Pennsylvania's Capital Statute: Does the Introduction of Victim Impact Evidence - Into the Evaluation of Mitigating and Aggravating Circumstances - At the Sentencing Hearing of a Murder Trial Introduce Unjust Prejudice into the Imposition of the Death Penalty

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Pennsylvania's Capital Statute: Does the Introduction of Victim Impact Evidence—Into the Evaluation of Mitigating and Aggravating Circumstances—At the Sentencing Hearing of a Murder Trial Introduce Unjust Prejudice into the Imposition of the Death Penalty?

I. INTRODUCTION

The Fourteenth Amendment to the United States Constitution provides, inter alia, "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Perhaps no other topic of law more directly embodies the very essence of our legal system than the determination of whether to impose the death penalty in the sentencing phase of a murder conviction. There is no liberty greater than life itself; no liberty is more personal and precious than the right to live. Yet this fundamental right is arguably infringed upon by the use of victim impact evidence by prosecutors during the sentencing phase of a first-degree murder conviction, pursuant to statutory sentencing guidelines.

When one is convicted of first-degree murder at trial in the Commonwealth of Pennsylvania, a second trial, the sentencing phase, is then held to determine if the individual will serve life imprisonment or have the death penalty imposed. This is statutorily provided for through the sentencing code for capital crimes.

The statute provides that the Commonwealth must prove beyond a reasonable doubt at least one of eighteen enumerated aggravating circumstances and then allows the defendant to introduce

1. U.S. CONST. amend XIV.
2. 42 PA. CONS. STAT. ANN. § 9711 (2003). In Pennsylvania, aggravated first degree murder is the only crime to which the sentence of death is applicable. Id. at (a)(1).
4. See 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iii), which provides "aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence." Id. See also id. at § 9711(d), which limits the aggravating circumstances to the following:
(1) The victim was a firefighter, peace officer, public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), judge of any court in the unified judicial system, the Attorney General of Pennsylvania, a deputy attorney general, district attorney, assistant district attorney, member of the General Assembly, Governor, Lieutenant Governor, Auditor General, State Treasurer, State law enforcement official, local law enforcement official, Federal law enforcement official or person employed to assist or assisting any law enforcement official in the performance of his duties, who was killed in the performance of his duties or as a result of his official position.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), or a substantially equivalent crime in any other jurisdiction, committed either before or at the time of the offense at issue.

(13) The defendant committed the killing or was an accomplice in the killing, as defined in 18 Pa.C.S. § 306(c) (relating to liability for conduct of another; complicity), while in the perpetration of a felony under the provisions of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and punishable under the provisions of 18 Pa.C.S. § 7508 (relating to drug trafficking sentencing and penalties).

(14) At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

(15) At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing was in retaliation for the victim's activities as a nongovernmental informant or in
evidence of mitigating circumstances. If at least one aggravating circumstance is found by a unanimous jury, and no mitigating circumstances are present, the imposition of death is mandatory. If mitigating circumstances exist, as found by any juror, the jury must unanimously determine whether the aggravating circumstances outweigh the mitigating ones to impose death; if it is found that the aggravating circumstances do not outweigh the mitigating circumstances or if a unanimous determination is not made, the jury must instead impose life imprisonment. It is this author's position that this is where victim impact evidence is unfairly utilized because the Pennsylvania statute provides for its use in weighing the circumstances.

Victim impact evidence is a form of evidence that describes the effect of the crime on the victim and, more specifically, on the victim's family. The Pennsylvania Statute itself actually provides providing information concerning criminal activity to an investigative, law enforcement or police agency.
(16) The victim was a child under 12 years of age.
(17) At the time of the killing, the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy.
(18) At the time of the killing the defendant was subject to a court order restricting in any way the defendant's behavior toward the victim pursuant to 23 Pa.C.S. Ch. 61 (relating to protection from abuse) or any other order of a court of common pleas or of the minor judiciary designed in whole or in part to protect the victim from the defendant.

Id.

5. See 42 PA. CONS. STAT. ANN. § 9711(e), which provides mitigating circumstances will include:
(1) The defendant has no significant history of prior criminal convictions.
(2) The defendant was under the influence of extreme mental or emotional disturbance.
(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(4) The age of the defendant at the time of the crime.
(5) The defendant acted under extreme duress, although not such duress as to constitute a defense under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.
(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.
(7) The defendant's participation in the homicidal act was relatively minor.
(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

Id.

6. Id. at § 9711(c)(iv).
7. Id.

8. Booth v. Maryland, 482 U.S. 496, 498-99 (1987). The victim impact statement is drafted by the State Division of Parole and Probation, with information supplied by the victim or the victim's family, and may be read to the jury during the sentencing phase. The family members may also be called to testify to the information in front of the jury at the sentencing hearing. Id. at 499.
for the use of this evidence, yet fails to provide sufficient guidelines on how the jury is to use such evidence.\textsuperscript{9} Herein lies the essence of one part of the unconstitutional nature of the use of victim impact evidence: the statute itself is structured so as to elicit the arbitrary and capricious imposition of death, because capital jurors often are not fully aware of how to consider victim impact evidence and because a verdict is to be reached only after making an "individualized assessment of the appropriateness of the death penalty," not merely by counting the aggravating and mitigating circumstances.\textsuperscript{10} Similar to those of other states, Pennsylvania's statute improperly leads jurors to believe they merely have to count and compare aggravating and mitigating circumstances to reach a decision without any thought of whether the verdict is a "reasoned moral response" to the crime.\textsuperscript{11}

The second part of the unconstitutionality of victim impact evidence is that, by the very nature of the evidence, an arbitrary factor is injected into the sentencing phase.\textsuperscript{12} Such testimonial evidence emphasizes the victim's outstanding qualities and describes the severe emotional and personal problems inflicted on the family members of the victim in a manner that can be described only as inflammatory;\textsuperscript{13} something that in any other situation is impermissible by the Rules of Evidence.\textsuperscript{14} Victim impact evidence by its

\begin{itemize}
\item \textsuperscript{9} 42 PA. CONS. STAT. ANN. § 9711(a)(2) provides:
\begin{quote}
In the sentencing hearing, evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible. Additionally, evidence may be presented as to any other matter that the court deems relevant and admissible on the question of the sentence to be imposed. Evidence shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e), and information concerning the victim and the impact that the death of the victim has had on the family of the victim. Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).
\end{quote}


\item \textsuperscript{11} See Garvey, supra note 10, at 38 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).


\item \textsuperscript{13} D'Onofrio, supra note 12, at 170 (asserting that "some victim impact evidence will necessarily carry more influence depending on who the victim was, who the members of the victim's family are, the ability of the jury to relate to the victim and the victim's family, and the ability of the victim's family to articulate their grief to the jury."). See also Booth, 482 U.S. at 504-06.

\item \textsuperscript{14} See FED. R. EVID. 403 (2003); PA. R. EVID. 403 (2003).
\end{itemize}
very nature is guaranteed to tug on the proverbial heart strings of the jury, thereby resulting in an unavoidably tainted decision.\textsuperscript{15}

In recent times, the United States Supreme Court shifted the legal tides and made a stark change in the prevailing precedent by holding that a defendant's culpability depends, in part, on the details of the victim's life and the impact that the death had on his or her family.\textsuperscript{16} The logic of this premise, specifically that a defendant's culpability actually depends on factors that most likely were not considered or even known at the time the crime was committed or known to the jury when making a determination of guilt or innocence, is rather demented. Further, and perhaps even more disturbing, is that such reasoning makes it somehow less morally reprehensible to murder someone who does not have family or who's family was less distraught over the murder. The unimaginable act of maliciously murdering someone without cause, and not the personal characteristics of the victim, should be what our society's most serious of retributions should be premised upon. After all, this country was founded upon the ideal that its citizens should receive equal treatment and protection of the law.

The use of victim impact evidence in sentencing introduces retaliation, pity, passion and personal vengeance into the proceeding's deliberative process.\textsuperscript{17} Accordingly, such evidence is extremely emotional as well as virtually unimpeachable and irrefutable.\textsuperscript{18} Victim impact evidence, and the Commonwealth's statute,\textsuperscript{19} promote punishment premised upon fortuitous, arbitrary, and inflammatory considerations.\textsuperscript{20} As such, its use in the sentencing phase of a first-degree murder case violates the Eighth and Fourteenth Amendments.

\begin{itemize}
  \item \textsuperscript{15} Both \textit{Fed. R. Evid.} 403 (2003) and \textit{Pa. R. Evid.} 403 (2003) mandate the exclusion of such evidence during the actual trial if the probative value is outweighed, \textit{inter alia}, by the danger of unfair prejudice.
  \item \textsuperscript{16} See Garvey, \textit{supra} note 10, at 48 (quoting Payne v. Tennessee, 501 U.S. 808, 825 (1991)).
  \item \textsuperscript{17} Dina R. Hellerstein, \textit{The Victim Impact Statement: Reform Or Reprisal?}, 27 \textit{Am. Crim. L. Rev.} 391, 398 (1989).
  \item \textsuperscript{18} Hellerstein, \textit{supra} note 17, at 398.
  \item \textsuperscript{20} Sandvik v. State, 564 P.2d 20, 28 (Alaska 1977) (Boochover, C.J., dissenting). “There is a world of difference between presenting the basic facts necessary for the judge to be informed adequately of the circumstances surrounding the offense and including an emotion-laden narrative pertaining to the victim.” \textit{Id.} at 28 (Boochover, C.J., dissenting).
II. HISTORICAL ORIGINS OF CAPITAL PUNISHMENT

Although victim impact evidence and jury sentencing guidelines, as a whole, are relatively new facets of capital sentencing statutes, capital laws are deeply entrenched in humanity's history as evidenced by their codification as early as the Eighteenth Century B.C. in the Code of King Hammurabi. Ancient societies subsequently enacted such laws as the Seventh Century B.C.'s Draconian Code of Athens and the Fifth Century B.C. Roman law of the Twelve Tablets, thereby developing their own variations of the death penalty.

Britain began enforcing the death penalty by throwing criminals into a quagmire at around 438 B.C. Eventually, hanging criminals from the gallows was the method of execution instituted by Britain during the Tenth Century A.D. The capital laws of Britain became the most influential on American law because the colonists brought the use of capital punishment from their experiences in England. The laws began to undergo reform in the 1700's due to evolving standards that viewed death as a punishment too severe for crimes other than treason and murder. In 1794, Dr. Benjamin Rush, a signer of the Declaration of Independence and U.S. Attorney, led Pennsylvania to become the first state to repeal the death penalty for all offenses except a first-degree murder conviction, which required death without exception. In 1838, some states began passing laws against the mandatory sentence of death by codifying discretionary statutes that became the basis of modern death penalty statutes. By 1963, mandatory capital punishment laws were removed from the penal codes of every state in the country. In 1959, the American Law Institute

21. LAURA E. RANDA, SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 1 (1997). The Code of King Hammurabi provided death for 25 separate crimes, although murder was not one of them. Id. at 1.
22. RANDA, supra note 21, at 1.
23. Id. at 2.
24. Id.
25. Id.
26. Id. at 4.
27. RANDA, supra note 21, at 5.
28. ROBERT E. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 5 (Anderson Publishing, 1999). "In 1838, Tennessee became the first state to enact a discretionary death penalty statute for murder; Alabama did the same, three years later. Between the Civil War and the end of the nineteenth century, at least 20 additional jurisdictions changed their death penalty laws from mandatory to discretionary ones." Id.
29. BOHM, supra note 28, at 5.
recommended that jury sentencing discretion should be controlled by some uniform standards, but the institute did not receive much support for this ideal until recently.\textsuperscript{30}

III. MODERN DEVELOPMENT OF DEATH PENALTY STATUTES

In \textit{Trop v. Dulles},\textsuperscript{31} the Eighth Amendment was interpreted as containing an "evolving standard of decency that marked the progress of a maturing society."\textsuperscript{32} This evolving standard became the basis of argument for opponents of capital punishment in the 1960's.\textsuperscript{33} Although \textit{Trop} was not a death penalty case, opponents used the evolving standard interpretation to argue that the death penalty was no longer appropriate in our country because it constituted "cruel and unusual punishment" under the Eighth Amendment.\textsuperscript{34} Despite the fact that these constitutional attacks were rejected, this marked the beginning of the "fine tuning" of the death penalty with the development of both jury and prosecutor discretion in the imposition of death.\textsuperscript{35}

In the 1968 case of \textit{U.S. v. Jackson},\textsuperscript{36} the Supreme Court reviewed a provision of the Federal Kidnapping Act\textsuperscript{37} that required a recommendation by the jury for the death penalty to be imposed.\textsuperscript{38} The sentence of death could only be imposed with a recommendation by the jury so defendants were essentially coerced into waiving their constitutional right to a jury trial to avoid the death penalty, which the Court held as unconstitutional.\textsuperscript{39}

In 1971, jury discretion was examined directly in the consolidated case of \textit{McGautha v. California}.\textsuperscript{40} The common claim be-
tween the two cases was that the jury had unrestricted discretion, resulting in arbitrary and capricious sentencing, which was directly violative of the Fourteenth Amendment's Due Process guarantee. The Court said that jury discretion was developed as a means of dispensing mercy in capital cases, and that instructions have the effect of interfering with this scheme instead of furthering it. Extemporizing circumstances such as intoxication were held to be committed to jury discretion alone. The Court stated that the sentencing authority's ability to draft means of channeling sentencing discretion that could be easily understood and applied are beyond present human ability and any attempt to do so would actually result in a restriction of what may be considered. Thus, the Court found that giving the jury complete discretion provided the largest scope of consideration in allowing a jury to be merciful and did not offend any part of the Constitution.

In McGautha, it was also argued that the Constitution requires a bifurcated trial as part of the Fourteenth Amendment's Due Process Clause so that evidence relevant to punishment would not prejudice the defendant's case on guilt. The contention was that Due Process required the removal of the conflict between the constitutional right to be heard during trial and the right not to have one's sentence fixed before all relevant evidence is heard. The use of a bifurcated trial eliminates this imperfection by its design because the guilt is fully adjudicated before any punishment phase is commenced.

The Court first stated that the criminal process is replete with situations where making a difficult decision is required and that, although one may have a constitutional right, the Constitution

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41. McGautha, 402 U.S. at 196. Both defendants argued the common claim that the absence of standards to be used as guidelines in the jury's discretion on deciding the punishment caused capricious sentencing that is "fundamentally lawless" and thus violative of the notion of no state depriving a person of life without due process of law as guaranteed by the U.S. Constitution's Fourteenth Amendment. Id.
42. Id. at 200 (citing Winston v. United States, 172 U.S. 303, 313 (1899)).
43. McGautha, 402 U.S. at 200-01.
44. Id. at 204.
45. Id. at 207-08.
46. Id. at 209-10 (citing Spencer v. Texas, 385 U.S. 554 (1967)). The contention was that, under Ohio law, one could exercise the Constitutional right not to incriminate oneself only at the cost of surrendering the ability to plead on the issue of punishment in a one trial adjudication. McGautha, 402 U.S. at 209-10.
47. McGautha, 402 U.S. at 211.
48. Id.
does not usually forbid a procedure that creates said choice. 49 No support was found in the history, policies, or precedents relating to the privilege provided by the Fifth Amendment, 50 to necessitate that a state provide a means whereby one wishing to proffer evidence on the issue of punishments can do so without worrying that he or she will ultimately be devastating his or her case. 51 Consequently, the Court held that although bifurcated trials may be a superior means of dealing with capital cases, as suggested by both the American Law Institute and the National Commission on Reform for Federal Criminal Laws, the Federal Constitution does not require trial procedures that are models of perfection. 52 The Constitution merely requires that trials are conducted fairly, while guaranteeing that a defendant's rights are scrupulously respected. 53

Due Process requires that a defendant be given the full benefits of our judicial system so as to vigilantly protect his or her fundamental rights. When the jury is completely at liberty to impose a death sentence as it sees fit, the law is essentially discarded. As such, the most precious fundamental right to life is deprived without due process.

The decision in McGautha offends Due Process in two ways. First, the holding that unrestricted jury discretion furthers the dispensing of mercy is completely devoid of any reasonable foundation. Despite the presumption that jurors are competent to comprehend the law, they are not jurists and do not possess a jurist's ability to approach legal analysis without bias. Without proper instruction, jurors will base their legal interpretations and decisions on their experiences or personal beliefs. By not limiting jury discretion in capital sentencing, to prevent diversion of focus to improper considerations, arbitrary and capricious determinations will inevitably result.

Second, by not requiring bifurcated trials, a capital defendant is unduly prejudiced in the determination of his or her guilt. Such court sanctioned prejudice emanates from the conflict of constitutional rights, which the McGautha Court insisted were not an is-

49. Id. at 213 (citing McMann v. Richardson, 397 U.S. 759, 769 (1970)).
50. McGautha, 402 U.S. at 213-14 (referencing the Federal Constitution's Fifth Amendment right not to be forced to testify so that evidence may be used against the defendant/witness).
51. Id. at 214.
52. Id. at 221 (referencing Spencer v. Texas, 385 U.S. 554 (1967)).
53. McGautha, 402 U.S. at 221.
sue, between the Fifth Amendment right not to testify and the right to present evidence to defend oneself at sentencing under the Fourteenth Amendment's guarantee of Due Process. In the absence of bifurcated trials in capital cases, a defendant's constitutional rights are not protected and it is impossible to have a fair trial.

In 1972, the proverbial tides began to shift in the consolidated landmark case of *Furman v. Georgia.*

Furman contended that unrestricted juror discretion resulted in arbitrary sentencing and brought his challenges under the Eighth and Fourteenth Amendments, arguing that a punishment is "cruel and unusual" if it was, inter alia, arbitrary. The Court held that the Georgia statute, providing complete jury discretion, could result in arbitrary sentencing and was therefore "cruel and unusual" punishment, which violated the Eighth Amendment. This decision effectively voided all state death penalty statutes, thirty-five separate state statutes in all, which did not provide guidelines for jury discretion in deciding whether to impose a sentence of death.

The Supreme Court holding in *Furman* effectively suspended the sentence of death in all cases, which resulted in a majority of the states ambitiously rewriting their statutes to limit discretion in an attempt to comport with the Supreme Court decision. Some states tried to accomplish this with a complete removal of discretion by mandating a sentence of death for certain heinous crimes, but such statutory efforts were quickly held unconstitutional. Other states sought to limit the discretion through the codification of sentencing guidelines that allowed for the introduction of aggravating and mitigating circumstances in determining the punishment to be imposed.

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55. Furman, 408 U.S. at 239-40. The Court set the standard that a punishment would be "cruel and unusual" if it was too severe for the crime, if it was arbitrary, if it offended society's sense of justice, or if it was not more effective than a less severe penalty. *Id.*

56. *Id.*


60. Woodson, 428 U.S. 280.
Such discretionary statutes were first approved by the Supreme Court in three cases collectively referred to as the Gregg decision in 1976.61 The landmark case was important in the following facets: the decision reinstated death penalty statutes that used aggravating and mitigating sentencing guidelines,62 held that the death penalty itself was constitutional under the Eighth Amendment,63 mandated the requirement of bifurcated trials with separate deliberations for guilt and penalty phases;64 imposed the requirement of automatic appellate review of capital cases,65 and required proportionality review.66

In Gregg, the Court first analyzed whether the death sentence was “cruel and unusual” punishment in violation of both the Eighth and Fourteenth Amendments.67 The Court first stated that the term “cruel and unusual” punishment was adopted by the framers who were primarily concerned with preventing “torments” and “barbarous” treatment, not capital punishment as a whole.68 The early challenges under this theory support this rationale because they questioned the method of the execution and not the imposition of death itself.69 However, the prohibition of the Eighth

62. Gregg, 428 U.S. at 193-95, 202-03.
63. Id. at 187.
64. Id. at 190-91.
65. Id. at 198, 204.
66. Id. at 198, 206. Proportionality review is defined as: “An appellate court's analysis of whether a death sentence is arbitrary or capricious by comparing the case in which it was imposed with similar cases in which the death penalty was approved or disapproved.” BLACK'S LAW DICTIONARY 989 (7th ed. 2000).
67. Gregg, 428 U.S. at 162.
68. Id. at 169 (citing Anthony F. Granucci, Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 CALIF. L. REV. 839, 852-853 (1969)). The tenth declaratory clause of a bill ratified by Monarchs William and Mary read: “That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.” Gregg, 428 U.S. at 169. This language was adopted verbatim into the Virginia Declaration of Rights of 1776 and, with the substitution of “shall” for “ought,” now appears in the Eighth Amendment to the United States Constitution. Granucci, 57 CALIF. L. REV. at 853. See U.S. CONST. amend. VIII.
69. Gregg, 428 U.S. at 170. The Court in Gregg stated: In the earliest cases raising Eighth Amendment claims, the court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to “torture” and other “barbarous” methods.

Id. See also Wilkerson v. Utah, 99 U.S. 130 (1879), where the Court stated:
Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be in-
Amendment has been interpreted in a dynamic manner, and evolves as "public opinion becomes enlightened by a humane justice." Therefore, modern values concerning the imposition of a challenged sanction must be assessed when analyzing the application of the Eighth Amendment. Under the Eighth Amendment, the punishment must not be excessive for the crime, which is determined by two aspects: 1) that the punishment does not involve unnecessary and wanton infliction of pain; and 2) the punishment must not be grossly disproportionate to the severity of the crime. However, the assessment of modern values must also recognize that, at the time the Eighth Amendment was ratified, capital punishment was common in every state and it is apparent from the language of the Constitution that the framers accepted it. Additionally, the Court posited the fact that the Fourteenth Amendment, though adopted more than seventy-five years later, similarly considered and accepted the existence of the sanction.

Accordingly, the Court found the "excessiveness" prong of the aforementioned test was not met because of society's endorsement of capital punishment, as evidenced by at least thirty-five states that immediately drafted statutes with discretionary sentencing guidelines shortly after the decision in Furman. Further proof was found in the fact that juries continued to impose death sentences, despite the ability to instead impose life imprisonment.

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70. Gregg, 428 U.S. at 171 (citing Weems v. United States, 217 U.S. 349, 373, 378 (1910)).
71. Id. at 173 (noting that although public policy is a concern, it is not conclusive in itself).
73. Gregg, 428 U.S. at 177. The Fifth Amendment ... contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases: 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ... not be deprived of life, liberty, or property, without due process of law ...'
74. Id.
75. Id. at 180. Statutes were enacted that attempted to comply with the opinion of Furman by: "(i) specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital punishment, or (ii) making death mandatory for specified crimes." Id. at 179-80.
76. Id. at 182. The penalty serves two purposes: (1) retribution—the instinct for this is part of the nature of man, and channeling that instinct in the administration of criminal
The Court found that the second prong was not met either because a sentence of death cannot be said to be disproportionate to the crime of intentional and unjustified murder.\(^7\) Therefore, the Court held that the death penalty as a whole could not be held to always be constitutionally impermissible.\(^7\)

The Court then examined the validity of death penalty statutes, in light of *Furman*, that provided jury guidelines through the use of aggravating and mitigating circumstances.\(^9\) *Furman* required that when a sentencing body is given discretion to impose death, such discretion must be appropriately directed and limited in order to avoid the risk of arbitrary and capricious sentences.\(^8\) However, the Court asserted that our judicial system has long recognized that justice requires the circumstances of the crime be considered, along with the character and propensities of the actor, for the determination of sentences in order for our legal system to operate in a consistent and sensible manner.\(^8\) The solutions to this problem were deemed to be the use of bifurcated trials and the use of jury guidelines through aggravating and mitigating circumstances.\(^8\)

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justice serves an important purpose in promoting the stability of a society governed by law, and (2) deterrence—though many studies have provided conflicting results on whether the threat of death actually deters such violence, there is no empirical evidence proving or disproving and thus, the court cannot say such punishment does not deter and thus is not unconstitutional. *Id.* at 183-86.

77. *Id.* at 187. Although there is no doubt that capital punishment is unique in its severity and irrevocability, the court could not hold that it is invariably disproportionate to the crime of deliberately taking another’s life . . . it is an extreme sanction, suitable to the most extreme crimes. *Id.*


79. *Id.* at 189.

80. *Id.*

81. *Id.* (citing Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937)). *See also* Williams v. Oklahoma, 358 U.S. 576, 585 (1959); Williams v. New York, 337 U.S. 241, 247 (1949). Jury sentencing is desirable in capital cases to maintain a link between contemporary values and the penal system; a link without which the determination of punishment could not reflect the “evolving standards of decency that mark the progress of punishment of a maturing society.” *Gregg*, 428 U.S. at 189. But this creates problems such as information relevant to the penalty phase being worthless during the guilt determination and more importantly that it may be prejudicial to a fair adjudication for the accused. *Gregg*, 428 U.S. at 190-92.

82. *Gregg*, 428 U.S. at 191. The *Gregg* Court indicated that this was recommended by the drafters of the Model Penal Code as follows:

[If a unitarian proceeding is used] the determination of the punishment must be based on less than all the evidence that has a bearing on that issue, such for example as a previous criminal record . . . though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone . . . The obvious solution . . . is to bifurcate the proceeding . . . but once guilt has been determined opening the record to the further information that is relevant to sentence.
The Court discussed the fact that although other courts have asserted that standards to guide jury discretion in capital case deliberations are impossible to formulate, these standards had already been developed by the drafters of the Model Penal Code. The drafters stated it was indeed possible to point to the main circumstances of aggravation and mitigation. These circumstances should be weighed individually and then against each other when both are present in a given case. Although such standards are somewhat general, they do reduce the possibility of a sentence being imposed in a capricious or arbitrary manner by providing guidance to the jury. These standards support constitutionality because the requirement of automatic appellate review safeguards from an improper sentence. The Court stated that statutes that incorporate guidelines, such as were suggested by the Model Penal Code, in conjunction with the safeguards of a bifurcated trial, automatic appellate review, and the procedure of comparing with similar cases to evaluate proportionality, proved that constructing a capital sentencing system that complied with the constitutional concerns in Furman was possible.

With the decision in Gregg, the validity of the Model Penal Code's aggravating and mitigating circumstances was solidified because it became the model for what is used across the nation in determining a sentence of death. However, the premise of victim impact evidence as an aggravating circumstance had not then been evaluated under constitutional guidelines. The personal-

Id. (citing MODEL PENAL CODE § 201.6, cmt. 5 (Tentative Draft No. 9, 1959)).

But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment. Since the members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant.

Id. at 192 (internal citations omitted).

83. See, e.g., McGautha, 402 U.S. at 183.
84. Gregg, 428 U.S. at 193.
85. Id. (citing MODEL PENAL CODE § 201.6, cmt. 3 (Tentative Draft No. 9, 1959)).
86. Gregg, 428 U.S. at 193 (citing MODEL PENAL CODE § 201.6, cmt. 3 (Tentative Draft No. 9, 1959)).
87. Gregg, 428 U.S. at 194-95.
88. Id. at 195. The Court in Furman held that death sentences imposed under statutes that gave juries unrestricted discretion to impose or withhold the death penalty violated both the Eighth and Fourteenth Amendments. Id. at 195 n.47.
89. Niru Shanker, Getting a Grip on Payne and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared, 26 HASTINGS CONST. L.Q. 711 (Spring 1999). Victim impact testimony allows family, friends, and members of the community to testify at capital sentencing
ized nature of victim impact evidence, and the emotions that are inherent in it, introduces what is often argued to be an impermissible element of arbitrariness into death penalty deliberation.\textsuperscript{90} Whether such arbitrary evidence could be utilized during the sentencing phase was an issue that had escaped review by the Supreme Court at the time of \textit{Gregg}.

The \textit{Gregg} decision finally gave validity to the assertion that Due Process was violated in the absence of a bifurcated trial, which had previously lacked historical support. This was a well founded holding since having a guilt determination and sentencing determination in the same trial would allow the jury to hear potentially prejudicial evidence upon which it could improperly base the determination of guilt. In regard to the subject of jury discretion, unrestricted jury discretion may cause jurors to impose the death sentence based on improper considerations such as personal emotions. This is at the very core of the problem with victim impact evidence. In \textit{Gregg}, the Court held that the safeguards of a bifurcated trial and jury guidelines are sufficient to eliminate any prejudicial effect. However, while simple guidelines may be enough to permit the use of aggravating and mitigating circumstances, victim impact evidence brings a whole new concern into play. Victim impact evidence is so purely emotional and inflammatory that there are no words that can make it likely, let alone ensure, that jurors will not improperly base the determination of death upon such improper considerations.

IV. THE ADVENT OF VICTIM IMPACT EVIDENCE

The origins of victim impact evidence date back to before the development of the sentencing discretion guidelines, with which they are now connected. The foundation for victim impact evidence was laid by the Victim’s Rights Movement of the nineteen-sixties, which sought to gain fairer treatment of rape victims during judicial proceedings.\textsuperscript{91} After two decades of evolution and increasing momentum, Congress enacted the Victim and Witness

\begin{footnotes}
90. \textit{Id.} at 712.
91. \textit{Id.}
\end{footnotes}
Protection Act of 1982,92 and the Comprehensive Crime Control Act of 1984.93 The first constitutional challenge to victim impact evidence in capital sentencing quickly followed these Acts in the Supreme Court case of Booth v. Maryland.94

In Booth, Maryland law mandated a pre-sentence report that contained both information about the defendant and a victim impact statement, which described the effect of the crime on the victim and the victim's family.95 Such statements often contain comments emphasizing the victim's outstanding qualities and vividly describing the severe emotional and personal problems caused to the family members of the victim.96 Booth was sentenced to death by the trial court, which was affirmed on automatic review by the Maryland Court of Appeals.97

The Court evaluated the rule established in Gregg, which stated that the discretion to impose death must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."98 The Booth Court held that the Constitution places some limits on this discretion,99 and therefore, a statute requiring consideration of factors other than those such as an actor's record and circumstances of the crime, must be scrutinized to ensure the evidence is relevant to establishing the actor's personal responsibility and moral guilt.100 The majority of victim impact evidence focuses on describing the emotional trauma suffered by the victim's family. The Court noted that states such as Maryland claim that by knowing the extent of this impact, the jury is better able to weigh the "gravity or aggravating quality" of the crime.101 The

92. 18 U.S.C. § 1512 (1982). This was an amendment to Federal Rules of Criminal Procedure requiring the inclusion of victim impact statements as part of a pre-sentence report submitted to the sentencing authority. See Shanker, supra note 89, at 712.
95. Booth, 482 U.S. at 498-99. The victim impact statement is drafted by the State Division of Parole and Probation with information supplied by the victim or the victim's family, which may be read to the jury during the sentencing phase. Id. The family members may also be called to testify to the information in front of the jury at the sentencing hearing. Id. at 499.
96. Id. at 499-500.
97. Id. at 501.
98. Id. at 502 (citing Gregg, 428 U.S. at 189).
99. Id. at 502.
100. Booth, 482 U.S. at 502 (citing Enmund v. Florida, 458 U.S. 782, 801 (1982)). "To do otherwise would create the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" Id. at 502; see also Zant v. Stephens, 462 U.S. 862, 885 (1983).
Court said that the function of the jury is to "express the conscience of the community" on the question of death and in doing so is required to view the defendant as a uniquely individual human being. However, victim impact evidence is focused on the effect on the victim's family and not the defendant.

A defendant usually has no knowledge about the existence or characteristics of the victim's family, and in fact, victims are rarely selected based on whether there would be an effect on anyone other than the victim. A decision premised on this evidence, instead of on evidence relevant to the defendant and the crime, diverts the jury's focus to irrelevant information independent of the decision to kill. Introduction of victim impact evidence results in an impermissible risk of a capricious and arbitrary imposition of the death penalty, and a family's grief is irrelevant to the decision whether a defendant should be subject to the death penalty because it is the crime at issue, not the resulting grief. The Court ultimately held that victim impact evidence is unconstitutional under the Eighth Amendment and that such evidence served "no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."

The rationale underlying the holding of the Booth Court was well reasoned. Factors other than the crime itself, the associated conduct or the defendant's admissible record must be strictly scrutinized to ensure that only relevant evidence may be presented to the jury. To be relevant, the evidence must go to culpability and not to the unfortunate effects that were not part of the crime or its scheme. Although the jury is said to require the impact of the crime to best weigh the gravity of the crime itself, victim impact

103. Booth, 482 U.S. at 504. "The focus of VIS, however, is not on the defendant, but on the character and reputation of the victim and the effect on his family . . . These factors may be wholly unrelated to the blameworthiness of a particular defendant." Id.
104. Id.
105. Id. at 504-05 (citing People v. Levitt, 156 Cal. App. 3d 500, 516-17 (1984)). A California state court noted:

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 . . . In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant . . . but it has no relationship to the proper purposes of sentencing in a criminal case.

106. Booth, 482 U.S at 505.
107. Id. at 508-09.
evidence is more likely to elicit anger or pity than it is to provide a basis upon which to determine the aggravating quality. The loss to the family is inherent in the death of the victim and, even assuming arguendo that it was not, can be established by less inflammatory means. When this occurs, victim impact evidence is more likely to result in juries returning verdicts based on their outrage or pity instead of the relevant facts, which results in arbitrary and capricious sentences that violate constitutional rights.

In 1990, the Crime Control Act was enacted by the United States Congress to provide further victims’ rights. In 1991, the Supreme Court holding in Booth was reversed in Payne v. Tennessee when the Court held that the use of victim impact evidence at capital sentencing was constitutional. In reaching this conclusion, the Payne Court revisited the two-fold analysis in the Booth decision. The first part of this analysis held that evidence of the harm the homicide causes a victim’s family does not go to the defendant’s blameworthiness, and second, that only evidence that relates to blameworthiness is pertinent to the sentencing phase of capital cases. The Court stated that the harm inflicted by a crime has a long history in our criminal law system in determining both the elements of the crime and the proper punishment, and it stated that victim impact evidence is merely a tool to inform the sentencing jury about the specific harm that was actually caused by the murder at issue. Consequently, the Court stated that two defendants with equal blameworthiness might be found guilty of different crimes premised solely on the fact that their respective conduct caused different degrees of harm. Hence, a fundamental unfairness would result if mitigating evidence was unrestricted while victim impact evidence was completely eliminated as suggested in Booth. For the foregoing reasons, the

109. See id.
111. Payne, 501 U.S. at 808.
112. Id. at 819. The Court concluded that while no prior decision has mandated that only the defendant’s character and immediate characteristics of the crime may be considered constitutionally, other factors are irrelevant to the capital sentencing unless they have some bearing on the defendant’s personal responsibility and moral guilt. Id. See also Booth, 482 U.S at 502.
113. Payne, 501 U.S. at 819.
114. Id. Thus, one could reason that understanding the degree of harm would be essential in determining the correct degree of punishment.
115. Id. at 825-26. "While virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is
Court thought the Booth Court's holding that victim impact evidence was a conduit to the arbitrary imposition of death was wrong.\(^{116}\)

However, the Payne Court recognized that there was some inherent risk with the use of victim impact evidence.\(^{117}\) Nonetheless, the Court held that the inherent risk was sufficiently safeguarded by the Due Process Clause of the Fourteenth Amendment.\(^{118}\) Despite the potential threat of prejudice, and because it believed that sufficient safeguards existed, the Court said that the need for the jury to have evidence of the specific harm in assessing the moral culpability and blameworthiness made victim impact evidence just and constitutionally valid.\(^{119}\) The majority asserted that the Booth Court misinterpreted precedent, which produced a decision that unfairly favored capital defendants.\(^{120}\) As such, the Court held that the Eighth Amendment did not create a per se ban if a state permitted the use of victim impact evidence by the prosecution.\(^{121}\) This holding was based on the reasoning as expressed by Justice O'Connor, who said that the state should have the discretion to determine if a jury should hear victim impact evidence so it can consider the true harm caused, as well as to enable it to associate a unique identity to the victim.\(^{122}\)

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117. *Id.*

118. *Id.* at 825. "If, in a particular case, victim impact evidence so unduly prejudices the jury that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment would provide a safeguard." *Id.* See *Darden v. Wainwright*, 477 U.S. 168, 179-83 (1986).

119. *Payne*, 501 U.S. at 825 (citing *Booth*, 482 U.S. at 517 (White, J., dissenting) (citations omitted)). "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." See also Victor D. Vital, *Payne v. Tennessee: The Use of Victim Impact Evidence at Capital Sentencing Trials*, 19 T. MARSHALL L. REV. 497 (1994).

120. *Payne*, 501 U.S. at 822. "But it was never held or even suggested in any of our cases preceding Booth that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed." *Id.*

121. *Id.* at 827.

122. *Id.* at 832 (O'Connor, J., White, J., and Kennedy, J., concurring). "Murder is the ultimate depersonalization . . . It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back." *Id.*
The *Payne* Court's holding that the elimination of victim impact evidence would result in a fundamental unfairness failed to realize that the harm, which is claimed to be shown by such evidence, can still be fully presented to the jury by other less prejudicial means. Because the same judicial goals can be accomplished through both the presentation of evidence of the crime and that the victim had a family, there is not a fundamental unfairness by prohibiting victim impact evidence. The fundamental unfairness is created by permitting the Commonwealth to parade the grieving family members into the courtroom to give tearful and despair-ridden recitations, which serve no purpose other than to infect the jury with anger and outrage. Furthermore, the Court's claim that such evidence better enables jurors to assess culpability and blameworthiness was without solid reasoning. Culpability and blameworthiness lie in the crime itself, the associated planning and the actor's conduct. The effect on the family typically is not a factor in the rationale for the crime. Instead, the tragic effect is simply a subsequent result that cannot be logically perceived as establishing blameworthiness, which must be directly linked to the act itself. If no family members exist to grieve for the victim, it does not diminish the actor's culpability and blameworthiness. Conversely, it should not be allowed to contribute to culpability and blameworthiness either.

Following the *Payne* decision, most of the states that utilized capital punishment incorporated victim impact statements into their statutory capital sentencing guidelines.123 Twelve of these states, including Pennslyvania, have revised their death penalty statutes to provide a method of regulating the admission of victim impact evidence at the penalty phase.124 One of the first and most well known cases dealing with restrictions on victim impact evidence in capital sentencing was the New Jersey case of *State v. Muhammad*.125

In *Muhammad*, the defendant was charged with the kidnapping, rape and murder of an eight-year-old girl and challenged the constitutionality of the New Jersey statute.126 The defendant ar-

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123. *Shanker*, supra note 89, at 719. All states but Alaska, the District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin allow the death penalty. *Id.* at 719 n.54.
124. *Id.* at 720.
126. *Muhammad*, 678 A.2d at 168. See N.J. STAT. ANN. § 2C:11-3c(6), which provides:
argued that the statute violated the prohibition of cruel and unusual punishment and the Due Process clause of the state constitution because the admission of victim impact evidence was likely to confuse and impassion the jury, which created an impermissible risk that the penalty decision would be made in an arbitrary and capricious manner rather than on the basis of the relevant evidence. In capital sentencing, each juror must decide individually whether each mitigating factor presented exists and then the jury must unanimously decide whether the aggravating factors outweigh the mitigating factors(s). The subject New Jersey statute provided for a “catch-all” circumstance, which was defined as any other factor relevant to a defendant’s character or record. The associated instruction in the statute, which is given by the judge before deliberation, provided that if a defendant presents catch-all evidence, “the State may present evidence of the victim’s character, background and the impact on the victim’s survivors.”

The jury is then instructed if at least one aggravating factor is proved beyond a reasonable doubt, and evidence of a mitigating circumstance is introduced as a catch-all factor, the jury may consider the victim impact evidence in determining the appropriate weight to attach to the mitigating catch-all evidence.

The court held that, consistent with the Supreme Court’s holding in Payne, such a statute guiding the use of victim impact evidence did not violate the Constitution. Further, such evi-

When a defendant at a sentencing proceeding presents evidence of the defendant’s character . . . the State may present evidence of the murder victim’s character and background and of the impact of the murder on the victim’s survivors. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor . . . the jury may consider the victim and survivor evidence . . . in determining the appropriate weight to give mitigating evidence presented....

Id. at 169.
127. Muhammad, 678 A.2d at 170-71. Under the statute, each individual juror must decide whether each mitigating factor exists and then individually determine if the aggravating outweigh the mitigating circumstances, beyond a reasonable doubt, and can only impose death if the aggravating are found to outweigh the mitigating unanimously. Id.
128. Id. at 170. “The death penalty is imposed only if the jurors unanimously agree that the aggravating factors outweigh the mitigating factors.” Id.
129. See N.J. STAT. ANN. § 2C:11-3c(5)(h). This is a catch-all factor of mitigating evidence that is not encompassed in the other defined factors under the statute.
130. Muhammad, 678 A.2d. at 170-71.
131. Id. at 171.
132. Id. at 171 (citing Payne, 501 U.S. at 811). “On July 27, 1991, the United States Supreme Court held that the Eighth Amendment of the Federal Constitution, which prohibits the imposition of cruel and unusual punishments, does not bar the admission of victim impact evidence during the penalty phase of a capital trial.” Muhammad, 678 A.2d at 171.
idence was held not to unconstitutionally burden one’s right to introduce catch-all mitigating evidence, despite the argument that such statutory language has the effect of defendants foregoing the right to present mitigation evidence to avoid the introduction of victim impact evidence. In harmonizing the constitutional rights of the victim’s family and of defendant’s due process, the court explained that both have a right to inform the jury of relevant information and that it is unlikely that either injects fatal emotionalism into the deliberations. The contention that the defendant did not know, nor base, the crime on either the uniqueness of the victim or the effect on the family was rejected on the premise that it is obvious that taking another’s life would terminate the victim’s uniqueness and have a negative effect on the family. Accordingly, the court held the jury should be permitted to consider such foreseeable consequences. The court then held that although it may have drafted the statute differently, the judiciary did not have a license to rewrite what was enacted by the legislature and that as written the statute was constitutional under state and federal constitutions.

The admission of victim impact evidence thus requires a balancing test, which weighs the probative value against the risk of creating undue prejudice or confusion of the jury. Ultimately, the court asserted, whether the evidence is too inflammatory should be decided on a case by case basis within the trial court’s discretion. Evidence that shows the impact of the crime, or the uniqueness of the victim, should be admissible unless it is unduly inflammatory or serves no legitimate purpose in the adjudication process. The court admitted that instructions regarding the limited use of victim impact evidence would be complex, but they are

133. Muhammad, 678 A.2d at 172-73. “Defendants are constantly forced to make difficult choices when they are determining what mitigating evidence to present... The defendant is no more restricted from introducing evidence relevant to the catch-all factor than he would in introducing evidence relevant to any other mitigating factor.” Id.
134. Id. at 175.
135. Id. at 173, 176.
136. Id.
137. Id. at 173 (citing Chapman v. United States, 500 U.S. 453, 464 (1991)). “While we may have drafted the victim impact statute differently, the judiciary does not have a license ‘to rewrite language enacted by the Legislature.’” Muhammad, 678 A.2d at 173.
138. Muhammad, 678 A.2d at 176 (citing Payne, 501 U.S. at 836 (Souter, J., concurring)). “[I]n each case there is a traditional guard against the inflammatory risk, in the trial judge’s authority and responsibility to control the proceedings consistently with due process, on which grounds defendant’s may object.” Muhammad, 678 A.2d at 176.
139. Id.
140. Id. at 176-77.
merely a further refinement that the system expects jurors to make in capital cases.\textsuperscript{141} Although these limiting instructions cannot eliminate the potential of misuse, the court said that the risk does not justify a per se ban on all victim impact evidence.\textsuperscript{142} Thus, the court held that it is clear from \textit{Payne} and the statutory language that the victim impact statute and its associated jury instructions were constitutional.\textsuperscript{143}

The \textit{Muhammad} court based its rejection of the argument that the defendant did not know of the victim's uniqueness, and that he had a family, on the premise that these were the obvious results from the taking of the victim's life. Similarly, the impact should be obvious to the jury as well and therefore it does not need to be cumulatively presented through victim impact evidence. Since there are not any proverbial givens in our legal system, this result can be conveyed by other less inflammatory means.

Despite the court's blind assertion that jurors are expected to understand complex instructions as part of making refinements in capital cases, it is the court's duty to provide proper guidance. Because words are not available that can truly stop a person from feeling impassioned and outraged, adequate instructions are not within the capability of our jurists. Accordingly, the only way to prevent arbitrary decisions based on prejudicial victim impact evidence is not to permit its more than questionable use. The court also stated that it was not free to rewrite what the legislature enacted. While the \textit{Muhammad} court's claim that it does not have the ability to rewrite legislative enactments repugnant to the Constitution may be accurate linguistically, in reality the court has the power to nullify the viability of the statute if it finds the statute to be clearly, palpably, and plainly violative.

\section*{V. \textbf{Victim Impact Evidence in Pennsylvania}}

The two most influential Pennsylvania cases on victim impact evidence and associated jury instructions in capital sentencing are \textit{Commonwealth v. Means}\textsuperscript{144} and \textit{Commonwealth v. Natividad}.\textsuperscript{145} In \textit{Means}, the defendant's motion to exclude victim impact evidence

\begin{itemize}
  \item \textsuperscript{141} \textit{Id.} at 178-79. Part of this rationale is based on the presumption that there is no reason to believe that jurors will act irresponsible in performing their duty even in the face of inflammatory evidence. \textit{Id.}
  \item \textsuperscript{142} \textit{Id.} at 179 (citing \textit{Payne}, 501 U.S. at 831 (O'Connor, J., concurring)).
  \item \textsuperscript{143} \textit{Muhammad}, 678 A.2d at 182.
  \item \textsuperscript{144} 773 A.2d 143 (Pa. 2001).
  \item \textsuperscript{145} 773 A.2d 167 (Pa. 2001).
\end{itemize}
as unconstitutional was sustained by the trial court because there was insufficient guidance in the death penalty statute regarding how to use the evidence in deliberations. 146 In reviewing the trial court's holding, the Pennsylvania Supreme Court first stated that the constitutional provisions to be considered were the Eighth and Fourteenth Amendments to the Federal Constitution, and Article 1 of the Pennsylvania Constitution. 147 Since the constitutionality of enacted legislation is presumed, 148 the court stated that it would declare a statute repugnant only if it "clearly, palpably, and plainly" was violative of the Constitution. 149 The Pennsylvania Supreme Court heard the issue of whether subsections (a)(2), dealing with procedure in jury trials, and (c)(2), dealing with instructions to the jury, of Pennsylvania's statute were invalid as written. 150 The defendant asserted that victim impact evidence interjected extremely emotional information into sentencing decisions, and since the statute did not categorize such evidence as either an aggravating or mitigating circumstance, it exposed the jury to inflammatory information because its function was not clearly de-

146. Means, 773 A.2d at 146 (referencing Furman, 408 U.S. 238 (1972)).
147. Means, 773 A.2d at 147. The Means court stated:
   The federal constitutional provisions at issue are Eighth Amendment prohibition against cruel and unusual punishment, and the Fourteenth Amendment guarantees of due process and equal protection. The provisions of the Pennsylvania Constitution cited by the appellee are in Article 1; beginning with Section 1, guaranteeing equal protection, Section 9, providing, in relevant part, for due process in criminal proceedings; Section 13, prohibiting the infliction of cruel punishment; Section 26, precluding governmental discrimination against any person; and Section 28, prohibiting discrimination based on gender.
   Id.
148. Id. (citing Commonwealth v. Barud, 681 A.2d 162 (Pa. 1996)).
149. Means, 773 A.2d at 147 (citing Commonwealth v. Mikulan, 470 A.2d 1339 (Pa. 1983)).
150. Means, 773 A.2d at 147-48; 42 PA. CONS. STAT. § 9711 (a)(2) states:
   In the sentencing hearing, evidence concerning the victim and the impact that the death of the victim has had on the family or the victim is admissible. Additionally, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed. Evidence shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e), and information concerning the victim and the impact that the death of the victim has had on the family of the victim. Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).
42 PA. CONS. STAT. § 9711 (a)(2). 42 PA. CONS. STAT. § 9711 (c)(2) states:
   The court shall instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it shall consider, in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim's family. The court shall also instruct the jury on any other matter that may be just and proper under the circumstances.
42 PA. CONS. STAT. § 9711 (c)(2).
fined. Such un-tethered use of victim impact evidence destroyed the statute's alleged balancing structure, which constituted an imposition of cruel and unusual punishment. The Payne Court had not found a due process or an equal protection issue in evaluating the constitutional challenges, thus the claims against the Constitution by Means were found to be without merit.

However, the court did evaluate whether victim impact evidence causes the constitutional balance of the sentencing statute's scheme to be disrupted. In determining this, the court relied on Commonwealth v. Abu-Jamal, wherein the court held that evidence need not be relevant strictly to the specific aggravating and mitigating factors at issue to be presented to the jury. Furthermore, the court noted that the legislature amended the statute, apparently in support of the holding, to specifically include victim impact evidence as admissible following the Abu-Jamal decision. Finally, the court said that the latitude given to the states in drafting their death penalty statutes allowed for the admission of victim impact evidence. Based on the language of the provision, the court held there was no historical support for finding the capital sentencing statute invalid. Thus, the Pennsylvania statute was held to be proper as drafted in light of the controlling precedent.

152. Id. at 149.
153. Id. at 150-51.
154. Id. at 152.

Appellee argues that only aggravating and mitigating circumstances are appropriate considerations in the deliberative process. Victim impact testimony is not defined by the legislature as an aggravating, nor is it tied to a mitigating circumstance as relevant rebuttal to the character evidence offered by the defendant; therefore, it must be precluded from consideration as it will cause the constitutional balance of the sentencing scheme to be disrupted.

Id.
156. Means, 773 A.2d at 152 (citing Abu-Jamal, 555 A.2d at 846) (referencing 42 PA. CONS. STAT. § 9711 (a)(2)). The Abu-Jamal court stated: "[I]n the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e)." Means, 773 A.2d at 152.
157. Means, 773 A.2d at 152. Section 9711 (a)(2) was amended in 1995.
158. Id. at 153 (mentioning Commonwealth v. Fisher, 681 A.2d 130 (1996)).
159. Means, 773 A.2d at 153.
160. Id. "Pennsylvania jurisprudence favors the introduction of all relevant evidence during a capital sentencing proceeding. Pennsylvania's sentencing scheme does not limit the evidence admissible in the penalty phase to only the information necessary to establish aggravating and mitigating circumstances." Id.
The next major issue addressed in Means was whether the evidence was improper because the jury instructions did not sufficiently inform jurors of how to weigh the evidence, which arguably caused the sentence to be arbitrary and capricious. The court stated that the absence of directions on what weight was to be given to victim impact evidence did not affect the constitutionality of such evidence because there is no constitutional requirement that a jury be advised in this manner. The court was satisfied with the fact that the judges have the knowledge and means to prevent prejudicial information from entering into the jury's deliberations under the guise of victim impact evidence, and therefore no bar against the admission of such evidence existed.

The court cited decisions such as Muhammad, to show that most jurisdictions that allowed victim impact evidence to be considered did so on the basis that such evidence is admissible as a foreseeable consequence of the crime and relevant as a factor in establishing the moral culpability of the defendant. Such decisions were found to be persuasive support for the Commonwealth in rejecting the constitutional challenges by Means.

No support was found for the trial court's conclusion that the statute in question violated Article 1, Section 13 of the Pennsylvania Constitution. Common practice within the Commonwealth was influential in determining the constitutionality of Pennsylvania's capital sentencing statute. As such, judicial notice of the practice of using pre-sentence reports containing victim impact evidence being a well established practice in the Commonwealth was taken, along with the fact that said use did not provide a basis for excluding cases involving fatality. The court believed that this supported the admission of such evidence in capital sentencing when monitored by judicial discretion. Furthermore, legislative intent evident in the Crime Victim's Act gave victims

161. Id. at 153.
162. Id. at 154.
164. Id.
165. Means, 773 A.2d at 155-56.
166. Id. at 156.
167. Id. at 157.
168. Id. at 156-57. "Policy is distilled through, among other things, observation of common practices, customs and legislation reflecting the will of the people." Id.
169. Id. at 157.
a basic bill of rights that favored the inclusion of victim impact evidence.\footnote{Means, 773 A.2d at 157.}

Although the court found the statute valid, it recognized the procedural concerns regarding the application of jury instructions for victim impact evidence.\footnote{\textit{Id.} at 157. In particular, the court noted § 9711 subsections (a)(2) and (c)(2) as relevant in this respect.} Despite the longstanding tradition of vesting great discretion in the trial judge's ability to phrase instructions, because of the complexity of such evidence in capital sentencing, the court drafted model instructions to be used at the judge's discretion in future cases.\footnote{\textit{Id.} at 158-59. The court noted that:}

The prosecution has introduced what is known as victim impact evidence. Victim impact evidence is not evidence of a statutory aggravating circumstance and it cannot be a reason by itself to impose the death penalty. The introduction of victim impact evidence does not in any way relieve the Commonwealth of its burden to prove beyond a reasonable doubt at least one aggravating circumstance. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt independent from the victim impact evidence, and if one or more jurors has found that one or more mitigating circumstances have been established by a preponderance of the evidence. Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. The sentence you impose must be in accordance with the law as I instruct you and not based on sympathy, prejudice, emotion or public opinion and not based solely on victim impact. \cite{Id.}

\footnote{\textit{Id.} at 160-61 (Zappala, J., dissenting in part, concurring in part).}

\footnote{681 A.2d 130 (Pa. 1996).}

mize the constitutional threat, it is not the role of the court to amend what the General Assembly has enacted.¹⁷⁸

Justice Zappala believed that the statute, in subsections (a)(2) and (c)(2), was fundamentally unfair, and thus violated due process.¹⁷⁹ Zappala also thought that victim impact evidence should not be introduced to rebut defense evidence introduced under the catch all factor.¹⁸⁰ The rationale for the foregoing was that in order to prevent victim impact evidence from being admitted, a defendant would be forced to forgo entering mitigation evidence.¹⁸¹ The statute was inadequate to regulate the presentation and consideration of victim impact evidence under subsections (a)(2) and (c)(2), thus Zappala thought it was unconstitutional.¹⁸²

Although Justice Nigro agreed with Justice Zappala that the statute was unconstitutional as written, he dissented in regard to the circumstances and procedures under which juries are permitted to consider victim impact evidence, because he believed the sentencing scheme to violate the Fourteenth Amendment.¹⁸³ He stated that in Payne, the Eighth Amendment was held not to provide a per se bar to the admission of victim impact evidence, but also recognized that such might be so unduly inflammatory as to violate the Due Process Clause by rendering the trial fundamentally unfair.¹⁸⁴ The statute allowed victim impact evidence to be presented for any purpose deemed relevant.¹⁸⁵ The statute instructed the jury, without any guidance, that it “shall consider” victim impact evidence if it finds at least one aggravating and mitigating circumstance.¹⁸⁶ Justice Nigro said that he, in contradiction to the majority, believed such an unguided admission of victim impact evidence to be used by the jury in its deliberations violated the Fourteenth Amendment’s Due Process Clause.¹⁸⁷ However, Justice Nigro asserted that he believed victim impact evidence should be admissible when used to rebut evidence pre-

¹⁷⁹. Id. (Zappala, J., dissenting in part, concurring in part).
¹⁸⁰. Id. (Zappala, J., dissenting in part, concurring in part). The catch-all factor in Pennsylvania’s statute is found in § 9711 (e)(8). Id.
¹⁸¹. Id. (Zappala, J., dissenting in part, concurring in part).
¹⁸². Id. at 162 (Zappala, J., dissenting in part, concurring in part).
¹⁸⁴. Id. (Nigro, J., dissenting in part, concurring in part) (citing Payne, 501 U.S. at 825).
¹⁸⁵. Means, 773 A.2d at 162 (Nigro, J., dissenting in part, concurring in part) (citing 42 PA. CONS. STAT. § 9711 (a)(2), (c)(2)).
¹⁸⁷. Id. (Nigro, J., dissenting in part, concurring in part).
sented as a catch-all mitigating circumstance as put forth by pre-
ceding Commonwealth decisions.\textsuperscript{188}

Pennsylvania's view of victim impact evidence was further ex-
plored in \textit{Commonwealth v. Natividad}.\textsuperscript{189} In \textit{Natividad}, the defen-
dant was sentenced to death for murdering the victim during the
commission of a robbery.\textsuperscript{190} The imposition of the death sentence
occurred after two aggravating circumstances and one mitigating
circumstance were found, with the jury determining that the ag-
gravitating circumstances outweighed the mitigating circum-
stance.\textsuperscript{191} The Supreme Court addressed the issue of victim impact
evidence after first finding that the evidence was sufficient to es-
tablish the conviction, as required on automatic appellate re-
view,\textsuperscript{192} and finding no merit in the claims of error.\textsuperscript{193}

The court then dealt with the claim that the Pennsylvania capi-
tal sentencing statute was unconstitutional.\textsuperscript{194} The court referred
to its decision in \textit{Means}, where no violation of the federal or Penn-
sylvania constitutions were found,\textsuperscript{195} and consequently the consti-
tutional challenges by the appellant were denied.\textsuperscript{196} The court
then addressed the specific claims of error regarding the admis-
sion of victim impact evidence at sentencing.\textsuperscript{197}

The issue involved whether notice of an intent to present victim
impact evidence prior to trial should be required.\textsuperscript{198} The court held
that to require such notice prior to trial is good practice because it
enables the defendant to prepare his or her defense.\textsuperscript{199} The court
then held that the notice provided by the Commonwealth twenty-
four hours prior, along with the fact that the defendant made no

\textsuperscript{188} \textit{Id.} at 162-63 (Nigro, J., dissenting in part, concurring in part) (citing \textit{Fisher}, 681
A.2d at 146 (holding that the admission of evidence at the penalty phase should be limited
to that which is specifically relevant to an enumerated aggravating or mitigating circum-
stance)).

\textsuperscript{189} \textit{Natividad}, 773 A.2d at 170-71.

\textsuperscript{190} \textit{Id.} at 171.

\textsuperscript{191} \textit{Id.} (citing \textit{Commonwealth v. Zettlemoyer}, 454 A.2d 937, 942 (Pa. 1982)).

\textsuperscript{192} \textit{Id.} at 176.

\textsuperscript{193} \textit{Id.} at 176-77.

\textsuperscript{194} \textit{Id.} at 177 (citing \textit{Means}, 773 A.2d 143).

\textsuperscript{195} \textit{Id.}

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.}

\textsuperscript{198} \textit{Id.} Appellant complained that without sufficient notice he was deprived of an op-
portunity to investigate the underlying basis of the testimony and the credibility of the
victim impact witness. Appellant urged such adoption, which is similar to that required
regarding notice of aggravating circumstances pursuant to PA R. CRIM. P. 352. \textit{Id.} See

\textsuperscript{199} \textit{Natividad}, 773 A.2d at 178.
objection at that time, was sufficient notice, thus no undue burden was placed on the defendant.\textsuperscript{200}

The final claim addressed in \textit{Natividad} was that insufficient instructions were given to the jury on how to properly consider victim impact evidence in their deliberation process.\textsuperscript{201} The court first stated that a judge is free to utilize discretion in wording instructions to a jury.\textsuperscript{202} Next, the court held that the absence of specific instruction as to what weight should be given to victim impact evidence did not affect the defendant's constitutional rights.\textsuperscript{203} Furthermore, the court held that there was not a constitutional issue with the instruction because it found that the instructions given to the jury were consistent with the model instructions drafted by the \textit{Means} court, which provided sufficient guidance for the jury to properly consider victim impact evidence.\textsuperscript{204}

The court, in both \textit{Means} and \textit{Natividad}, passed judgment on the issue of whether victim impact evidence violated Due Process, the prohibition of cruel and unusual punishment, and equal protection because of the holding in \textit{Payne}. While the court was admittedly bound by the doctrine of \textit{stare decisis}, the fact remains that what constitutes cruel and unusual punishment evolves as societal norms change. \textit{Payne} was decided a decade before either \textit{Means} or \textit{Natividad} and as such by itself cannot be said to accurately represent what our society accepts as cruel and unusual punishment. Even the Supreme Court itself changed from one end of the spectrum to the other from the decision in \textit{Booth} to that of \textit{Payne}, which spanned a period of only four (4) years. As such, the subject of victim impact evidence needs to be revisited because times and opinions change. Furthermore, the rationale for the \textit{Payne} decision is not nearly as strong as the argument against victim impact evidence in light of its highly prejudicial nature and the fact that a person's life is at issue.

Despite the court's holdings, victim impact evidence causes a disruption of the constitutional balance of the statutory scheme.

\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.} at 180.
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{Id.}
\textsuperscript{204} \textit{Natividad}, 773 A.2d at 182-83 (Zappala, J., dissenting in part, concurring in part and Nigro, J., dissenting in part, concurring in part) (in each of their separate dissents each said they would remand for a new sentencing hearing, reiterating their beliefs as stated in their dissents in the \textit{Means} case).
While it may be true that there is not a constitutional requirement that the jury be instructed on what weight to give victim impact evidence, the threat of arbitrary decisions created by the inflammatory nature of such evidence without adequate judicial limitations, which limitations are not feasible, does create a constitutional violation because cruel and unusual punishment ensues. Because the statute inadequately regulates the presentation and consideration of victim impact evidence, and because such evidence is so unduly inflammatory, the use of victim impact evidence under the statute violates the Due Process Clause because the proceeding is rendered fundamentally unfair.

Most recently, the Pennsylvania Supreme Court revisited the issue of using victim impact evidence under the capital sentencing statute in *Commonwealth v. Rice.* At a non-jury trial, the defendant Timothy Rice was found guilty of two counts of first-degree murder. During the sentencing phase, the jury returned a sen-
tence of death for each of the murder convictions after finding that
the aggravating circumstances outweighed the mitigating circum-
stances. Accordingly, the trial court imposed a sentence of death
for each first-degree murder conviction.

Rice sought direct review by the Pennsylvania Supreme Court, bypassing the Appeals
Court of Philadelphia County.

Rice raised two issues on capital appeal with regard to victim
impact evidence, which he asserted warranted a new sentencing
hearing. These issues were whether the language of the statute
was unconstitutional, and whether the court erred in giving its
jury instructions on how to consider the evidence. The court
first addressed the constitutional challenge to the statute itself. Rice’s precise contention was that the subsections were unconsti-
tutional because they did not provide any guidance as to how a
jury was to incorporate the evidence into its deliberation.
The court held that because these exact constitutional concerns were
addressed in previous cases, and found constitutionally valid, the
claim had no merit.

Rice’s claim of judicial error in using the law of New Jersey to
instruct the jury was addressed next. The general rule was that
a court is well within its discretion to use whatever wording it sees
fit in phrasing instructions, provided the words sufficiently convey
the law to the jury. The court stated that appellate review must

207. Rice, 795 A.2d at 345. The jury found, for each murder conviction, two aggravating
circumstances as follows: (1) Rice caused a grave risk of death to another person, in addition
to the victim of the offense, in the commission of an offense. See 42 PA. CONS. STAT. § 9711 (D)(7); and (2) that he had been convicted of another murder at the time of the
murders at issue. See 42 PA. CONS. STAT. § 9711 (D)(11). The two mitigating circum-
cstances that were found for each murder conviction were: (1) the capacity of Rice to appreci-
ate the criminality of his conduct had been substantially impaired (See 42 PA. CONS. STAT. § 9711 (E)(3)) and (2) that he allowed himself to be turned over to the police following
the murders (See 42 PA. CONS. STAT. § 9711 (E)(8)). Rice, 795 A.2d at 345.

208. Rice, 795 A.2d at 345. An aggregate consecutive term of twenty to forty years impris-
sonment was imposed on the remaining charges. See id.

209. Id.

210. Id. at 350 n.11. Rice asked if the court erred in admitting victim impact evidence.
However, he did not mention or develop this issue in his brief and therefore waived his
claim. Id. See Commonwealth v. LaCava, 666 A.2d 221, 229 n.9 (Pa. 1995). Although the
court in LaCava held that none of the claims warranted relief, only the discussion on victim
impact evidence under the statute is of concern within the context of this comment.

211. Rice, 795 A.2d at 350-51. See also the text of 42 PA. CONS. STAT. § 9711(a)(2), supra
note 9 and 42 PA. CONS. STAT. § 9711 (c)(2), supra note 151.

212. Rice, 795 A.2d at 351 (relying on its decisions in Means and Natividad).

213. Rice, 795 A.2d at 351.

214. Id.

215. Id. See N.J. STAT. ANN. § 2C:11-3c(6).

216. Rice, 795 A.2d at 351-52.
examine the instruction in its totality in determining if the charge was erroneous, while noting that the relevant law was stated without any ambiguity.\textsuperscript{217}

The court then stated the fact that the prosecution, Rice's counsel, and the trial court all discussed how to instruct the jury about victim impact evidence prior to the charge actually being made to the jury.\textsuperscript{218} The majority also noted that the \textit{Rice} court, without the benefit of \textit{Means} and \textit{Natividad} as procedural precedent, expressed concern as to how to properly channel juror discretion in considering victim impact evidence before giving the instructions.\textsuperscript{219} The Pennsylvania Supreme Court held that the trial court incorrectly stated the law because it stated that victim impact evidence could be considered only after any aggravating circumstance and the catch-all mitigating circumstance were found, similar to the New Jersey Statute.\textsuperscript{220} The rationale for this was that Pennsylvania law permits victim impact evidence after any aggravating and any mitigating, not just the catch-all mitigating as with the New Jersey statute, are found.\textsuperscript{221} Furthermore, the jury was instructed to consider the evidence only to determine the weight to attach to the catch-all circumstance instead of in weighing the aggravating circumstances against any mitigating circumstances presented.\textsuperscript{222}

Despite this error, the Pennsylvania Supreme Court determined that a new sentencing hearing was not warranted because the er-

\textsuperscript{217} Id. at 351-52 (citing Commonwealth v. Ohle, 470 A.2d 61, 70 (Pa. 1983)).

A trial court has broad discretion in phrasing its instructions to a jury, and may chose its own wording so long as it clearly, adequately, and accurately presents the law to the jury for its consideration. Appellate review of a charge must be based on an examination of the instruction as a whole to determine if it was fair or prejudicial. \textit{Rice}, 795 A.2d at 351-52. See 42 PA. CONS. STAT. § 9711(c)(2).

\textsuperscript{218} Id.

\textsuperscript{219} Id.

\textsuperscript{220} Id.

\textsuperscript{221} Id.

\textsuperscript{222} Id. at 353.
ror was not prejudicial.\textsuperscript{223} The error was held not to be prejudicial because the jury would have been allowed to consider the evidence even if it had received an instruction like that in \textit{Means}, because the instruction actually given was more restrictive than the one given in \textit{Means}.\textsuperscript{224} The jury was also correctly instructed that victim impact evidence is neither an aggravating nor mitigating circumstance in itself and is not to be used to weigh the worth of Rice's life against that of the victims.\textsuperscript{225} Consequently, the majority held that none of the claims of error raised by Rice warranted relief.\textsuperscript{226} Upon a thorough review of the record, the court determined that the sentence of death was not the product of passion or prejudice, and therefore affirmed the sentence of death imposed upon Rice.\textsuperscript{227}

Justice Nigro concurred with the majority opinion, but wrote separately to address the jury instruction regarding victim impact evidence, stressing the rationale he proffered in his dissent in \textit{Means}.\textsuperscript{228} However, realizing that the majority of courts have concluded that the statute was constitutionally valid, Justice Nigro stated that he was compelled to concur that the challenge must fail.\textsuperscript{229}

Chief Justice Zappala, however, authored a dissenting opinion in which he said that he would remand the case for a new sentencing hearing.\textsuperscript{230} Justice Zappala stated that he would remand the case because he believed that victim impact evidence unconstitutionally directs the jury's deliberations to examine the victim's life instead of the criminal act because it explains in great detail the enduring pain suffered by the victim's family.\textsuperscript{231} Although the court expressed its great concern for the horrific consequences

\textsuperscript{223} \textit{Rice}, 795 A.2d at 354.
\textsuperscript{224} \textit{Id.} Referring to the fact the instruction stated in \textit{Means}, that victim impact evidence is only to be considered after at least one aggravating and one mitigating circumstance is found, as compared to one aggravating and the catch-all mitigating factor relevant to the defendant's character would have been met since the jury found two aggravating and two mitigating circumstances. \textit{Id.} The gist of the court's interpretation was that since victim impact evidence was proper even with the more restrictive instruction that was actually given, it was harmless because such evidence would have been proper had the correct instruction adhered to the less restrictive Pennsylvania law. \textit{Id.}
\textsuperscript{225} \textit{Id.} at 354. The \textit{Rice} court stated that this is consistent with the established case law in Pennsylvania.
\textsuperscript{226} \textit{Id.} at 359
\textsuperscript{227} \textit{Id.} at 359.
\textsuperscript{228} \textit{Rice}, 795 A.2d at 363 (Nigro, J., concurring). \textit{See also Means}, 773 A.2d at 162-67.
\textsuperscript{229} \textit{Rice}, 795 A.2d at 364 (Nigro, J., concurring).
\textsuperscript{230} \textit{Id.} at 359 (Zappala, J., concurring in part, dissenting in part).
\textsuperscript{231} \textit{Id.} (Zappala, J., concurring in part, dissenting in part).
arising from such crimes as murder, Justice Zappala said that the court was obligated to follow the law in the narrowly crafted sentencing scheme to avoid the capricious and arbitrary imposition of death.\(^{232}\) He further stated that capital sentencing was not designed as a mechanism for an outpouring of grief, no matter how presented, because victim impact evidence by its very nature is extremely prejudicial.\(^{233}\) The ability of such evidence to persuade a fair-minded juror to impose the death penalty in itself mandates that there must be safeguards in place sufficient to prevent the jury from disrupting the constitutionally required weighing process.\(^{234}\) Therefore, he could not agree with the majority's opinion that the jury, though not properly instructed, was capable of determining how to use such evidence when the court system's jurors have trouble interpreting the same.\(^{235}\)

Also joining the majority in affirming the guilt phase verdict was Justice Cappy, who dissented in the affirming of the sentence phase. He found the jury instruction to be erroneous because the jury was instructed that victim impact evidence was connected to its consideration of the evidence presented under the “catch-all factor” mitigating circumstance.\(^{236}\) Justice Cappy noted that the language of the instruction was similar to that examined by the New Jersey Supreme Court in *Commonwealth v. Muhammad*.\(^{237}\) He then asserted that the Pennsylvania statute is distinctly different from that of New Jersey because it does not intend the evidence to be considered as a direct link or counterweight to mitigation evidence, but instead the legislative intent provides for it as a part of the general deliberation process.\(^{238}\)

Justice Cappy could not agree with the majority's mere acknowledgment that the charge, which reflected the New Jersey

\(^{232}\) Id. at 360 (Zappala, J., concurring in part, dissenting in part).

\(^{233}\) Id. (Zappala, J., concurring in part, dissenting in part).

\(^{234}\) *Rice*, 795 A.2d at 360 (Zappala, J., concurring in part, dissenting in part).

\(^{235}\) Id. (Zappala, J., concurring in part, dissenting in part). On this basis he would remand for a new hearing. Id.

\(^{236}\) Id. (Cappy, J., concurring in part, dissenting in part). See 42 PA. CONS. STAT. § 9711(e)(8), which codified the “catch-all factor” through the introduction of “any other evidence of mitigation.” *Rice*, 795 A.2d at 360 (citing 42 PA. CONS. STAT. § 9711(e)(8)).

\(^{237}\) *Rice*, 795 A.2d at 361 (Cappy, J., concurring in part, dissenting in part). See State v. Muhammad, 678 A.2d 164 (N.J. 1996). In *Muhammad*, the court upheld the constitutionality of the provision and approved the use of the jury instructions that only provided for consideration of victim impact evidence as linked to testimony relevant to the defendant's character. This holding was in line with the nature of the statutory scheme of the New Jersey legislature. *Rice*, 795 A.2d at 361.

\(^{238}\) *Rice*, 795 A.2d at 361-62 (Cappy, J., concurring in part, dissenting in part).
approach, resulted in no prejudice since the instruction was more restrictive because he believed the statutes offered two distinct solutions to how victim impact evidence should be utilized. The two statutes reflect conscious and differing choices of how such evidence should be used, not that they are merely different degrees of restricting the same use. Therefore, Justice Cappy believed that following the New Jersey approach caused prejudice to a defendant and, consequently, he disagreed with the majority opinion that the error was harmless. Justice Cappy's rationale for this belief was that the charge did not reflect the proper deliberative use intended by the statute's enactment and that to uphold the instruction would contradict the intent of the legislature.

To quote Justice Zappala in his dissent, "victim impact evidence unconstitutionally channels the jury's deliberations toward examining the victim's life instead of the criminal act." Such testimony unnecessarily explains in great detail the overwhelming and continual pain suffered by victim's survivors. As such, victim impact evidence is extremely prejudicial by its very nature and has the substantial inherent risk of persuading even a fair-minded juror to return a sentence of death solely by itself. Although there are safeguards in place within the statute, appellate procedure, and our Constitution, none of them can negate the devastating nature of the prejudice of such evidence. Victim impact evidence is a cancer that eats away at any rationale person's reasoning and causes the person to act upon the improper passion. As a direct result, decisions are unavoidably rendered on an arbitrary and capricious basis.

239. Id. at 362-63 (Cappy, J., concurring in part, dissenting in part).

Under the New Jersey approach, victim impact testimony can only be introduced in a case where the defendant has chosen to present evidence of his or her own character as a factor mitigating against the imposition of death. Thus, in the New Jersey system, a defendant can preclude introduction of victim impact testimony by choosing to forgo presentation of character testimony in mitigation. In distinct contrast, in Pennsylvania victim impact evidence is not viewed as a counterweight to evidence of the defendant's character. Instead, victim impact evidence is introduced as part of the texture of the case: it provides the jury with an identity for the victim and helps to foster a complete understanding of the foreseeable consequences of the defendant's actions. Thus, in Pennsylvania, a defendant need never weigh the Hobson's choice of forgoing relevant mitigation evidence in an effort to prohibit introduction of victim impact testimony.

Id.

240. Id. at 363 (Cappy, J., concurring in part, dissenting in part).

241. Id. at 363 (Cappy, J., concurring in part; dissenting in part). For the aforementioned reasons, Justice Cappy would have remanded for a new sentencing hearing with instructions consistent with those proposed in Means and approved in Natividad.
VI. CONCLUSION

The death penalty has a long history, which extends back to ancient times. As societal norms evolved, methods of both imposition and execution of capital punishment also changed. While the surrounding laws that provide for the imposition of the death sentence have changed, the gravity of the sentence has not. However, just as these beliefs have caused the laws and methods of capital punishment to become unacceptable and mandated their change, the concept of what justifies fundamental fairness in the procedural arena should change with these modifications. In this age of technology, such advances as DNA testing and forensic sciences have reduced the degree of doubt surrounding many capital cases exponentially. Consequently, the Commonwealth’s burden of proving guilt “beyond a reasonable doubt” has become an increasingly easier burden to meet. Such changes provide greater justice, which is what our legal system is premised upon. However, this justice also requires procedural protection for the accused as well as the convicted. Without such a basis, our society would revert back to barbarism.

Our legal system not only strives to provide justice for those who suffer the consequences resulting from crime, but also to protect those accused of committing crimes from an over usurpation of governmental power. Indeed, our country and legal system were born from the need of our forefathers to escape the brutal tyranny of colonial British rule. The history books are fraught with accounts of unjust and excessive punishments resulting from the application of governmental police powers. Victim impact evidence falls into this category.

When dealing with capital sentencing, the threat to society from that particular criminal has already been eliminated. This individual, at a minimum, will never see the “outside” world again. Before the most severe of all punishments is imposed, it is imperative that the facts of the crime merit such an extreme punishment. This is not to say that the death penalty does not have its place, for inevitably there are those who will undoubtedly commit acts that are so horrific that their right to life itself should be deemed forfeited. However, this ultimate retribution should be imposed based on the crime itself, the surrounding circumstances, and the actor’s intent, and not on improper considerations elicited by victim impact evidence.
The logical reasoning in the dissenting opinions of such cases as *Furman*, *Means*, and *Natividad*, and the premises of the majority’s holding in such cases as *Booth*, which assert that victim impact testimony violates Due Process and Equal Protection, proffer much well reasoned wisdom. Such evidence clearly is violative of the Federal and Commonwealth Constitutions because victim impact evidence elicits arbitrary sentencing, which constitutes cruel and unusual punishment, as well as creating a functional prohibition of a defendant being able to fully argue on his or her own behalf, thereby denying the defendant Due Process. The arbitrary sentencing is a direct byproduct of the impossibility to draft sentencing instructions that can truly eliminate the inflammatory effect created by hearing the outpouring of grief from the members of the victim’s family. Regardless of the role of the jury in our system, and the fiction we hold that the jury is capable of discerning how to properly use victim impact evidence, such an evidentiary admission can serve no valid purpose other than to inflame their hearts and passions. While it is true that the requirement of limiting instructions established in *Furman*, and put forth as a prototype in *Means*, clearly inform jurors to what extent victim impact evidence is permissible in their deliberations, there are no possible instructions that can tell human beings not to feel impassioned. As such, jurors in the capital sentencing phase who have heard victim impact evidence are led to act upon their feelings, thereby resulting in an arbitrary and capricious sentence. It is human nature to be controlled to some degree by one’s feelings. This is not to say that people cannot separate emotion from judgment. However, a person’s beliefs will inevitably be affected on some unconscious level by the combination of personal values and emotions. When this occurs, there is no instruction that can be drafted that can prevent its effect, and the threat of arbitrary results cannot be eliminated.

Victim impact evidence is unnecessary because the sentencing decision should be based on the objective facts. By the penalty phase, guilt has been established on the facts presented. If they, along with the crime itself, are insufficient for a jury to render a sentence of death, then such a sentence is unwarranted and con-

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242. *Furman*, 408 U.S. at 239.
244. *Natividad*, 773 A.2d at 167.
245. *Booth*, 482 U.S. at 496.
stitutes a violation of a defendant's constitutional rights. When someone has been killed in a manner so malicious as to establish a conviction for first-degree murder, a defendant's presentation of mitigating evidence is not going to nullify the facts of the crime. On the other hand, the proverbial "sob story" told by the aggrieved and tear-ridden child or widow will undoubtedly inflame the passions of most jurors that must endure the horrific explanation of the effect of the crime. If it does, then the facts of the crime are not strong enough to warrant an imposition of death and to accomplish such through the use of victim impact evidence would be fundamentally unfair. Victim impact evidence is designed to stir emotions and make those involved want swift and appropriate justice, plain and simple. This is clearly violative of the rights and protections of the Federal and Pennsylvania Constitutions, not to mention the Rules of Evidence.

Just as many courts have stated that victim impact evidence should be allowed as a foreseeable consequence of the crime of murder, this foreseeable consequence eliminates the reason for the very existence of such evidence in the jury's deliberation. Victim testimony cannot establish anything that the crime itself and common sense cannot establish, except an impermissible passion. As horrible as it may sound, live accounts of how lives have been torn apart are not, and should not, be pertinent to a jury's deliberation process. If a father and husband is brutally murdered, it is obvious that the crime will cause his family great emotional pain, make a widow out of a loving wife, leave infant children fatherless, and potentially cause financial ruin to all who relied on the victim. A competent juror does not need victim impact evidence to be informed of these painful realities.

A defendant's most fundamental right to life should be vigorously guarded. However, this right is violated when factors other than conduct and the crime result in a sentence of death. To submit victim impact evidence to a jury is merely a method of emotional coercion that has no legitimate purpose in our legal system, which constitutes a constitutional violation of a defendant's Fourteenth Amendment right to Due Process and Eighth Amendment right to Equal Protection.

Jason Elliot Nard