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The Inadmissibility of Victim Impact Evidence

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ABSTRACT

Currently, 41% of inmates on death row in the United States are Black, even though Black people make up only 13.6% of the total population in the country. Additionally, the data has repeatedly shown that states that do not have the death penalty have lower murder rates than states that do. Despite these disparities, more than half of states in the United States continue to allow capital punishment in some form as an alternative to a life sentence. These disparities were further exacerbated by the Supreme Court's decision in *Payne v. Tennessee*, which allowed prosecutors to introduce victim impact evidence in the sentencing phase of death penalty proceedings. Due to the widespread implementation of the death penalty across the states in this country, it is unlikely that the Court would abolish the death penalty in the near future. Thus, a compromise to alleviate some of the inequalities in capital punishment, without removing it in its entirety, is for the Supreme Court to reverse its decision in *Payne* and hold that admission of victim impact evidence is unconstitutional under the Eighth and Fourteenth Amendment.

The central aim of this paper is to demonstrate that victim impact evidence has no place in death penalty sentencing proceedings because it has no bearing on the defendant's culpability and moreover it has a prejudicial effect on the defendant's verdict. First, I will argue that victim impact evidence is irrelevant for a juror's determination of a defendant's culpability for three reasons (1) the evidence shifts the jury's attention from the defendant's background to the victim's background; (2) a defendant is often unaware of their victim's personal circumstances; and (3) a defendant's introduction of

*I am a 3L student and social justice concentrator at UC Law San Francisco (formerly known as UC Hastings). I proudly come from a big Latinx family and am grateful for the privilege to study law and represent my community in a field in which we have been historically underrepresented. My aim with this article is to shed light and offer a potential solution to yet another structural barrier for people of color that demonstrates that our criminal system is rarely ever just. Thank you to my family and friends, all of this would not have been possible without their love and support. I'd also like to thank my *Constitutional Law Quarterly* colleagues and Professor John Mills for their feedback on this article.

victim impact evidence to show the victim's less favorable characteristics often does not influence a defendant's culpability. Next, I will demonstrate that victim impact evidence has a prejudicial effect on the defendant because of the arbitrariness of several factors including (1) whether the victim's family can articulate their emotions in a way that resonates with the jury; (2) jurors' lack of cultural competence; and (3) viewpoint and racial bias in jury selection. Thus, to reduce some of the disparities in a criminal system that is already unequal, it is imperative for the Court to prohibit victim impact evidence in death penalty proceedings.

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INTRODUCTION

Capital punishment, or the death penalty, should be abolished in the United States due to the arbitrary and capricious manner in which capital sentences have been and continue to be imposed and carried out.[1] In 1972, Justice Douglas stated in *Furman v. Georgia* that capital punishment was discriminatory in its current application because the criminal system

1. *See* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). Please note that *Furman* was one of a compilation of cases that took on its name. *See also* Gregg v. Georgia, 428 U.S. 153, 181–82 (1976) ("It may be true that evolving standards have influenced juries in recent decades to be more discriminating in imposing the sentence of death.").

disproportionately imposed and carried out this punishment on Black people, low-income people, and "the members of unpopular groups."[2] Today, the same application continues. Currently, 41% of inmates on death row in the United States. are Black, even though Black people make up only 13.6% of the total population in the country.[3] As of 2022, Black people were seven times more likely than White people to be falsely convicted of crimes.[4] Proponents say that the threat of death in capital proceedings is meant, in part, to deter people from committing severe offenses. However, the data has repeatedly shown that states that do not have the death penalty have lower murder rates than states that do.[5]

Despite these disparities, more than half of states in the United States continue to allow capital punishment in some form as an alternative to a life sentence.[6] Consequently, it is unlikely that the U.S. Supreme Court will abolish the death penalty in the near future. Therefore, I want to offer a compromise that would partially alleviate the arbitrary and capricious implementation of capital punishment, without removing it in its entirety: the Supreme Court should reverse its decision in *Payne v. Tennessee* because the admission of victim impact evidence ("VIE") is unconstitutional under the Eighth and Fourteenth Amendment.[7]

My article addresses why we must eliminate VIE in four parts. I will provide a background on VIE and Supreme Court precedent regarding the death penalty in Sections I and II. Section III will demonstrate that VIE is irrelevant for a juror's determination as to whether the state should sentence a defendant to death for three reasons: first, the evidence shifts the jury's attention from the defendant's background to the victim's background; second, a defendant is often unaware of their victim's personal circumstances; third, less favorable characteristics of the victim would also not influence a defendant's culpability. In Section IV, I argue that VIE has a prejudicial effect because of the arbitrariness of several factors including (A) whether the victim's family can articulate their emotions in a way that resonates with the

2. *Furman*, 408 U.S. at 249–50.

3. *Racial Demographics*, DEATH PENALTY INFO. CTR. (Apr. 1, 2022), https://deathpenaltyinfo.org/death-row/overview/demographics; *Quick Facts*, U.S. CENSUS BUREAU (July 1, 2021), https://www.census.gov/quickfacts/fact/table/US/PST045221.

4. Samuel Gross et al, *Race and Wrongful Convictions in the United States*, NATIONAL REGISTRY OF EXONERATIONS 1, 1, (Sept. 2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf

5. *Study: International Data Shows Declining Murder Rates After Abolition of Death Penalty*, DEATH PENALTY INFO. CTR. (Jan. 3, 2019), https://deathpenaltyinfo.org/news/study-international-data-shows-declining-murder-rates-after-abolition-of-death-penalty.

6. *State by State*, DEATH PENALTY INFO.CTR. (2023), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Feb. 26, 2024).

7. 501 U.S. 808 (1991); U.S. CONST. AMEND. VII.; U.S. CONST. AMEND. XIV.

jury; (B) jurors' lack of cultural competence; and (C) viewpoint and racial bias in jury selection.

As this article will show, if this "evidence" imports irrelevant, inflammatory, and highly subjective information into juror determinations, then the admission of VIE will irreparably harm the defendant's case and should have no place in death penalty proceedings. Therefore, VIE has no place in death penalty proceedings.

I. BACKGROUND ON AND PREJUDICIAL IMPACT OF VICTIM IMPACT EVIDENCE

Prosecutors present VIE to the jury during the sentencing phase of the trial usually as statements that relate to the crime's emotional impact on the victim's family and the victim's personal characteristics.[8] The Supreme Court held in *Booth v. Maryland* that a State may find this type of VIE to be relevant to the jury in reaching a sentence and thus admissible in capital punishment proceedings.[9] Later the Court clarified that it is still unconstitutional to admit evidence regarding "characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence."[10] The victims' rights movement and its efforts to increase victims' participation in their criminal proceedings resulted in the widespread admission of VIE.[11] Although the movement intended to create positive change, in actuality VIE can sway jurors to sentence a person to death based on emotion rather than the facts related to the defendant's culpability. If our judicial system truly values retribution and impartiality in reaching a verdict, then continuing to introduce VIE as admissible evidence undermines these values.

Moreover, there is a disturbing correlation between the states that impose and carry out the death penalty with the greatest frequency and the states that allow admission of VIE.[12] The emotional influence that the evidence carries, coupled with some prosecutors' desire to encourage jurors to sentence a defendant to death, may explain this correlation. Criminologist Raymond Paternoster and Law Professor Jerome Deise from the University of Maryland conducted a study in 2011 with 132 participants to test this

8. Booth v. Maryland, 482 U.S. 496, 502–03 (1987), *overruled by Payne*, 501 U.S. 808 (1991).

9. *Id.* at 827.

10. Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (per curiam).

11. Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129, 131 (2011).

12. Robert Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 CORNELL L. REV. 543, 545 (2003).

correlation.[13] They had seventy-three participants watch a video of a penalty phase testimony that included VIE, and the remaining sixty-two participants watched the same video but with the VIE edited out.[14] They found that 62.5% of the participants who viewed the VIE said that they would impose a death sentence on the offender, while only 17.5% of the participants who did not view the video with VIE decided to impose a death sentence.[15] From the group that viewed the edited video, 44.4% said they would impose a sentence of life without parole and 38.1% of participants would have voted for a straight life sentence.[16] Overall, the study found that participants who viewed the VIE "were more likely to feel negative emotions like anger, hostility, and vengeance . . . and were more likely to have favorable perceptions of the victim and victim's family as well as unfavorable perceptions of the offender."[17] These emotions should have no place in sentencing determinations, particularly when the legal system already attempt to remove them from the civil context, which involves much lower stakes.[18] Therefore, due to its improper influence on jurors, VIE that relates to the victim's personal characteristics or the crime's impact on the victim's family has no place in capital sentencing proceedings.

II. DEATH PENALTY PRECEDENT

Despite the alarming results of VIE, prosecutors can rely on case law to endorse their choice to include VIE, but it was not always this way. In 1987, the prosecutors in *Booth v. Maryland* introduced VIE based on interviews about the emotional and personal hardships that the victim's son, daughter, son-in-law, and granddaughter had faced as a result of the murders and robbery that the defendant allegedly carried out.[19] The Supreme Court held that this VIE—containing the victim's personal characteristics, the emotional impact of the crime on the victim's family, and the family's opinions and characterizations of the defendant and crimes committed—"is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary

13. Paternoster, *supra* note 11, at 142–43.

14. *Id*.

15. *Id.* at 148–49.

16. *Id.* at 149.

17. *Id.* at 129–30.

18. *See* Legal Information Institute, Federal Rules of Evidence Rule 403, CORNELL L. SCH. (2024), https://www.law.cornell.edu/rules/fre/rule_403 (last visited Mar. 10, 2024) ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: *unfair prejudice, confusing the issues, misleading the jury*, undue delay, wasting time, or needlessly presenting cumulative evidence.") (emphasis added).

19. *Booth*, 482 U.S. at 499.

and capricious manner."[20] Justice Powell further specified that "[t]hese factors may be wholly unrelated to the blameworthiness of a particular defendant," as another rationale.[21] From then on, these dangers prevented states from allowing juries to consider this type of evidence.[22]

The Court reaffirmed and in fact extended the inadmissibility of VIE, specifically the victim's personal characteristics, two years later in *South Carolina v. Gathers*.[23] In that case, prosecutors gave extensive remarks during closing arguments about the victim's character, including his religious devotion and status as a registered voter.[24] The Court upheld the Supreme Court of South Carolina's finding that it was unnecessary for the jury to consider the victim's characteristics, and that the circumstances of the crime should provide the appropriate sentencing decision instead.[25] The Justices also affirmed *Booth* when they decided that this type of evidence, even when given by a prosecutor, violated the Eight Amendment because a defendant's sentence must be proportional to his or her "personal responsibility and moral guilt," and not factors outside of the defendant's culpability.[26]

However, just another two years later, the Court reversed course when it revisited the issue of VIE in *Payne v. Tennessee*.[27] The Justices sided with and expanded upon the dissent's rationales in both *Booth* and *Gathers* when they held that neither the Eighth nor Fourteenth Amendment barred consideration of this evidence *per se*.[28] Therefore, VIE could be relevant to the jury's decision to sentence a defendant to capital punishment.[29]

In this case, the State of Arkansas charged Pervis Tyrone Payne, a Black man, with two counts of first-degree murder and one count of assault with intent to commit murder in the first degree, which qualified him for the death sentence.[30] The victims were a White family in which the mother and her two-year-old child died on the scene and only her three-year-old child

20. *Id.* at 502–03.

21. *Id.* at 502.

22. *Id.* at 503; Boothe v. Roofing Supply, Inc. of Monroe, 893 So. 2d 123, 126 (La. App. 2 Cir. 2005) (explaining that action carried out arbitrarily and capriciously is action taken without consideration or regard for the circumstances or the facts).

23. 490 U.S. 805, 808–09 (1989), *overruled by Payne*, 501 U.S. 808 (1991).

24. *Id*. at 809–10.

25. *Id*. at 810.

26. *Id*. (citing Enmund v. Florida, 458 U.S. 782, 801 (1982); *id*. at 825 (O'Connor, J., dissenting) ("[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness.)).

27. 501 U.S. 808 (1991).

28. *Id.* at 827.

29. *Id.* at 827.

30. *Id.* at 811.

survived.[31] The defendant denied ever harming the victims and explained that he had been at the scene because he lived nearby and was trying to help the victims after he heard loud noises.[32] During the sentencing phase of the trial, the defendant presented testimony from witnesses who described him as a "very caring person," and vouched for his calm personality.[33] A clinical psychologist also testified that the defendant was "mentally handicapped," but non-violent and in fact "the most polite prisoner he had ever met."[34] Meanwhile, the State presented three pieces of VIE.[35] First, the prosecutor presented testimony from the surviving victim's grandmother on how she believed the crimes had affected him. She testified that "[h]e cries for his mom. He doesn't seem to understand why she doesn't come home. He comes to me many times . . . and asks me, Grandmama, do you miss my [sister] Lacie? And I tell him yes. . . He says, I'm worried about my Lacie."[36] Second, during closing arguments, the prosecutor also spoke to the jury about the continuing effects the incident had on the surviving child.[37] The prosecutor stated that "there is obviously nothing you can do for [the victims]. But there is something that you can do for [the survivor] . . . He is going to want to know what happened. With your verdict, you will provide the answer."[38] Third, the prosecutor ended his rebuttal argument by listing all of the things that the two-year-old victim would not be able to experience after the loss of his family members and how much both of the victims were loved by their families.[39] The Court held that this evidence was not barred by the Eighth Amendment and thus admissible if the State chose to allow it because it could explain some of the harm the incident caused.[40] Writing for the majority, Chief Justice Rehnquist wholeheartedly endorsed VIE. Chief Justice Rehnquist wrote, "[VIE] is designed to show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be,"[41]—completely abandoning the reasoning from *Booth* and *Gathers* about the dangers of this type of evidence. And so, the jury ultimately sentenced the defendant,

31. *Id.*
32. *Id.* at 813.
33. *Id.* at 814.
34. *Id.*
35. *Id.* at 814–16.
36. *Id.* at 814–15.
37. *Id*. at 815.
38. *Id*.
39. *Id*.
40. *Id.* at 826–27.
41. *Id.* at 823.

Payne, to death for each of the murders, despite the strong mitigating evidence presented during the trial.[42]

The *Payne* Court should not have overturned *Booth* and *Gathers* because the surrounding circumstances—our societal expectations, our current laws, and the underlying facts from those cases—have not significantly changed in a way that could support this shift on the admission of VIE. American jurisprudence values *stare decisis*—the doctrine that commands courts to honor prior case decisions and only abandon them for good reason and after careful analysis[43]—because "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[44] Consistent adherence to precedent in this area is critical to ensure that citizens can trust the judicial system, particularly due to the finality and gravity of the death penalty. These high stakes are why the Supreme Court usually only departs from precedent due to a "special justification," such as a subsequent development in the law, new facts, or some reason to find that adherence would be detrimental or contradictory to the rule of law.[45] The *Payne* majority instead only relied on the history of "sentencing authority [as] always [having] been free to consider a wide range of relevant material."[46] In reality, the Court only offered this flimsy explanation to overturn *Booth* and *Gathers* because the ideological makeup of the bench had changed.[47] Former President George W. Bush had appointed Justice Thomas, a conservative judge and proponent of the death penalty, to the

42. *Id.* at 816.

43. ABA SUPREME COURT PREVIEW, *Understanding Stare Decisis*, A.B.A. (Dec. 16, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/.

44. Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986); *see Payne*, 501 U.S. at 848–49 (J., Marshall, dissenting) (citing THE FEDERALIST, NO. 78 (Hamilton) (stating that "*stare decisis* is basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'").

45. *Payne*, 501 U.S. at 849 (J., Marshall, dissenting) (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) *overruled by* CBOCS W., Inc. v. Humphries, 553 U.S. 442 (2008); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), *overruled by* Helvering v. Bankline Oil Co., 303 U.S. 362 (1938), and Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938)).

46. *Payne*, 501 U.S. at 820–21 (majority opinion) (citing Williams v. New York, 337 U.S. 241 (1949)).

47. *Id.*; *see also* Jonathan H. Levy, *Limiting Victim Impact Evidence and Argument after* Payne v. Tennessee, 45 STAN. L. REV. 4, 1027–60 (Apr., 1993), https://www.jstor.org/stable/1229203.

Court just prior to *Payne*.[48] Justice Marshall explicitly commented on this change in his Payne dissent: "It takes little real detective work to discern just what has changed since this Court decided *Booth* and *Gathers*: this Court's own personnel."[49] Thin historical arguments and shifting political power dynamics cannot justify this extremely consequential change in death penalty jurisprudence.

Instead, juries in all criminal cases should assign punishment based on the defendant's personal culpability alone—just as the Court had previously held in *Gathers* and *Booth*.[50] That fundamental principle is particularly important in capital proceedings because this punishment is "unique in its severity and irrevocability."[51] This finality and gravity should force courts to provide defendants charged with capital punishment with more protections.[52] I propose that VIE should be inadmissible because it has no bearing on the defendant's culpability, and it has a prejudicial effect on the defendant's verdict.

III. VICTIM IMPACT EVIDENCE IS IRRELEVANT TO A DEFENDANT'S CULPABILITY

VIE should be inadmissible evidence in capital sentencing proceedings because it has no bearing on a defendant's culpability. One of capital punishment's main functions is to provide retribution, or imposing punishment as a reciprocal consequence for committing a wrongful act.[53] "The heart of the retribution rationale is that a criminal sentence must be *directly* related to the *personal* culpability of the criminal offender," meaning that juries must give a consequence directly related to the act for which the defendant is guilty.[54] Yet the retribution rationale falls flat when we examine how we actually administer capital punishment. In fact, at least 4.1% of defendants sentenced to death in the United States are innocent, so this punishment is

48. SUPREME COURT OF THE UNITED STATES, *Justices 1789 to Present* (Apr. 9, 2023 11:00 PM), https://www.supremecourt.gov/about/members_text.aspx; Nina Totenberg, *Supreme Court's Conservatives Defend Their Handling Of Death Penalty Cases*, NPR (May 14, 2019), https://www.npr.org/2019/05/14/722868203/supreme-courts-conservatives-defend-their-handling-of-death-penalty-cases (explaining how Justice Thomas has a tendency to favor executions in cases that reach the high court).

49. *Payne*, 501 U.S. at 850 (J., Marshall, dissenting).

50. Tison v. Arizona, 481 U.S. 137, 149 (1987).

51. *Gregg*, 428 U.S. at 187.

52. *Id*.

53. *Tison*, 481 U.S. at 149; Cambridge Advanced Learner's Dictionary & Thesaurus, *Retribution*, Cambridge Univ. Press (Apr. 9, 2023, 11:05 PM), https://dictionary.cambridge.org/us/dictionary/english/retribution.

54. *Tison*, 481 U.S. at 149 (emphasis added).

not always imposed on guilty people.[55] There are at least three reasons why VIE doesn't relate directly to the personal culpability of the defendant and therefore doesn't support the retribution rationale for imposing the death penalty. First, VIE misleads the jury by diverting jurors' attention from the defendant's background and record, which does directly relate to their culpability, to the victim's background. Second, a defendant is often unaware of the victim's personal circumstances or that of their family. Third, a defendant's introduction of VIE to show the victim's less favorable characteristics often does not influence a defendant's culpability.

A. Diverting the Jurors' Attention from Key Exculpatory Evidence

VIE's powerful emotional impact can easily distract jurors and cause them to overlook exculpatory facts, specifically, the mitigating factors that could save a defendant's life.[56] Chief Justice Burger once called mitigating factor evidence "a constitutionally indispensable part of the process of inflicting the penalty of death," because without it defendants often do not have the opportunity to win over juries based on facts that have a tendency to prove they are not guilty.[57] The Supreme Court held in *Lockett v. Ohio* that courts could admit mitigating factors regarding "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[58] Burger provided examples of admissible mitigating factors such as the defendant's "character, prior record, age, *lack of specific intent* to cause death [which only underscores the need to determine mental state prior to sentencing], and her relatively minor part in the crime."[59] These factors are crucial because the "core principle of [the] Court's capital jurisprudence is that the sentence of death must reflect an *individualized* determination of the defendant's *personal* responsibility and moral guilt."[60] Since it is impossible to remedy a capital sentence after it has been served, the jury is required to focus on the

55. *National Academy of Sciences Reports*, INNOCENCE PROJECT (April 28, 2014), https://innocenceproject.org/national-academy-of-sciences-reports-four-percent-of-death-row-inmates-are-innocent.

56. *See* Coker v. Georgia, 433 U.S. 584, 599–600 (1977) (holding that a death penalty sentence must be proportional to the crime otherwise, or else the punishment violates the Eighth Amendment).

57. Lockett v. Ohio, 438 U.S. 586, 597 (1978) (explain that "[w]e do not write on a 'clean slate.'"). In fact, the Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id*. at 608.

58. *Id*. at 601, 604.

59. *Id*. at 597 (emphasis added).

60. *Payne*, 501 U.S. at 845 (J., Marshall, dissenting) (emphasis added).

defendant as a "uniquely individual human bein[g]," before they decide to impose the death penalty.[61]

However, VIE compromises the jury's ability to consider the defendant's mitigating factors impartially by focusing their attention predominately on irrelevant generalizations and presupposed facts. We can reasonably assume that, for example, a victim's death will dramatically and negatively impact their loved one's lives, but evidence that seeks to elaborate on that suffering does not provide the jury with any information regarding the crime itself and therefore the appropriate punishment for a defendant's crime.[62] In other words, VIE puts a thumb on the scale for evidence about societal truths—like the damaging impact of all crime and the inherent uniqueness of all victims—rather than the crime itself and the alleviating characteristics of the person whose life is at stake. This danger of confusing relevant facts with emotional platitudes is why courts should only admit evidence if it relates directly to "the circumstances of the crime.'"[63] Therefore, because VIE redirects a juror's attention from the defendant's personal characteristics and circumstances that may mitigate their culpability to preestablished facts about the victim, this type of evidence is misleading and prejudicial.

Some may argue that if the defendant can introduce mitigating factors and character evidence as an exculpatory effort, then the law should allow prosecutors to introduce VIE as a factor to determine a defendant's culpability. However, the victim's character is not on trial, while the defendant's is, which is precisely why VIE undermines a defendant's right to a fair trial. Our legal system already provides prosecutors with tools to combat mitigating evidence by being able to rebut mitigating factors and also designate any pertinent conduct as an aggravating factor.[64] Courts should not give prosecutors any more tools to fight in a system that is already inherently in their favor. We should not and cannot equate VIE with the introduction of evidence about a defendant.[65]

B. A Defendant's General Lack of Knowledge About a Victim's Personal or Familial Characteristics and Circumstances

Juries should not be allowed to consider unforeseeable factors unknown to the defendant at the time of the incident because they do not relate to the defendant's personal culpability, which is fundamental for administering capital punishment.[66] A defendant is often unaware of their victim's

61. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

62. *Gathers*, 490 U.S. at 810–11.

63. *Id.* at 811; *also see Booth*, 482 U.S. at 507 n.10).

64. *Payne*, 501 U.S. at 860.

65. *Id.*

66. *Enmund,* 458 U.S. at 801.

personal characteristics or information regarding the victim's family members apart from what is learned at the time of the crime.[67] Instead, juries must focus on the defendant's mental state when they committed the crime. The defendant's then-current mental state is key to the "individual determination of culpability" in almost all crimes subject to the death penalty, and so this determination is necessary to sentence an individual to death.[68] For example, a defendant charged with murder must have had the intent to commit the murder or have manifested an extreme indifference to the value of human life to be considered eligible for the death penalty.[69] Therefore, the jury must determine a defendant's guilt before deciding to impose the death penalty and that determination inherently turns on whether a defendant intended to commit the murder. VIE inverts these critical steps to the detriment of defendants.

A victim's personal characteristics are only relevant in an individual determination of culpability when a defendant should have known about the victim's personal characteristics and intended to murder the victim in part due to these characteristics. Sometimes the prosecution can sidestep a determination of intent when the defendants are on notice of such consequences, such as in felony murder. However, these exceptions should be relatively rare because defendants often do not have notice of the victim's characteristics or other unknowable personal or familial circumstances when they allegedly commit a crime.

The *Booth* Court specifically addressed this issue.[70] Justice Powell pointed out that "the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will affect anyone other than the person murdered."[71] The admissibility of VIE would allow the introduction of information that a defendant might not have been aware of at the time of the crime and would not have played a factor in their decision to commit the crime. Thus, this information would be irrelevant to the jury in reaching their sentencing decision.

Moreover, courts should see VIE as a violation of the defendant's due process rights because the unaware defendant cannot prove or disprove that type of evidence. It is difficult for a defendant to rebut a victim's family's testimony regarding their grief if they cannot explain or properly counter the information presented. In *Gardner v. Florida*, the Supreme Court held that the "petitioner was denied due process of law when the death sentence was

67. *See Booth,* 482 U.S. at 504.

68. *Tison*, 481 U.S. at 156.

69. *Id.* at 156–57.

70. *Booth,* 482 U.S. at 504.

71. *Id.*

imposed at least in part, based on information that he had no opportunity to deny or explain."[72] Although the defendant in *Gardner* won because he was not able to respond to an investigative report, courts should also find testimony about the impact of the crime on the victim's family as a violation of due process. A defendant who is unaware of surrounding circumstances similarly has no opportunity to deny or confirm information for which they had no notice. Consequently, it should be a violation of due process to admit VIE because a defendant who is unaware of a victim's personal or familial circumstances cannot properly defend themselves from that unknown information.

C. A Victim's Negative Characteristics Should Not Influence the Determination of a Defendant's Culpability.

As previously mentioned, it should be a due process violation to allow the prosecution to introduce VIE regarding a victim's personal or familial characteristics because that tactic denies the defendant a chance to rebut that evidence.[73] However, providing a defendant with an opportunity to rebut that evidence by offering evidence of a victim's less favorable characteristics should also be prevented because this evidence also does not have an impact on a defendant's culpability. It would be just as unfair for a jury to reach a lesser sentence for a defendant based on evidence that the victim had less socially appealing characteristics—such as the victim's low socioeconomic status or their family's willingness to speak on the impact of their death. VIE can create different sentencing outcomes depending on how the VIE demonstrates the victim's character or reputation. This type of evidence forces jurors to evaluate and rank a victim's personal characteristics, creating a hierarchy of victim attributes where possessing certain attributes makes victims worthier of higher remedies than other victims. The result being that the punishment for killing the "worthier" victims would be the highest sanction possible, death. Allowing testimony of the victim's personal characteristics to be presented as evidence, which the defendant was not aware of at the time of the crime, allows jurors to consider the value of the victim's life as a factor playing in whether the defendant should be sentenced to death.[74] In *Furman*, the now-reversed landmark case that prohibited the imposition of the death penalty, the majority held that they were "troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy," and that our justice system was not created to allow "such distinctions."[75]

72. 430 U.S. 349, 349 (1977).

73. *Booth,* 482 U.S. at 506–07.

74. Booth v. State, 306 Md. 172, 233 (Md., 1986) (cleaned up).

75. 408 U.S. 238, 242 (1972).

Yet the admission of VIE creates such disparities. Jurors will sentence aggressors of "good" victims to death and will give life sentences to aggressors of "bad" victims.

A study by Professor Edie Greene, where eighty participants served as mock jurors, found that the perceived emotional impact of the murder is greater for survivors of "highly respectable" victims than for survivors of "less respectable" victims.[76] The study also found that mock jurors felt more compassion for survivors of highly respectable victims than for survivors of less respectable victims.[77] Mock jurors in the highly respectable victim condition gave less weight to certain mitigating factors such as the defendant's difficult childhood than the mock jurors in the less respectable victim condition did.[78] Resulting in mock jurors in the highly respectable victim condition rating the murders as significantly more serious than jurors in the less respectable victim condition.[79] The study demonstrates that a victim's social status influences a jury in determining whether a defendant should be sentenced to death or life in prison. Consequently, VIE should not be admissible in capital proceedings.

A decision based on a victim's characteristics would be unjust because, as previously mentioned, the defendant is the one on trial and not the victim. The Court in *Booth* predicted the negative consequences of admitting this type of evidence. Specifically, it would result in a "mini-trial" on the victim's character that will "distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime."[80] A victim is worthy of a remedy not because of the type of person they were, the life they carried, or the impact their death had on their family, but because the crime that was committed against them is a behavior that, as a society, we condemn to the fullest extent. For these reasons, courts should exclude both evidence of a victim's positive and negative characteristics in capital punishment cases since those characteristics, except in limited circumstances, do not tend to prove or disprove a defendant's culpability.

In sum, VIE focused on a victim's personal characteristics or the incident's impact on the victim's family should be excluded because it is unrelated to a defendant's culpability. It is unfair to present this evidence against a defendant because they are often unaware of their victim's personal and

76. Edie Greene, *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter,* 28 J. APPLIED SOC. PSYCH., 149, 152 (1998).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Booth,* 482 U.S. at 507.

familial circumstances. As a result, courts should view this asymmetry of knowledge, and in turn the defendant's inability to mount a defense, as a due process violation. VIE also unnecessarily diverts the jury's attention to the victim and could lead some jurors to ignore a defendant's background and record. Without the jury's undivided attention, the defendant does not have a reasonable chance to prove their innocence based on mitigating factors—including admissible evidence of their positive characteristics and other exculpatory circumstances. The courts should likewise refuse to admit evidence of a victim's negative or positive characteristics because this evidence does not make a defendant more or less culpable. Thus, VIE should be made inadmissible in capital sentencing proceedings because they do not benefit either side and undermine the jury's role as an impartial fact finder.

IV. THE PREJUDICIAL EFFECT OF JURORS' POTENTIAL LACK OF CULTURAL COMPETENCY ON THE DEFENDANT'S VERDICT

The Sixth Amendment of the Constitution bestows upon those accused in criminal prosecutions the "right to a speedy and public trial, by an impartial jury."[81] Due to the irrevocability of the death sentence once it is carried out, the need to protect that right in capital proceedings is more important than ever.[82] This extreme sanction, if needed to be imposed, then must be imposed only for the most horrific of cases.[83] "[A]ny decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."[84] The admissibility of VIE makes it difficult for defendants to get the impartial jury that the Constitution guarantees them because a juror's personal biases can infect their judgment and the weight they give to the VIE presented. This could ultimately lead jurors to reach their decision on whether to impose the highest punishment based on emotion rather than reason. Implementation based on emotion is cruel and unusual because how compelling the VIE is could result in sentencing disparities for defendants with the same level of culpability. In particular, this evidence has a prejudicial effect because of the arbitrariness that results from (A) a victim's family's ability to articulate their emotions; (B) jurors' lack of cultural competence; and (C) viewpoint and racial bias in jury selection.

A. How Compelling a Family's Victim Impact Evidence is Depends on

81. U.S. CONST. AMEND. VI.; *see* Irvin v. Dowd, 366 U.S. 717, 722 (1961) (internal citations omitted) ("The theory of the law is that a juror who has formed an opinion cannot be impartial.").

82. *See* Turner v. Murray, 476 U.S. 28, 35 (1986) ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.").

83. *Gregg*, 428 U.S. at 182.

84. *Gardner,* 430 U.S. at 358.

Their Ability to Articulate their Grief.

VIE is arbitrary and capricious because the sentencing outcome could vary depending on how well the victim's family members can express and articulate their grief or whether the victim even has a family. The Court in *Booth* also warned of such a flaw and stated, "[t]he fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information."[85] A victim's family member's ability to articulate how their loved one's death impacted them can depend on various factors such as their education level and socioeconomic status. Victims whose family members have obtained a higher level of education and belong to a higher social class are able to articulate their grief in a more compelling manner.

This communication barrier exacerbates existing racial disparities because 95.1% of the White population has completed high school, while only 90.3% of Black and 74.2% of the Latinx population have completed the equivalent level of education.[86] In 2021, around 40% of both Black and Hispanic adults were part of the lower income tier, while only 24% of White adults were in the lower income tier.[87] Combining these lived experiences results in victims from White families being more likely to be able to express their grief in a way that resonates better with the jury than families of color can, which could weigh in favor of imposing the death penalty for White victims over victims of color.[88] Factoring in a victim's family's ability to express their grief essentially serves as a proxy for considering a victim's social status in deciding how to punish their aggressor because of the close link between social class and speaking in a socially favorable manner.

Another factor that affects a family's ability to articulate their grief is whether English is their primary language. Family members of victims from immigrant families, in which English was the second language learned, may not be able to communicate as clearly as they would in their primary language.[89] The ability to speak multiple languages could put these victim family members at a disadvantage in comparison to other victims' families due to language barriers outside of their control.[90] Lastly, a history of negative

85. *Booth*, 482 U.S. at 505.

86. US CENSUS BUREAU, CENSUS BUREAU RELEASES NEW EDUCATIONAL ATTAINMENT DATA (Feb. 24. 2022), https://www.census.gov/newsroom/press-releases/2022/educational-attainment.html. [hereinafter "CENSUS BUREAU, 2022 DATA"].

87. Rakesh Kochhar & Stella Sechopoulos, *How the American Middle Class has Changed in the Past Five Decades*, PEW RSCH. CTR. (Apr. 20, 2022), https://www.pewresearch.org/fact-tank/2022/04/20/how-the-american-middle-class-has-changed-in-the-past-five-decades.

88. CENSUS BUREAU, 2022 DATA, *supra* note 86.

89. *Languages spoken among U.S. immigrants, 2018*, PEW RSCH. CTR. (Aug. 31, 2022), https://www.pewresearch.org/hispanic/chart/languages-spoken-among-u-s-immigrants-2018.

90. *See id.*

encounters with the legal system has made certain communities of color more distrusting of it than others, which could influence their decision to not want to provide any victim impact statements.[91] For example, a majority of both Black and White populations believe that Black people are treated less fairly than White people by the criminal system and in dealing with the police.[92] This could result in Black victim families being less willing to interact with the criminal system beyond what is required than other victim families. How well a family can articulate their grief or whether they choose to do so, should not hold any weight in determining whether a defendant should be sentenced to death or life in prison.

Hearing victim impact testimony can create the perception that more harm was inflicted on the victim's family than actually was.[93] It can also lead jurors to believe that the family is not coping well with the death.[94] As a result, jurors often believe that imposing the highest sanction available—death—would help the victim's family find closure and help them recover from their loss.[95] But the reality is that not all victims have families. What if the three-year-old child in *Payne* had not survived and the grandma had not been able to testify about what he said? Would the jury have reached a different sentencing decision had they not heard that? The uncertainty of how a sentencing outcome could vary depending on whether a victim has family or not is unacceptable when a person's life is at stake. Besides, the fact that the victim had a family does not make the crime committed any more heinous and therefore worthier of a death sentence. The crime was committed against the victim, not the victim's family. What is being assessed at trial during this phase is whether the defendant should be sentenced to death for the offense they committed, and bringing attention to the victim's family is irrelevant in reaching that assessment.[96]

B. How Culture Competency Changes Jurors

Cultural dynamics influence not only individual jurors at a personal level, in their own decision making, but also the jury's deliberative process

91. Maruice Mangum, *Explaining Political Trust among African Americans*, 23 J. PUB. MGMT. & SOC. POL'Y 84, 85 (2016).

92. Juliana Menasce Horowitz et al., *Race in America 2019,* PEW RSCH. CTR. (Apr. 9, 2019), https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/#majorities-of-black-and-white-adults-say-blacks-are-treated-less-fairly-than-whites-in-dealing-with-police-and-by-the-criminal-justice-system.

93. Paternoster, *supra* note 11, at 154.

94. *Id*.

95. *Id.*

96. *See* Booth v. State, 306 Md. 172, 233 (Md., 1986) (cleaned up).

as a whole.[97] However, jurors often lack the cultural competency to properly assess VIE without allowing their internal biases to affect their judgment which further undermines a defendant's ability to put on a reasonable defense. Culture is "any set of shared, signifying practices-practices by which meaning is produced, performed, contested or transformed."[98] An individual's cultural background influences how that person understands the world and ultimately makes judgments.[99] These cultural differences often cause individuals to attribute different meanings to the same set of facts.[100] This results in giving value to facts based on one's personal values, which are shaped by their lived experiences.[101] For example, jurors are more likely to justify criminal behavior by in-group defendants to external attributions but not afford out-group defendants the same justifications.[102] Out-group defendants can be seen as more culpable for their acts and thus worthy of a higher punishment than in-group defendants.[103]

Individuals with cultural competency have better skills to interact, work, and develop meaningful relationships with individuals from backgrounds different from theirs.[104] Cultural competency goes beyond mere tolerance of other's backgrounds because a person is not simply putting up with the differences of others but understanding and embracing those differences.[105] Jurors who have cultural competency are mindful of a defendant's cultural background, the racial and ethnic stereotypes that can arise as they make any decision, and the systems that perpetuate those biases.[106]

97. Bidish J. Sarma, *Challenges and Opportunities in Bringing the Lessons of Cultural Competence to Bear on Capital Jury Selection*, 42 U. MEM. L. REV. 907, 911 (2012).

98. Danielle L. Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering*, 6 BROOK. L. REV. 201, 209 (2020).

99. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers,* 8 CLINICAL L. REV. 33, 40 (2001).

100. *Id.* at 42.

101. David Fritzsche & E. Oz, *Personal Values' Influence on the Ethical Dimension of Decision Making*, 75 J. BUS. ETHICS 335, 335 (2007).

102. Jennifer S. Hunt, *Race Ethnicity and Culture in Jury Decision Making*, ANNU. REV. L. SOC. SCI. 269, 276 (2015).

103. *Id.*

104. Jackie M. Guzman & Kathy L. Potthoff, *Cultural Competence*, NEBGUIDE (Feb. 2016), https://extensionpublications.unl.edu/assets/html/g1375/build/g1375.htm.

105. *Id.*

106. Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, A.B.A. (Mar. 1, 2017), https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century; Rushton Davis Pope, *How They Get Away with Murder: The Intersection of Capital Punishment, Prosecutor Misconduct, and Systemic Injustice*, 72 EMORY L.J. 1531 (2023), https://scholarlycommons.law.emory.edu/elj/vol72/iss6/4 (exploring how the criminal justice system itself

Additionally, they understand how the criminal system has historically victimized and excluded racial and ethnic minorities and how that continues to play a role today—such as in the jury selection process and in which defendants are more likely to face the death penalty.[107] This multi-perspective awareness also includes understanding the effect that victim impact statements have on their own perceptions of the defendant's culpability. Consequently, cultural competency is an essential tool to combat implicit biases that may infect the sentencing outcome and help ensure that we only impose the death penalty on those who are truly culpable.[108]

However, one cannot passively engage with cultural competency. It requires intentional communication and asking questions of others to better understand their lived experiences.[109] Unfortunately, the structure of capital sentencing proceedings makes it essentially impossible to give jurors enough time or provide the proper setting to ask the defendant questions that would help them gain a better understanding of the defendant's perspective. If we want jurors to analyze VIE properly, then each juror must first be able to compartmentalize the evidence's emotional weight and the societal implications that we as a society attribute to those characteristics and second, know how that portion of evidence ties in with the entirety of evidence presented. As the sub-section below will show, this task is particularly difficult when White pro-death penalty jurors make up the majority of the jury box.[110]

C. Biased Jury Selection and the Death Penalty

1. Viewpoint Bias

The jury selection process reduces the diversity of juries by only offering certain people the opportunity to serve. In most jurisdictions, jurors are randomly selected from source lists that are typically assembled from voter registration lists and driver's licenses and identification card lists obtained

perpetuates racial disparities by institutionalizing and covering up racially motivated prosecutorial misconduct).

107. Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 146 (2004).

108. Madaan, *supra* note 106.

109. *Id.*

110. Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 162–63 (2004) ("Research has found that whites generally have more positive constructions of their own racial group and fewer positive constructions of other racial groups.").

from the Department of Motor Vehicles.[111] By limiting jury selection to these underinclusive lists, the criminal system excludes from the jury pool populations that do not have access to those lists due to socioeconomic, historical, and geographic obstacles. This structural selection bias ultimately leads to the exclusion of people of color and low-income populations from jury pools because they are less likely to be a part of those lists.[112] Members of these populations who are represented in these lists and called to serve as jurors may nevertheless still be excluded from serving on the jury if the duty would cause an undue financial hardship, which would also be more likely the case for people of color or people of low socioeconomic status.[113] Moreover, the Court in *U.S. v Hernandez-Estrada* held that "if a minority group makes up less than 7.7% of the population in the jurisdiction in question, that group could *never* be underrepresented in the jury pool, even if none of its members wound up on the qualified jury wheel."[114] This further demonstrates the limitations of the jury selection process to actually be representative of all viewpoints.

The process of determining who is a "death-qualified" juror presents another opportunity for viewpoint and racial bias. In *Witherspoon v. Illinois*, the Supreme Court held that in forming their death-qualified jury, courts may permit prosecutors to exclude individuals from the venire that are opposed to the death penalty, commonly known as "*Witherspoon-excludables*".[115] Thus, a death-qualified jury leads to a loss of representation in juries that ultimately decide whether a person lives or dies.[116] In most criminal cases, a defendant is tried by a mix of jurors that *could* represent any viewpoint by members of the community, but in capital punishment proceedings, defendants are tried with the explicit knowledge that not all viewpoints are represented in the jury box.[117] Unsurprisingly, this criminal procedure loophole excludes from the venire a higher percentage of people who generally oppose the death penalty than potential jurors who strongly favor the death

111. *Public Notice of Process by Which Names of Prospective Jurors are Periodically and Randomly Drawn*, U.S. DIST. CT. N. DIST. OF CAL., https://www.cand.uscourts.gov/juryoldpage/how-prospective-jurors-are-selected/.

112. *Race and the Jury: Illegal Racial Discrimination in Jury Selection,* EQUAL JUST. INITIATIVE (2021), https://eji.org/report/race-and-the-jury/what-needs-to-happen/#examples-from-across-the-country.

113. *See* Juan R. Sánchez, *A Plan of Our Own: The Eastern District of Pennsylvania's Initiative to Increase Jury Diversity*, 91 TEMPLE L. REV. 1, 14 (2019).

114. 749 F.3d 1154, 1161 (9th Cir. 2014).

115. C. L. Cowan, W. C. Thompson & P. C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation,* 8 L. HUM. BEHAV., 53, 53 (1984).

116. *Id.* at 55.

117. *Id.* at 54.

penalty.[118] By allowing prosecutors to exclude these individuals, the courts can effectively create two distinct types of juries in criminal cases: one with a mix of viewpoints that could find for the defendant and one with a uniform viewpoint that likely would not.[119] The very existence of "*Witherspoon*-excludables" creates a structural barrier that inherently calls into question whether there is actually a direct relationship between the verdict and the defendant's culpability.[120] Therefore, Sixth Amendment protections—access to an impartial jury that reaches a verdict free from biases—are knowingly limited for defendants tried in capital proceedings by giving prosecutors the power to stack the jury box with jurors that are more likely in their favor. But viewpoint homogeneity is not the only consequential correlation between the selection process and system injustice. Jury selection in capital punishment proceedings also exclude potential Black jurors from serving on a death-qualified jury at a disproportionately higher rate compared to potential White jurors.[121]

2. Racial Bias in Jury Selection

Without the proper cultural competency, jurors are less likely to be able to analyze how a victim's personal characteristics or that of the victim's family may trigger one's personal biases, particularly biases that may trigger racial and ethnic stereotypes. Jurors are likely to engage in racial biases when they believe that there are valid justifications for the negative consequence; and stereotypes can be used as that justification.[122] For example, members of the jury are more likely to recommend harsher punishments when the defendant is accused of committing an offense that is stereotypically associated with his or her racial or ethnic group.[123] In cases that are eligible for the death penalty, the crime tends to be violent, which is stereotypically associated with Black and Latinx populations, so these groups are particularly vulnerable to stereotypes in capital sentencing trials especially if the jury box is

118. Bidish J. Sarma, *Challenges and Opportunities in Bringing the Lessons of Cultural Competence to Bear on Capital Jury Selection*, 42 U. MEM. L. REV. 907, 915 (2012).

119. Cowan, *supra* note 115, at 53.

120. *See* Lockhart v. McCree, 476 U.S. 162, 189 (1986) (Marshall, J., dissenting) (calling the *Witherspoon*-excludeables rule "a blatant disregard for the rights of a capital defendant [that] offends logic, fairness, and the Constitution."); *see also* Rick Seltzer, et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 HOW. L.J. 571, 588 (1986), https://heinonline.org/HOL/P?h=hein.journals/howlj29&i=585 (pointing out social science at the time of the *Witherspoon* decision that demonstrated strong pattern of "essential unanimity," in favor of the death penalty against Black persons).

121. Bidish, *supra* note 118, at 914.

122. Jennifer S. Hunt, *Race Ethnicity and Culture in Jury Decision Making*, ANNU. REV. LAW SOC. SCI. 269, 275 (2015).

123. *Id.*

lacking representation from jurors that could demystify these stereotypes.[124] Since VIE indirectly makes a victim's race and socioeconomic status a relevant factor in determining whether to sentence a defendant to death, individuals who can engage in this self-reflection and recognize when their unconscious biases might arise are essential because they can better relate and identify with individuals from different backgrounds.

However, this exercise of cultural competency is especially difficult for the societal group that enjoys the most privileges in society—which in America means White people—because trying to understand how society has treated other groups less favorably requires the dominant group to recognize their own role in the social injustice.[125] In other words, for a White juror to engage sincerely in the practice of cultural competency, they must acknowledge their role in perpetuating systemic injustice. But as "members of the dominant culture" and "enjoy the most privileges in our society," it is easy for many White people to avoid this self-reflection.[126] The privilege to ignore systemic injustice can decrease the likelihood of a lesser sentence for defendants of color.

This racial disparity can have a prejudicial effect because individuals tend to have more empathy towards individuals to whom they can relate to.[127] As a result, juries of White, middle-class people are more likely to have more empathy towards White, middle-class victims than victims of other races.[128] In capital cases, White male jurors tend to show the greatest racial biases and are more likely to have negative views of defendants, seeing them as vicious, while Black male jurors are more likely to characterize the defendant as "a good person who got off on the wrong foot."[129]

Additionally, during the deliberation process of these cases, racial minorities speak an average of 867 fewer words than White jurors do; therefore, White jurors even when selected in equal numbers to non-White jurors can still have a disproportionately greater influence on the sentencing outcome.[130] Juries that are composed of a diverse group of jurors are valuable since they discuss evidence more thoroughly and deliberate for a longer

124. *Id.* at 273; Rachel Kunjummen, *Black Jurors Matter: Why the Law Must Protect Minorities' Right to Judge Paulose*, 27 BERKELEY J. CRIM. L. 133 (2022), https://heinonline.org/HOL/P?h=hein.journals/bjcl27&i=302.

125. Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 136 (2004).

126. *Id.*

127. Hunt, *supra* note 122, at 275.

128. *Id.* at 273.

129. *Id.* at 280.

130. *Id.* at 279.

period.[131] This inclusive deliberation is essential because jurors often do not have the cross-cultural competency to compensate for the stereotypes and in-group biases that VIE exacerbates—especially when the typically capital sentencing jury is predominately White.[132] As a result, disparate outcomes will arise for defendants depending on the weight that jurors give to this evidence.

The results of this underrepresentation are clear. For example, a study found that 80% of new death sentences imposed in 2019 involved cases with White victims, despite the fact that around half of all murder victims are Black.[133] This data illustrates that more likely than not, victims in capital punishment proceedings will be White and the jurors who decide the outcome of the case will also be White.

Since the jury selection process purposefully excludes certain groups from participating in the legal system, it is imperative that the jurors, who are allowed to serve on capital sentencing juries, have sufficient cultural competency because it is the role of the sentencing jury to "express the conscience of the community on the ultimate question of life or death."[134] If a diverse group of jurors, representative of the wide range of perspectives in the community, cannot make up the jury box then the jurors who do get to be present should have the competency to relate to the defendant despite him or her coming from a different background. In capital proceedings, the ability of the juror to relate and see the perspective of a person whom they do not share much in common with is particularly important because a failure to do so can result in death for that individual. Courts do not give jurors cultural competency training when we select them to serve. Accordingly, courts should not admit VIE because jurors do not have the skills to also relate to the defendant when the VIE brings to light similarities they share with the victim.

CONCLUSION

The Supreme Court reached the correct conclusion when it held in *Booth* and *Gathers* that victim impact statements were irreverent to a defendant's culpability. VIE should be inadmissible in capital sentencing proceedings because it has no bearing on the defendant's culpability. First, VIE can shift the focus from the defendant's background, which can mitigate culpability, to the victim's background. Second, a defendant is often unaware of

131. Bidish, *supra* note 118, at 911.

132. *Id.* at 915.

133. DEATH PENALTY INFO. CTR., *PIC Analysis: Racial Disparities Persisted in U.S. Death Sentences and Executions in 2019* (Jan. 21, 2020), https://deathpenaltyinfo.org/news/dpic-analysis-racial-disparities-persisted-in-the-u-s-death-sentences-and-executions-in-2019.

134. *Witherspoon*, 391 U.S. at 519.

a victim or their family's personal characteristics when committing the offense so that information does not add to a defendant's culpability. Third, if a victim's negative characteristics should have no bearing on a defendant's culpability, then we should not allow a victim's positive characteristics to influence the jury either. The criminal system implemented victim impact statements to provide victims and their families more autonomy in the criminal process, however, this type of evidence causes more harm than the good trying to be accomplished because it creates further racial disparities in a system already plagued with racism.

VIE that focuses on the personal characteristics of the victim or the impact the incident had on the victim's family has a prejudicial effect on the defendant's sentencing outcome because of (1) the varying ability of the victim's family to articulate their emotions regarding the incident's impact; (2) jurors' lack of cultural competence interferes with their ability to reach an impartial verdict; and (3) viewpoint and racial bias in jury selection. Since it is difficult, if not impossible, to remove the inherent prejudicial effect embedded in VIE, courts should prohibit this evidence in its entirety.