased in severity as social status diminished. Id.


151. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 CALIF. L. REV. 839, 852-60 (1969). The language of the eighth amendment was drawn from the English Bill of Rights of 1689. The English statute was concerned primarily with the selective or irregular application of harsh penalties. Furman, 408 U.S. at 242 (Douglas, J., concurring).

152. But see Solem v. Helm, 463 U.S. 277 (1983) (life sentence without parole held significantly disproportionate to the crime and therefore unconstitutional).
the progress of a maturing society."\(^{153}\) Despite the current widespread popularity of victim impact evidence, constitutional standards are not dependent on legislative definition.\(^{154}\) In the Court's view, enlightened sentencing mandates a focus on the individual defendant's culpability. This focus precludes the consideration of the type of evidence contained in the VIS. Considering the very potent arguments raised by the Booth Court, it does not require a very broad or expansive reading of the eighth amendment's requirements to find that noncapital sentencing utilizing victim impact evidence violates the Constitution.

**B. Procedural Problems**

Given such general concerns, the more practical and perhaps more immediate problems connected with noncapital victim impact evidence are the procedural difficulties posed by its use. It has been suggested that the reasoning in Booth is unique to the peculiar circumstances of a jury determined sentence.\(^{155}\) Such circumstances, however, do not pertain exclusively to capital sentencing.\(^{156}\) And though some concerns may be alleviated when the sentencing authority is a judge, presumably more experienced and versed in the ways of legal decisionmaking and less susceptible to emotionalism, other problems remain.

The effectiveness of victim impact evidence is dependent on the presence of an articulate, sympathetic victim or family. If it is not presented through direct testimony, the persuasiveness of the evidence also is dependent on the unchecked discretion of whoever prepares the reports. The possible discriminatory effect is not mitigated when the crime is assault, not murder. Ascribing an aggravat-

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154. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Va. State Bd. of Educ. v. Barrette, 319 U.S. 624, 638 (1943), quoted in Furman, 408 U.S. at 268 (Brennan, J., concurring).

155. See Monk, *Do the Victims of Crime Have a Role to Play in Criminal Justice After Booth v. Maryland?*, 20 Md. Bar J. 6, 7 (1987) (the author, a deputy Maryland attorney general, represented the State in Booth before the Supreme Court).

156. Although certainly not the usual circumstance, several states permit the jury to determine the actual sentence for many noncapital offenses. Indeed, the Maryland legislature has now provided for a jury determination of life or life without parole for certain convicted first degree murderers. See Md. Ann. Code art. 27, § 413 (1987). Interestingly, this provision is devoid of any guidelines or channeling of the jury's discretion, thus posing its own constitutional difficulties.
ing character to any offense based on the characteristics and abilities of the victim and the victim's family is not only philosophically objectionable, but procedurally unmanageable as well. 157

Problems of rebuttal remain. There is no practical way for the defendant to refute most of the information contained in a VIS. A claim that the defendant broke the victim's arm can be medically verified; a claim of emotional trauma cannot. Due process seemingly would permit the presentation of conflicting evidence, yet a "minitrial on the victim's character" is no less odious in a noncapital context. 158 Because the "essence" of due process is "the right to a fair opportunity to defend against the State's accusations," 159 the denial of such an opportunity, for whatever reason, is constitutionally troublesome.

Even if the sentencing authority is a judge, passion or ill will should not sway the sentencing process. Yet that is the precise effect of victim impact information. Indeed, as noted above, victim and family member opinion testimony and characterizations of the crime serve no other purpose than to inflame and prejudice the sentencing authority. Concern for the victim does not necessarily entail subjecting a sentencing judge to impassioned pleas for vengeance. 160

Fundamental fairness and due process require any sentencing process to abide by certain basic procedural safeguards. The introduction of victim impact evidence significantly handicaps the criminal defendant in the search for fair and impartial sentencing. Given the dubious probative value of such information, this handicap may prove so unfairly detrimental that it reaches constitutional proportions.

This result is unfortunate in many ways. There is no question that the treatment of victims within the criminal justice system can be much improved. The victims' rights movement has made great strides in promoting community awareness of the plight of crime victims. Yet the pendulum can swing too far. Engrafting an atavistic

157. Some victims' rights advocates argue for an even more intrusive role for the victim at sentencing, demanding that victims, as well as criminals, be accorded "elementary due process," including notice and the opportunity to be heard. Hudson, The Crime Victim and the Criminal Justice System, 11 PEPPERDINE L. REV. 23, 36 (1984) (Symposium Special Issue).
158. See Booth, 107 S. Ct. at 2535.
160. See, e.g., People v. McCarthy, 519 N.Y.S.2d 118, 119 (N.Y. Civ. Ct. 1987) (limiting crime victim to written statement submitted to sentencing judge, as oral presentation could "becloud the judicial atmosphere").
system of private prosecution onto the criminal process does not enhance any legitimate societal objective, unless one includes private vengeance and retaliation.\(^{161}\) A formalized role for the victim at sentencing, no matter what its specific form, detracts from the sentencing authority's focus on the defendant and imperils the very concept of individualized sentencing.\(^{162}\) It is almost certainly unenlightened; it may be unconstitutional as well.

VI. Conclusion

In *Booth v. Maryland* the Supreme Court for the first time confronted the use of victim impact evidence in criminal sentencing. The Court conclusively determined that the use of this type of evidence was constitutionally impermissible in death penalty proceedings. Instead of focusing exclusively on the very real procedural flaws in the use of such information before a capital sentencing jury, the Court examined the very nature of victim impact evidence, holding it irrelevant to questions of criminal culpability. In addition, the Court found the Maryland Victim Impact Statement procedurally troublesome, inflammatory, and overly prejudicial. Although the Court's holding is factually and textually limited to the capital sentencing context, the reasoning and methodology employed by the Court cast a serious pall over the future of victim impact evidence in the American criminal justice system.\(^{163}\)

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162. The majority of state victim statutes provide for the introduction at sentencing of information similar or identical to that contained in the Maryland VIS. See supra note 28; Appendix infra at 733. Of course, there is nothing to stop a jurisdiction from going beyond the strict language of its statute and, based on legislative intent, adopting an even more expansive role for victim impact evidence. See, e.g., *Lodowski v. State*, 302 Md. 691, 748-49, 490 A.2d 1228, 1254-55 (1985) (allowing victim to make oral as well as written statement, though not specifically permitted in statute). But see *McCarthy*, 519 N.Y.S.2d at 119 (murder victim's family not entitled to make oral statement at sentencing, limited to written VIS). Indeed, certain victims' rights proponents advocate an even more substantial sentencing role than indicated by the majority of the legislation described in the Appendix, including a return to private prosecution, see Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 Miss. L.J. 515, 558-61 (1982), and even a constitutional amendment, see President's Task Force on Victim of Crime, *Final Report* 114 (Dec. 1982) (recommending amending the sixth amendment to include the words: "Likewise, the victim in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."). See generally Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 Utah L. Rev. 517.

163. This shadow would dissipate rapidly if the changing composition of the Court alters its capital sentencing philosophy. *Booth* was a 5-4 decision, with Justice Powell,
since retired, in the majority. The dissent's view of the role of victim impact evidence may gain the adherence of Justice Kennedy, giving it a majority.

The Supreme Court recently decided another Maryland death penalty case, Mills v. Maryland, 108 S.Ct. 1860 (1988). Mills had been sentenced to death for killing his prison cellmate. The issues raised on appeal included the consideration of victim impact evidence contained in a memorandum submitted to the sentencing jury. See Mills v. State, 310 Md. 33, 527 A.2d 3 (1987). The memorandum contained information concerning the personal and criminal history of Mills' victim. The Court, in a 5-4 decision, held unconstitutional the sentencing form used by the jury to convict Mills, since the form did not make adequate provision for the consideration of mitigating factors. The majority, therefore, did not reach the issue of victim impact evidence. The dissent (Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy) commented that the type of evidence considered in Mills was not within the scope of Booth. The dissenters also registered their disagreement with the basic tenets of the Booth decision. 108 S.Ct. at 1876. It is significant in terms of the future course of victim impact jurisprudence that Justice Kennedy joined this dissent.
SYNOPSIS OF OTHER VICTIM IMPACT STATUTES

A victim impact statement is prepared as part of the presentence report on every felony offender by a probation officer. The statement contains:
(1) financial, emotional, and medical effects on the victim;
(2) the victim's need for restitution; and
(3) any other information required by the court.

The presentence report lists the physical, emotional, and financial impact on the immediate family. The victim or immediate family has the right to appear personally or by counsel at any aggravation or mitigation hearing.

A convicted felon's probation (presentence) report will include a statement of the victim's comments concerning the offense. The court may direct the probation officer not to obtain the victim's comments when the victim previously has testified in the trial.

The presentence report for a felony offender (except for capital offenses) will include a victim impact statement prepared by the district attorney's office using information supplied by the department of social services. The VIS may include the following:
(1) an identification of the victim;
(2) the victim's economic loss;
(3) the victim's physical injuries;
(4) a description of any change in the victim's personal welfare or familial relationships as a result of the offense;
(5) any requests for psychological services by the victim or the victim's family as a result of the offense; and
(6) any other information related to the impact of the offense upon the victim that the court requires.

Connecticut - CONN. GEN. STAT. ANN. § 54-91a(c) (1985).
A probation officer in preparing a presentence report will inquire into the attitude of the victim, or in case of homicide the immediate family, as to the crime and any damages suffered by the victim, including medical expenses, loss of earnings, and property loss. The crime victim has the right to testify at the sentencing hearing.

If the defendant pleads guilty to a crime or is convicted of a felony, the victim (or next of kin if the victim has died as a result of the crime) may make an oral or written statement to the sentencing court relating solely to the facts of the case and the extent of any harm, including social, psychological, physical, or financial harm, suffered as a result of the crime.


The presentence investigation will include a written statement of the victim as to the sentence and the acceptance of any recommendation. If desired, a probation officer will reduce the victim's oral statements to writing.

**Iowa** - IOWA CODE ANN. § 901.3 (Supp. 1986).

The presentence report will include the harm to the victim, the victim's immediate family, and the community. Additionally, the victim has an opportunity to complete a victim impact statement to be included in the report.


The presentence report (discretionary for misdemeanor, mandatory for felony) will include information as to the attitude of the complainant or victim, or the victim's immediate family in cases of homicide.


The statutory section is entitled "Basic Rights for Victim." Provisions include the opportunity for a felony victim to make an oral or written VIS at sentencing and pardon or parole hearings. The VIS will include:

1. the name of the victim;
2. the net financial loss; and
3. a statement of the psychological impact on the victim's personal welfare or family relationships. Family members of homicide victims are accorded all the rights of a victim under the statute.


A victim of any crime shall, on request, have the right to address the sentencing court. If unwilling or unable to appear, the victim may submit a written statement.

**Massachusetts** - MASS. ANN. LAWS ch. 279, § 4B (Supp. 1988).

A victim of any noncapital felony has the right to make an oral or written statement to the sentencing court concerning the impact of the crime and any recommended sentence. If unable to make a statement due to mental, emotional or physical incapacity, or age,
the victim’s attorney or a designated family member may do so. In addition, the district attorney will file a statement identifying the victim, the net financial loss of the victim and the victim’s family caused by the crime, any psychological impact on the victim and the victim’s family, and any impact on the victim’s personal welfare or family relationship. The defendant will be given the opportunity to rebut any oral or written statement.


Misdemeanor presentence investigations may, and felony presentence investigations shall, include a VIS detailing:

1. a summary of the damages or harm and any other problems generated by the criminal occurrence;
2. a concise statement of what disposition the victim deems appropriate for the defendant or juvenile court respondent, including any reasons given by the victim in support of the victim’s position; and
3. any written objections to any proposed disposition of the offender.

Minnesota also provides for victim input into a prosecutorial decision to channel an offender into a pretrial diversion program.


The presentence investigation will include an inquiry by the probation officer into the harm caused to the victim, the victim’s immediate family, and the community.


The presentence report for a felony offender will include any written statements submitted to the probation officer by the victim. The probation officer must certify that he or she has attempted to contact the victim to solicit a statement, including offering to transcribe a victim’s oral statement.


The presentence report for a felony offender will contain information concerning the effect on the victim, including but not limited to, any physical or psychological harm or financial loss suffered by the victim. The extent of the information included is solely at the discretion of the department of parole and probation.


The presentence report may include a statement by the victim. The VIS may include the nature and extent of physical, psychological, and emotional harm or trauma, the extent of any loss to include
loss of earnings or ability to work, and the effect of the crime on the victim's family. The nearest relative of a homicide victim may make the statement.


The presentence report should contain, when "relevant," an analysis of the victim's version of the offense, the extent of injury or economic loss or damage, and the amount of restitution requested. In the case of homicide or incapacity, the information may be acquired from the victim's family.


In all felony cases involving the infliction of physical harm, a VIS will be prepared by the probation officer, a victim assistance program, or other governmental entity. The VIS will be considered by the court at sentencing. The VIS shall identify:

1. the victim;
2. any economic loss;
3. any physical injury;
4. any change in the victim's personal welfare or familial relationships as a result of the offense;
5. any psychological impact experienced by the victim or the victim's family; and
6. any other information related to the impact of the offense that the court may require.


The presentence investigation for noncapital felony offenders shall include the voluntary statement of the victim concerning the offense and the amount of the victim's loss.


The presentence report shall include a statement by the victim describing the effect of the offense on the victim.


Rhode Island has enacted a "Victim's Bill of Rights." Provisions include the right to address the court during district court misdemeanor pretrial conferences, all plea negotiations, and at sentencing concerning the impact of the crime. In homicide cases, or if the victim is incapacitated, a member of the victim's immediate family may exercise the victim's rights.

*South Carolina* - *S.C. CODE ANN.* § 16-3-1550 (1985).

The statute provides for a VIS in all noncapital cases involving a victim, to be presented at the sentencing or probation hearing. The statement may be presented orally or in writing, at the victim's op-
tion. The victim desiring to make a written statement is assisted by the state Victim Assistance Unit, utilizing a standard form developed by the Attorney General's Office. The VIS will:

1. identify the victim;
2. itemize the victim's economic loss;
3. identify the victim's physical and psychological injury;
4. describe any changes in the victim's personal welfare or familial relationships as a result of the offense;
5. identify any requests for psychological services by the victim or the victim's family; and
6. contain any other information related to the impact of the offense upon the victim.


A criminal presentence report will include any statement relating to sentencing submitted by the victim of the offense or the investigative agency. At sentencing, the court may permit the victim or the victim's family to testify.


The victim of a crime, or next of kin if the victim has died or become incapacitated, has the right to appear personally at sentencing, and have the court consider his or her views concerning the crime, the person convicted, and the need for restitution.


At the discretion of the court, when a felony offender has caused significant physical, psychological, or economic injury to the victim, a VIS will be included in the presentence report. It shall:

1. identify the victim;
2. itemize any economic loss suffered by the victim;
3. identify any physical or psychological injury suffered by the victim;
4. detail any change in the victim's personal welfare, lifestyle, or familial relationships as a result of the offense;
5. identify any request for psychological or medical services initiated by the victim or the victim's family as a result of the offense; and
6. provide such other information as the court may require related to the impact on the victim. Even if the court does not order a VIS prepared, the prosecutor may do so on his or her own initiative.

Article 11A of the West Virginia Code contains the Victim Protection Act of 1984. Included in the Act are provisions for a felony victim’s right to testify at sentencing concerning the facts of the case and the extent of any injuries or financial losses resulting from the crime. In addition, all presentence investigations for crimes causing physical, psychological, or economic injury will include a VIS. The VIS will describe the nature and extent of any economic, physical, or psychological injury suffered by the victim, the details of any changes in the victim’s personal welfare, lifestyle, or family relationships resulting from the offense, any requests for psychological or medical services from the victim or the victim’s family, and any other information that the court may require.


Wisconsin has enacted an entire chapter entitled the “Rights of Victims and Witnesses of Crime.” Included in the chapter is a “basic bill of rights for victims and witnesses,” providing, inter alia, that a court will be provided with information relating to the economic, physical, and psychological effect of the crime upon the victim of a felony and that the information will be considered by the court.