South Carolina v. Gathers: Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings

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Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol40/iss1/9
The eighth amendment to the United States Constitution prescribes imposing a sentence that is both fair and reasonable: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In interpreting the eighth amendment, the United States Supreme Court has required that a sentence be based on objective information and be proportional to the defendant's moral culpability. Thus, courts review sentencing decisions to ensure that the information on which the judge or jury relies is objective, and the sentence proportional, in accordance with the eighth amendment.

In the context of capital punishment, the Court has articulated a distinct standard for the imposition of sentences. Specifically, the Court has stated that a judge or jury should impose a death sentence based only on reason, and not emotion. Capital sentences must be individualized and based on information that relates to the defendant's "personal responsibility and moral guilt." Imposition of a capital sentence that does not meet this strict criteria violates the eighth amendment and its prohibition against cruel and unusual punishment. Therefore, courts must thoroughly analyze information that the sentencer considers, particularly in capital punishment proceedings, to ensure that it complies with the eighth amendment.

To arrive at an individualized sentencing determination, the sentencer must consider information specifically related to the crime committed. Examining the victim impact statement is one means by which the sentencer can gain such information. Victim impact statements contain information

1. U.S. CONST. amend. VIII.
5. Zant, 462 U.S. at 884-85.
6. See infra notes 50-68 and accompanying text.

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describing the identity and characteristics of the victim and the effect of the crime on the victim and the victim's family.\textsuperscript{7} The purpose of these statements is to allow the victim to participate more meaningfully in the prosecution of the defendant.\textsuperscript{8} Congress called for the inclusion of victim impact statements in presentence reports with the passage of the Victim and Witness Protection Act of 1982.\textsuperscript{9} Currently, similar legislation mandating the inclusion of such statements in presentence reports exists in most states and the District of Columbia.\textsuperscript{10}

The Supreme Court addressed the admissibility of a victim impact statement in a capital punishment proceeding as a means of describing the victim's character in \textit{Booth v. Maryland}.\textsuperscript{11} Specifically, the Court held that the

\textsuperscript{7} See infra notes 74-85 and accompanying text.


\textsuperscript{9} See infra notes 74-85 and accompanying text.

\textsuperscript{10} See infra notes 74-85 and accompanying text.

statement was not admissible during the sentencing phase of a capital punishment proceeding because the statement might lead the jury to render a capricious or emotional decision. In Booth, however, the Court left unresolved the issue of whether all victim-related information was admissible by stating that the inadmissibility of victim impact statements did not automatically exclude victim-related information and that victim-related information might be admissible when it "relate[s] directly to the circumstances of the crime." An example of such information is an object found at the scene of the crime that provides information about the victim's character. To resolve the issue of the admissibility of victim-related information during the sentencing phase of a capital punishment proceeding, the Court granted certiorari in South Carolina v. Gathers.

In Gathers, the General Sessions Court of Charleston County, South Carolina, convicted and sentenced Demetrius Gathers to death for the murder and criminal sexual assault of Richard Haynes. During the sentencing phase of the trial, the prosecution read to the jury the contents of a prayer card and referred to a voter registration card which were found on the victim. One of the grounds on which Gathers appealed his conviction to the Supreme Court of South Carolina was that the prosecution's reading of the prayer card and reference to the voter registration card violated Gathers' eighth amendment right against cruel and unusual punishment. Specifically, Gathers based his eighth amendment appeal on the United States Supreme Court's decision in Booth v. Maryland, which held that the use of victim impact statements during the sentencing phase of capital punishment proceedings violated the defendant's eighth amendment rights. Gathers contended that, by reading the contents of the prayer card and referring to the voter registration card before the jury during the sentencing phase, the prosecution focused "extensively on the personal characteristics of the victim" rather than on the defendant.

12. Id. at 508-09. A majority of five Justices decided Booth. Justices Powell, Brennan, Marshall, Blackmun, and Stevens constituted the majority, and Chief Justice Rehnquist, and Justices White, O'Connor, and Scalia dissented. Id. at 497, 515.

13. Id. at 507 n.10. The Court stated, "Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime." Id.


16. Id. at 482-83, 369 S.E.2d at 143-44.

17. Id.

18. Booth, 482 U.S. at 509.

On appeal, the Supreme Court of South Carolina held that the prosecution’s reading of the victim-related information, the prayer card, and the reference to the voter registration card during the sentencing phase of the trial violated Gathers’ constitutional rights. The court based its decision on Booth. Moreover, the South Carolina court noted that if the sentencer considered the victim’s personal characteristics, the court would have to allow the defendant an opportunity to rebut the character information and, therefore, focus the sentencing decision on the victim and not the defendant. Thus, the Supreme Court of South Carolina concluded that the reading of the prayer card and reference to the voter registration card during the sentencing phase violated Gathers’ eighth amendment rights, and may have led the jury to impose the death sentence based on the victim’s alleged religious character and the belief that the victim was a registered voter rather than on Gathers’ moral culpability.

The United States Supreme Court affirmed the decision. The Supreme Court held that the information relating to the victim, the contents of the cards, was inadmissible because the information could be “purely fortuitous,” unrelated to the circumstances of the crime, and not “relevant to the defendant’s moral culpability.” In particular, the Court held that the prayer card and voter registration card were similar to victim impact statements, which the Booth Court had previously declared inadmissible during the sentencing phase of a trial.

Justice O’Connor dissented, arguing that the eighth amendment does not prohibit the jury from considering the victim’s characteristics. Justice O’Connor reasoned that prohibiting the jury from considering victim-related information would prevent the jury from examining the harm caused by the

20. Id. at 484, 369 S.E.2d at 144.
21. Id. at 483-84, 369 S.E.2d at 144.
22. Id.
23. Id. The Supreme Court of South Carolina affirmed the convictions of murder and first degree criminal sexual conduct, reversed the death sentence, and remanded for a new sentencing proceeding. Id. at 484, 369 S.E.2d at 144-45.
26. Id. at 811-12.
27. Id. at 810-12. Although the Court stated that “[t]he fact that Gathers scattered Haynes’ personal papers around his body while going through them looking for something to steal was certainly a relevant circumstance of the crime,” the Court concluded that the contents of the two cards were not relevant because no evidence existed that Gathers had read the cards. Id. at 811.
28. Id. at 814 (O’Connor, J., dissenting). Chief Justice Rehnquist and Justice Kennedy joined Justice O’Connor’s dissent. Id. at 812.
defendant to the victim and the victim's family. Justice Scalia, in a separate dissent, also argued that victim-related information should be considered and urged the Court to overturn Booth. Justice Scalia stated that "wrongly decided" cases like Booth, which deal with "evolving standards of decency" should be overturned before society revamps its laws to comply with the erroneous decisions.

This Note surveys the standards defining the admissibility of information in capital punishment proceedings. It then examines the prior history regarding the admissibility of victim impact statements during the sentencing phase of death penalty proceedings. Next, this Note analyzes the United States Supreme Court's decision in South Carolina v. Gathers in light of prior Supreme Court precedent. The Note concludes that Gathers is simply one step in the Supreme Court's continuing prohibition on the use of victim impact statements and victim-related information in capital punishment proceedings. Further, while the Note recommends a method by which the victim-related information might be considered, this Note asserts that the Court's prohibition is likely to continue until there is a legislative mandate or a change in the composition or posture of the Supreme Court.

I. THE STANDARDS DEFINING THE ADMISSIBILITY OF INFORMATION IN CAPITAL PUNISHMENT PROCEEDINGS

Whether information is admissible in a capital punishment proceeding depends on numerous constitutional, legislative, and judicial constraints. These controls are present to maintain fairness in capital punishment proceedings. The most important constraint in death penalty sentencing is the eighth amendment to the United States Constitution. The legislature and judiciary have also imposed restrictions in the capital sentencing arena.

A. The Constitutional Parameters to Capital Sentencing: The Eighth Amendment

The eighth amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The courts and commentators defining the rather vague cruel and unusual punishments clause of the eighth amendment highlight the requirement that a sentence be fair and reasonable.

29. Id. at 816-21.
30. Id. at 823-25 (Scalia, J., dissenting).
31. U.S. CONST. amend. VIII.
32. See Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring); Nevares-Muniz, supra note 2, at 273-78.
Moreover, the judiciary has recognized two approaches to interpreting the cruel and unusual punishments clause.\textsuperscript{33}

Under the first approach, the traditional interpretation, only punishments of torture and unnecessary cruelty are prohibited by the eighth amendment.\textsuperscript{34} The traditional interpretation is backward-looking because it attempts to determine if a punishment is cruel and unusual by comparing the particular punishment to punishments considered cruel and unusual at the time the eighth amendment was adopted.\textsuperscript{35} The United States Supreme Court, in \textit{Weems v. United States},\textsuperscript{36} acknowledged this approach while determining the legality of a Philippine Penal Code provision under the Philippine Bill of Rights.\textsuperscript{37} There, the Court stated that in \textit{Wilkerson v. Utah},\textsuperscript{38} an earlier Court found death by firing squad acceptable under the eighth amendment of the United States Constitution because death was a typical punishment for murder, Utah resorted to death by firing squad for many years, and military law provided for death by firing squad.\textsuperscript{39} Nevertheless, in \textit{Weems}, the Court rejected the traditional approach and stated that "[i]n the application of a constitution . . . our contemplation cannot be only of what has been, but of what may be."\textsuperscript{40}

The second approach, termed the "evolving standards of decency" interpretation, was recognized by the United States Supreme Court in 1958 and is more flexible than the traditional approach in satisfying the eighth amendment.\textsuperscript{41} Since the Court recognized this interpretation, courts have used the

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  \item \textsuperscript{33} Nevarres-Muniz, \textit{supra} note 2, at 273-76; \textit{see also} \textit{Furman}, 408 U.S. at 264-85 (Brennan, J., concurring). Justice Brennan's concurrence in \textit{Furman} provides a concise interpretation of the eighth amendment. Justice Brennan stated that (1) a punishment could be considered excessive if a less severe punishment is available which would serve the same purpose, \textit{id.} at 279; (2) severe punishment may not be imposed arbitrarily by a state, \textit{id.} at 274; (3) the court must be as objective as possible in rendering a decision, \textit{id.} at 277; and (4) human dignity may not be sacrificed by a punishment, \textit{id.} at 270, 273.
  \item \textsuperscript{34} \textit{See} \textit{Wilkerson v. Utah}, 99 U.S. 130, 136 (1878) (death by firing squad held not cruel and unusual under the eighth amendment); \textit{Louisiana ex rel. Francis Resweber}, 329 U.S. 459 (1947) (failure of electrocution to be successful on the first attempt was held not to be cruel and unusual under the eighth amendment). Examples of unnecessary cruelty, according to the Court, are disembowelling alive, beheading, burning alive, quartering, and crucifixion. \textit{Furman}, 408 U.S. at 264-65 (Brennan, J., concurring) (citing \textit{In re Kemmler}, 136 U.S. 436, 446 (1890); \textit{Wilkerson}, 99 U.S. at 135).
  \item \textsuperscript{35} \textit{See} \textit{Furman}, 408 U.S. at 264 (Brennan, J., concurring) (citing \textit{Weems v. United States}, 217 U.S. 349, 376 (1910)).
  \item \textsuperscript{36} 217 U.S. 349 (1910).
  \item \textsuperscript{37} \textit{Id.} at 351.
  \item \textsuperscript{38} 99 U.S. 130 (1878).
  \item \textsuperscript{39} \textit{Weems}, 217 U.S. at 369-70.
  \item \textsuperscript{40} \textit{Id.} at 373.
  \item \textsuperscript{41} \textit{Trop v. Dulles}, 356 U.S. 86, 101 (1958); Nevarres-Muniz, \textit{supra} note 2, at 274 n.16. In \textit{Weems}, the Court first addressed the possibility that as time passed, the judiciary could inter-
The traditional approach less frequently. The evolving standards of decency interpretation construes the eighth amendment by looking to "objective indicia that reflect the public attitude toward a given sanction." These objective indicia include statutorily and judicially imposed penalties and societal values as defined by the public, the judiciary, history, and morals. The evolving standards of decency interpretation of the eighth amendment, in conjunction with the legislative and judicial sentencing goals of retribution, deterrence, incapacitation, and rehabilitation, encourages courts to interpret the eighth amendment differently. \(\text{Weems, 217 U.S. at 373; Nevares-Muniz, supra note 2, at 274.}\)

42. Nevares-Muniz, supra note 2, at 274-75.


44. Woodson, 428 U.S. at 288; Nevares-Muniz, supra note 2, at 275.

45. When determining appropriate sentences, courts do not rely on one particular sentencing goal, but instead rely on a combination of sentencing goals. A. Campbell, Law of Sentencing § 4, at 21 (1978). Congress designed the sentencing goals to "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1)(B) (1988). Retribution, in general, is retaliation by society against the defendant for the harm caused by the defendant to the victim and the victim's family. See 18 U.S.C. § 3553(a)(2)(A) (1988); Comment, supra note 10, at 212. There are basically two forms of retribution: "moral retribution" and "social retribution." See Comment, supra note 10, at 212, 214. Under moral retribution, the sentencer measures the goodness of society against the evil nature of the defendant. If the sentencer finds that the defendant acted immorally, a punishment can be imposed. \(\text{Id. at 212.}\)

Under social retribution, the sentencer imposes a punishment based on the degree of harm caused by the defendant to society, in general, and to the victim and the victim's family, in particular. Id. at 214. Retribution was a sentencing goal under the Bible and the Hammurabi Code. Ogletree, The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 Harv. L. Rev. 1938, 1940 (1988). In the 1950's, the judiciary and the commentators favored rehabilitation and deterrence. Id. at 1940-41. Most recently, emphasis has shifted back to favoring retribution and incapacitation. \(\text{Id. at 1941; Sebba, The Victim's Role in the Penal Process: A Theoretical Orientation, 30 Am. J. Comp. L. 217, 218 (1982).}\)

46. The sentencing objective of deterrence is to prevent a potential criminal from committing a crime. See 18 U.S.C. § 3553(a)(2)(B) (1988); Comment, supra note 10, at 215. The concept underlying deterrence is that a potential criminal will weigh the expected costs and benefits of committing a certain crime and act only if the expected benefits outweigh the expected costs. See Comment, supra note 10, at 215. There are two types of deterrence: general and specific. A. Campbell, supra note 45, § 5, at 24. General deterrence deters the general public from committing crimes. Specific deterrence deters a particular criminal from committing the same or another crime. \(\text{Id.; see also H. Gross, A Theory of Criminal Justice 394-400 (1979) (referring to general deterrence as the intimidation version and specific deterrence as the persuasion version).}\)

The deterrence rationale, however, has certain weaknesses. Many criminals neither think rationally nor weigh the expected costs and benefits of committing a certain crime. Therefore, sentences based on deterrence fail to deter "irrational" criminals. A. Campbell, supra note 45, § 5, at 26; Greenberg, Against the American System of Capital Punishment, 99 Harv. L. Rev. 1670, 1676-77 (1986). Another weakness of the deterrence rationale is the possible loss of respect for the legal system by the public when the court imposes a sentence that is too harsh on a criminal. A. Campbell, supra note 45, § 5, at 26-27. Instead of deterring the general public, the public sympathizes with the criminal. \(\text{Id. § 5, at 27.}\)
sessed the proportionality between the offense committed and the punishment imposed on the accused, and to ensure a close nexus between the two. 49

Accordingly, under the eighth amendment and the sentencing goals, courts strive to ensure that sentences are proportional to the severity of the defendant's crime. Courts achieve the necessary proportionality by making individualized sentencing determinations that reduce the likelihood of imposing subjective and disproportional sentences. In the capital punishment context, because of the irrevocable nature of death sentences, an even stronger need exists for the sentencer to make individualized sentencing determinations for each defendant.

B. Sentencing in Capital Cases: The Need for an Individualized Sentencing Determination

As the sentencer in capital punishment proceedings, the judge or jury considers all of the relevant information to determine the propriety of imposing

47. As a sentencing goal, incapacitation is designed to remove criminals from society to eliminate possible commission of future crimes. See 18 U.S.C. § 3553(a)(2)(C) (1988); Comment, supra note 10, at 216. Forms of incapacitation range from probation to the death penalty. A. CAMPBELL, supra note 45, § 6, at 28. The success of incapacitation depends entirely upon the ability of the criminal justice system to identify and incapacitate criminals who have a disposition to commit crimes. A. CAMPBELL, supra note 45, § 6, at 29-30; H. GROSS, supra note 46, at 385-86. Herein lies a problem with incapacitation. The criminal justice system confines some convicted criminals to prisons which may make criminals even more dangerous upon their release. H. GROSS, supra note 46, at 386-87. In addition, not only is identifying criminals with dispositions to commit crimes difficult, but the criminal justice system is designed to determine guilt or innocence and not criminal disposition. Id. at 387. Nevertheless, by identifying and incapacitating those criminals with dispositions to commit crimes, the criminal justice system protects society only from those criminals who are a danger to society. A. CAMPBELL, supra note 45, § 6, at 30; H. GROSS, supra note 46, at 386. These criminals who do not pose a threat to society are punished as well, but not by incapacitation. A segment of the population, however, believes all criminals should be imprisoned. A. CAMPBELL, supra note 45, § 6, at 30.

48. Rehabilitation focuses on reforming offenders and altering their criminal tendencies through individualized programs. 18 U.S.C. § 3553(a)(2)(D) (1988); A. CAMPBELL, supra note 45, § 8, at 34; Comment, supra note 10, at 217-18. Under rehabilitation, crime is considered a disease which has distorted a person's disposition. A. CAMPBELL, supra note 45, § 8, at 34. Rehabilitation cures this disease through job training, psychiatric therapy, or other types of treatment. Id. § 8, at 34-35. There is a conflict among commentators and the courts over whether rehabilitation is effective. Some lawmakers and commentators believe that incarceration will not rehabilitate criminals, and instead, the lawmakers and commentators advocate education and medical treatment to help criminals reform. Comment, supra note 10, at 217-18. Others believe that rehabilitation fails because few criminals take advantage of the rehabilitative programs. A. CAMPBELL, supra note 45, § 8, at 40. Because rehabilitation focuses on the criminal and his disease, rather than on the crime committed, some commentators believe rehabilitation is tailored more to the individual criminal than the other sentencing goals. Id. at § 8, at 34-35.

49. Nevares-Muniz, supra note 2, at 274-75.
a death sentence. The sentencer, however, is not without guidance. In fact, the Supreme Court requires that "'clear and objective standards'" guide the sentencer to avoid an arbitrarily and capriciously imposed death sentence. Moreover, the Court requires that the sentencer find a "nexus between the punishment imposed and the defendant's blameworthiness," and consider all mitigating circumstances.

Specifically, the Supreme Court has required that, because the death sentence is a profoundly different penalty and is so "unique in its severity and irrevocability," a sentencer must reach an individualized sentence and must be able to evaluate mitigating circumstances such as the defendant's background and the details of the crime committed. In Lockett v. Ohio, the Court reversed the Supreme Court of Ohio's imposition of the death penalty on the grounds that Ohio's death penalty statute violated the eighth and fourteenth amendments by limiting the relevant mitigating factors that the sentencer could consider. According to the Court, to reach an individualized sentencing determination, the sentencer must be able to consider "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." Ideally, this additional evaluation of circumstances during the sentencing process leads to a determination of whether the death sentence is appropriate in individual cases. In particular, this individualized sentencing determination attempts to decrease the possibility that a sentencer will impose the death penalty on a first time offender as readily as on a multiple offender.

52. Gregg, 428 U.S. at 189.
55. Lockett, 438 U.S. at 604.
58. Id. at 608.
59. Id. at 604.
The Court also requires that the information which the sentencer evaluates relate to the defendant's "personal responsibility and moral guilt."62 This requirement attempts to ensure that a sentencer will only consider information relating to the defendant's state of mind at the time of the crime, and will ignore irrelevant or unfairly prejudicial information. Therefore, by limiting the information that the sentencer considers, the sentencer will more likely impose a sentence proportional to the crime committed, as mandated by the eighth amendment.63 In addition, the information that the sentencer considers must not be "constitutionally impermissible or totally irrelevant to the sentencing process."64 In McCleskey v. Kemp,65 the defendant appealed his death sentence, contending that the jury imposed the death sentence because of his race.66 Although the Court held that the defendant failed to prove that the sentence was racially based, the Court intimated that a sentence based on such information would be unconstitutional.67 In an earlier case, the Court stated that "the race, religion, or political affiliation of the defendant" were constitutionally unacceptable factors for the jury to consider when imposing the death sentence.68

Finally, according to the Court, the jury speaks for the community69 and acts as a liaison between the community and the criminal justice system in capital cases.70 The Court prescribed this role for the jury because of the jury's perceived ability to act as a "significant and reliable objective index of contemporary values."71 To act effectively as a liaison between the community and the penal system, the jury must assess the effect of the crime on the victim, the victim's family, and society.72 Victim impact statements are one

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63. See, e.g., Tison, 481 U.S. at 149-50, 152 n.4, 156 (to assume proportionality, the prosecution must show some intent or attempt to kill, at the least, before the death sentence is imposed). “In Enmund v. Florida, the Court recognized again the importance of mental state, explicitly permitting the death penalty in at least those cases where the felony murderer intended to kill and forbidding it in the case of a minor actor not shown to have had any culpable mental state.” Id. at 156.
64. Zant, 462 U.S. at 885.
66. Id.
67. Id. at 291-99.
68. Zant, 462 U.S. at 885.
70. Id. at 519 n.15.
source of victim information that courts use to assist the sentencer in considering the effects of the crime.\textsuperscript{73}

II. VICTIM IMPACT STATEMENTS AND CONGRESSIONAL ENDORSEMENT

Victim impact statements serve as only one method of increasing the involvement of victims in the sentencing process.\textsuperscript{74} In capital punishment proceedings, a victim impact statement usually constitutes a part of the presentence report and contains information regarding the personal characteristics of the victim of the crime.\textsuperscript{75} The statement may include any one or more of the following types of information: the details of the crime, a description of the victim, the effects of the crime on the victim and on the victim's family, and opinions of the victim or the victim's family regarding the defendant and the appropriate sentence.\textsuperscript{76} Although states widely accept victim impact statements as sentencing tools in non-capital sentencing proceedings,\textsuperscript{77} some state courts question the statements' role in capital punishment proceedings.\textsuperscript{78}

In 1982, Congress passed the Victim and Witness Protection Act (Act).\textsuperscript{79} The purpose of the Act was to bolster the protection and the involvement of victims and witness in the criminal justice system and "to provide a model

\textsuperscript{73} Id. at 202-03.

\textsuperscript{74} See id. at 200. Other methods include informing the victim of a convicted defendant's judicial proceedings and requiring the convicted defendant to pay restitution to the victim or the victim's family. Id. (citing Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, §§ 5(a), 6(a)(4), 96 Stat. 1248, 1253-56 (1982); 18 U.S.C.A. §§ 3663-64 (West 1985 & Supp. 1988)).

\textsuperscript{75} Victim impact statements include "information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense . . . and any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense." Victim & Witness Protection Act of 1982, Pub. L. No. 97-291, § 3, 96 Stat. 1248, 1249.

\textsuperscript{76} Id.

\textsuperscript{77} Forty-seven states and the District of Columbia have adopted legislation dealing with victim impact statements. See supra note 10.

\textsuperscript{78} See People v. Levitt, 156 Cal. App. 3d 500, 516-17, 203 Cal. Rptr. 276, 287-88 (1984) (holding that the victim's family's sorrow has no place in the sentencing decision of a criminal case); People v. Ramirez, 98 Ill. 2d 439, 454, 457 N.E.2d 31, 38 (1983) (victim's widow's testimony at sentencing phase of capital punishment proceedings lacked any probative value and was therefore inadmissible), aff'd, 114 Ill. 2d 125, 500 N.E.2d 14 (1986), cert. denied, 481 U.S. 1053 (1987). But see Sandvik v. State, 564 P.2d 20, 23, (Alaska 1977) (the victim's background is relevant in a negligent vehicular homicide case even if the defendant did not know or select the victim); Lodowski v. State, 302 Md. 691, 751, 490 A.2d 1228, 1259 (1985) (victim impact information is not prohibited by the Constitution and may be relevant during the sentencing phase), vacated on other grounds, 475 U.S. 1078 (1986).

for legislation for State and local governments.\(^{80}\) Congress enacted the Act in response to growing public concern that while defendants have a right to counsel, victims and witnesses have no such right.\(^{81}\) According to the Act, victims suffer mental, financial, and physical hardship, are often left in the dark regarding the status of the proceedings, and are "used as tools."\(^{82}\) The Act requires that presentence reports include victim impact statements, protects victims and witnesses from intimidation, provides a mechanism for courts to order restitution, orders the United States Department of Justice to establish guidelines consistent with the Act, and restricts the opportunities for a federal felon to profit from his or her crime.\(^{83}\) Although state legislatures and Congress have passed substantial legislation regarding the use of victim impact statements,\(^{84}\) the United States Supreme Court did not consider the use of such statements in capital punishment proceedings until Booth v. Maryland.\(^{85}\)

**III. Booth v. Maryland: Addressing the Admissibility of Victim Impact Statements in Capital Punishment Proceedings**

In Booth v. Maryland, the United States Supreme Court considered the constitutionality of a Maryland law requiring incorporation of victim impact statements in presentence reports for capital cases.\(^{86}\) The Maryland Circuit Court of Baltimore City convicted the defendant of murdering an elderly couple.\(^{87}\) During the sentencing phase of the trial, the prosecutor read a victim impact statement to the jury.\(^{88}\) The statement, prepared by the Maryland Division of Parole and Probation and the victims' family, described the victims as "amazing people" who were "butchered like ani-

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81. Id. at § 2(a), 96 Stat. at 1248.
82. Id.
84. See supra note 10.
86. Id. at 509.
88. Booth, 482 U.S. at 500-01.
In addition, the statement indicated that the victims' family did not believe that the defendant could be rehabilitated. Booth appealed the decision, contending, *inter alia*, that the introduction of the victim impact statement violated his eighth and fourteenth amendment rights. The Maryland Court of Appeals affirmed the circuit court's decision, and held that the victim impact statement was "straightforward and factual" and that the death sentence was not imposed arbitrarily.

The United States Supreme Court reversed the Maryland Court of Appeals' decision and held that the admission of a victim impact statement during the sentencing phase of the trial violated the defendant's eighth amendment rights. Justice Powell, writing for the majority, began the Court's analysis by focusing on the need to limit the information introduced at sentencing to information related to the defendant's "personal responsibility and moral guilt." The Court noted that victim impact statements typically focus on the victim, not the defendant, and may relate to circumstances irrelevant to the crime. Moreover, the Court indicated that such statements may even describe circumstances over which the defendant had no control, such as the effect of the crime on the victim's family. The Court asserted that only on rare occasions do defendants commit crimes based upon the effect of the crime on people other than the victim. The Court stated, however, that when the crime is committed with knowledge of

89. *Id.* at 510, 512. The complete victim impact statement is attached to the Court's opinion as an appendix. *Id.* at 509-15. The victim impact statement discusses, among other things, the effects of the murders upon the upcoming wedding in the family and upon the daily routine of the victims' family, and the viciousness of the murders. *Id.*; see infra notes 90, 101.
90. *Booth*, 482 U.S. at 513. The victims' daughter "doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this. She feels that the lives of her family members will never be the same again." *Id.*
91. *Booth*, 306 Md. at 222, 507 A.2d at 1124.
92. *Id.* at 223, 507 A.2d at 1124.
95. *Booth*, 482 U.S. at 503, 504.
96. *Id.* at 504.
97. *Id.*
98. *Id.* at 504 n.7. The Court quoted People v. Levitt, 156 Cal. App. 3d 500, 516-17, 203 Cal. Rptr. 276, 287-88 (1984), regarding the proposition that the harm caused to a victim's family is related to damages in a civil action and not sentencing in criminal action. *Booth*, 482 U.S. at 504-05 & n.7.
the consequences, that information is relevant because it relates to the defendant's state of mind at the time of the crime.\textsuperscript{99} 

The majority also found that the composition of victim impact statements create the risk that the sentencer might arbitrarily impose the death sentence.\textsuperscript{100} In 	extit{Booth}, the family was articulate and able to express its grief.\textsuperscript{101} The Court also noted, however, that there would be cases in which the victim did not leave a family behind, or the family was less able to articulate its grief.\textsuperscript{102} In these situations, the Court asserted that victim impact statements might reflect an absence or decreased level of grief when, in reality, the suffering was equal to or greater than the suffering of a family which was more articulate.\textsuperscript{103} Therefore, the Court stated that a jury could indirectly base its determination of whether to impose the death sentence on a victim impact statement that reflected a family's ability to articulate its thoughts and feelings of suffering, rather than on a defendant's background and record and the circumstances of the case.\textsuperscript{104}  

Furthermore, the Court noted that if the prosecution introduces evidence relating to the victim's personality and characteristics, then courts must allow the defendant the chance to rebut that evidence.\textsuperscript{105} The Court, relying on its own precedent,\textsuperscript{106} stated that due process requires the Court to allow


\textsuperscript{100} \textit{Booth}, 482 U.S. at 505.

\textsuperscript{101} \textit{Id.} For example, the impact statement reported that the victims' daughter still cries every day. She states that she doesn't sleep through a single night and thinks a part of her died too when her parents were killed. She reports that she doesn't find much joy in anything and her powers of concentration aren't good. She feels as if her brain is on overload. The victims' daughter relates that she had to clean out her parents' house and it took several weeks. She saw the bloody carpet, knowing that her parents had been there, and she felt like getting down on the rug and holding her mother.

\textit{Id.} at 512.

\textsuperscript{102} \textit{Id.} at 505.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.} In 	extit{Booth v. State}, 306 Md. 172, 507 A.2d 1098 (1986), vacated in part, 482 U.S. 496 (1987), 	extit{vacated en banc}, 316 Md. 363, 558 A.2d 1205 (1989), Judge Cole, in a separate opinion, raised the issue of the opinion of the victims' family. He stated that victim impact statements in capital punishment proceedings create the subjectivity and uncertainty that the Supreme Court had previously denounced. \textit{Id.} at 233, 507 A.2d at 1129 (Cole, J., concurring in part and dissenting in part); see also Lodowski v. State, 302 Md. 691, 764 n.6, 490 A.2d 1228, 1265 n.6 (1985) (Cole, J., concurring) (victim impact information is not prohibited by the Constitution and may be relevant during the sentencing phase), 	extit{vacated on other grounds}, 475 U.S. 1078 (1986); see Comment, supra note 10, at 214 n.67.

\textsuperscript{105} \textit{Booth}, 482 U.S. at 506-07 (citing Gardner v. Florida, 430 U.S. 349, 362 (1977)).

\textsuperscript{106} \textit{Gardner}, 430 U.S. at 362.
the defendant the opportunity to rebut presentence reports. According to the Court, a rebuttal phase could sidetrack the jury and result in a "mini-trial" on the victim's personality, instead of enabling the jury to decide whether to impose the death sentence based on the defendant's crime.

In addition, the majority stated that the introduction of the victim impact statement clouds an observer's ability to determine the grounds upon which the court imposed a death sentence. The Court indicated that the introduction of victim impact statements allows the jury to consider emotional factors such as the grief and anger felt by the victim's family. According to the Court, however, the sentencer must impose the death penalty based on reason and not on caprice or emotion. Therefore, the Court stated that by allowing the jury to consider emotional factors, courts obscure the standards upon which the jury relies in imposing the death sentence and increase the possibility that the jury will impose the death sentence based upon caprice and emotion.

Justice White, dissenting in Booth, focused first on the fact that sentencing procedures are peculiarly questions of legislative policy. As Justice White noted, the majority in Booth should have respected the Maryland legislature's decision that the degree of harm caused by the defendant and the victims' family's statement were relevant sentencing considerations. Based on this assertion, Justice White claimed that the Court should have refrained from taking action against the admissibility of the victim impact statement.

In the alternative, Justice White stated that, regardless of whether the relevance of the harm caused by the defendant is a legislative question, a jury's consideration of the harm caused by the defendant as a result of the crime is proper. Justice White posited that courts often consider the harm caused

108. Id. at 507.
109. Id. at 506 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).
110. Id. at 506-07; Godfrey, 446 U.S. at 428-29, 433.
111. Booth, 482 U.S. at 508 (citing Gardner v. Florida, 430 U.S. 349, 358 (1977)).
112. Id. at 506, 508.
113. Chief Justice Rehnquist and Justices O'Connor and Scalia joined Justice White's dissent. Id. at 515 (White, J., dissenting).
114. Id. (quoting Gore v. United States, 357 U.S. 386, 393 (1958)). The dissent quoted Chief Justice Burger's dissent in Furman v. Georgia, 408 U.S. 238, 383 (1972), that legislatures, and not the courts, are designed to respond to the will and moral values of the people. Booth, 482 U.S. at 515. Justice White also stated that there was nothing "'cruel or unusual' or otherwise unconstitutional about the legislature's decision to use victim impact statements in capital sentencing hearings." Id. at 515-16.
115. Booth, 482 U.S. at 515.
116. Id. at 515-16.
117. Id. at 516.
by the defendant as a relevant factor during the sentencing phase. The Justice indicated that the identity of the victim is relevant in sentencing decisions under 18 U.S.C. §§ 351, 1111, and 1751, which authorize the death sentence for anyone who assassinates the head of a governmental agency, a Member of Congress, a Supreme Court Justice, a Cabinet Official, a Congressman, and the Vice President or President of the United States. Justice White concluded that these statutes reflect Congress' recognition that the harm caused by the defendant in committing certain crimes may dictate whether the defendant receives the death sentence.

According to Justice White, other reasons also exist supporting jury consideration of victim impact statements in capital cases. One reason Justice White raised is the states' valid interest in rebutting mitigating evidence submitted by the defendant. Justice White noted that each state's interest in capital punishment proceedings is particularly strong because the victim is an individual who also has rights, and society may suffer a loss because of the victim's death. The victim impact statement, Justice White claimed, provides useful information regarding aggravating circumstances needed to counter the mitigating circumstances in favor of the defendant. Furthermore, Justice White dismissed the majority's concerns over the prospect of a "mini-trial" on the victim's personality, resulting from the submission of aggravating and mitigating circumstances, as purely speculative because no such "mini-trial" occurred at the trial court.

Finally, Justice White denounced the majority's declaration that all victim impact statements admitted during the sentencing phase were unconstitutional per se. Justice White indicated that, while the victim impact statement in Booth stated that the victims' family did not believe the defendant could be rehabilitated, not all victim impact statements contain such prejudicial opinions. Therefore, Justice White contended that the admissibility of victim impact statements should turn upon the content and the degree of prejudice elicited by the statements rather than their status as victim impact statements.

118. Id.
119. Id. at 516-17 nn.1 & 2.
120. Id. at 516-17.
121. Id. at 517.
122. Id.
123. Id.
124. See supra notes 105-08 and accompanying text.
125. Booth, 482 U.S. at 518.
126. Id. at 518-19.
127. Id.
128. Id.
Also dissenting, Justice Scalia\(^{129}\) focused on the degree of harm caused by the defendant and the relationship of the harm caused by the defendant to the "personal responsibility and moral guilt"\(^{130}\) of the defendant. Justice Scalia disputed the majority's claim that all death sentences are imposed based on moral guilt.\(^{131}\) Rather, the Justice stated that such sentences are imposed based on personal responsibility.\(^{132}\) According to Justice Scalia, personal responsibility is directly proportional to the amount of harm caused.\(^{133}\) Therefore, Justice Scalia argued that the Court should consider the harm caused by the defendant in Booth, namely, the effect of the murders on the victims' family.

Justice Scalia also asserted that the present capital punishment procedure is unfair in its focus on protecting the defendant without allowing the victim or the victim's family to express the nature and degree of harm caused by the defendant.\(^{134}\) Thus, Justice Scalia called for greater consideration of "victims' rights"\(^{135}\) to counter the defendant-oriented nature of capital punishment proceedings.\(^{136}\)

IV. The Status of Victim Impact Statements After Booth

Lower courts have interpreted the Booth v. Maryland decision regarding the admissibility in sentencing decisions of information relating to the victim in various ways.\(^{137}\) In People v. Ghent,\(^{138}\) the defendant was sentenced to

\(^{129}\) Chief Justice Rehnquist and Justices White and O'Connor joined Justice Scalia's dissent. Id. at 519 (Scalia, J., dissenting).

\(^{130}\) Id. (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)); see supra notes 62-68 and accompanying text.

\(^{131}\) Booth, 482 U.S. at 519.

\(^{132}\) Id. at 519-20.

\(^{133}\) Id.; see also Tison v. Arizona, 481 U.S. 137, 152, 157-58 (1987) (the death sentence is appropriate for major participation in felony murder because of personal responsibility for harm caused); see infra notes 194-95, 201-04, 245-50 and accompanying text.

\(^{134}\) Booth, 482 U.S. at 519-20.

\(^{135}\) Id. at 520. Justice Scalia stated, "Recent years have seen an outpouring of popular concern for . . . 'victims' rights'—a phrase that describes what its proponents feel is the failure of courts of justice to take into account . . . the amount of harm [the defendant] has caused to innocent members of society." Id.; see also O'Neill, The Good, the Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review, 75 J. CRIM. L. & CRIMINOLOGY 363 (1984) (examining the effects of expanded roles for "victims' rights" organizations on the criminal justice system). O'Neill states that victims' rights movements have multiplied in the past years with organizations such as Mothers Against Drunk Drivers, Crime Victims Legal Advocacy Institute, and the Guardian Angels. This movement has pushed state and federal governments to adopt programs creating more opportunities for victims to participate in criminal prosecutions. Id. at 369-71.

\(^{136}\) Booth, 482 U.S. at 520-21.

death for first degree murder and other related crimes. The defendant appealed to the Supreme Court of California contending, *inter alia*, that the prosecutor, during the sentencing phase, acted improperly in referring to the impact of the victim’s death upon the victim’s family. According to the court, “the prosecutor . . . merely observed that [the victim’s] death will ‘leave something precious missing from her family and her friends, her husband, for [sic] everyone. It’s something that can never be replaced for a moment’s pleasure on [the defendant’s] part.’” The court asserted that the comments were “brief and mild” and differed from the “lengthy and specific details regarding the actual impact on the victim’s family” that were present in *Booth*. The court, affirming the conviction, concluded that the prejudicial effect of the comments was “minimal or nonexistent.”

Similarly, the Supreme Court of Illinois, in *People v. Jones*, affirmed the death sentence of a defendant convicted of murder, attempted murder, armed robbery, and other related crimes. The defendant appealed the conviction by the circuit court on several grounds, including the contention that the trial judge improperly considered victim impact information when imposing the sentence. The court distinguished the victim impact statement in *Booth* from the information the trial judge considered in *Jones*, and stated that the Court in *Booth* realized that information such as the injuries to the victim’s husband, which “related ‘directly to the circum-

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138. 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987), cert. denied, 485 U.S. 929 (1988); see also People v. Rich, 45 Cal. 3d 1036, 1089-90, 755 P.2d 960, 993-94, 248 Cal. Rptr. 510, 543-44 (1988) (prosecutor’s statements made during closing arguments did not constitute reversible error under *Booth* because no evidence was introduced regarding the impact of the victim’s death), cert. denied, 488 U.S. 1051 (1989); Daniels v. State, 528 N.E.2d 775, 782 (Ind. 1988) (prosecutor’s statements during closing argument in the sentencing phase did not violate *Booth* because the prosecutor only commented on evidence concerning the victim’s family relationship which had been introduced during the guilt phase of the trial), vacated, 109 S. Ct. 3182 (1989), aff’d on remand, 561 N.E.2d 487 (1990) (acknowledging that prosecutor’s statements present a potential issue under *Gathers*, but refusing to apply *Booth* and *Gathers* retroactively because of Indiana’s statutory capital sentencing scheme).
139. *Ghent*, 43 Cal. 3d at 748, 739 P.2d at 1255, 239 Cal. Rptr. at 87.
140. *Id.* at 771-72, 739 P.2d at 1271-72, 239 Cal. Rptr. at 103-04.
141. *Id.* at 772, 739 P.2d at 1271, 239 Cal. Rptr. at 103.
142. *Id.* (emphasis in original).
143. *Id.* at 772, 780, 739 P.2d at 1271, 1277, 239 Cal. Rptr. at 103-04, 109.
145. *Id.* at 393, 428, 528 N.E.2d at 651, 667.
146. *Id.* at 423, 528 N.E.2d at 665.
147. *Id.* at 424-26, 528 N.E.2d at 665-66. In *Jones*, the victim impact statement was a brief, one page account describing the victim’s husband’s physical injuries, psychological treatments, medical expenses, and living arrangements, as well as a statement by the husband on the loss of his wife. *Id.* at 425, 528 N.E.2d at 665.
stances of the crime," might be admissible at the sentencing phase.\textsuperscript{148} In affirming the death sentence, the court concluded that the trial judge's consideration of the victim impact statement was not in violation of Booth or the defendant's eighth amendment rights.\textsuperscript{149}

Not all courts, however, have read Booth so narrowly. In State v. Gathers,\textsuperscript{150} the South Carolina Supreme Court reversed the death sentence of a defendant convicted of murder and first degree criminal sexual conduct.\textsuperscript{151} One of the grounds on which the defendant appealed the lower court's conviction was that the prosecution, during the sentencing phase, violated the defendant's eighth amendment rights by reciting at length the contents of a prayer card and referring to a voter registration card found on the victim's body.\textsuperscript{152} Although the prayer and voter registration cards were not the same as victim impact statements, the defendant argued that the victim-related information was similar to the victim impact statements rejected in Booth.\textsuperscript{153} To resolve the confusion in the lower courts over the admissibility of victim-related information, the United States Supreme Court granted certiorari in South Carolina v. Gathers.\textsuperscript{154}

\vspace{1em}

V. \textit{SOUTH CAROLINA V. GATHERS: THE APPLICATION OF BOOTH V. MARYLAND TO VICTIM-RELATED INFORMATION IN CAPITAL CASES}

In \textit{South Carolina v. Gathers},\textsuperscript{155} the Supreme Court addressed the admissibility of victim-related information in light of the Court's precedent regarding victim impact statements. In \textit{Gathers}, Richard Haynes, a self-proclaimed minister with a prior history of mental problems was attacked in a park by Demetrius Gathers and three of Gathers' friends.\textsuperscript{156} Gathers and his friends assaulted Haynes after Haynes refused to speak to Gathers.\textsuperscript{157} Gathers and one of his friends then searched Haynes' belongings to steal something.\textsuperscript{158} Haynes had several bags of religious items with him which

\begin{itemize}
  \item \textsuperscript{148} Id. at 425, 528 N.E.2d at 666 (quoting Booth v. Maryland, 482 U.S. 496, 507 n.10 (1987)).
  \item \textsuperscript{149} Id. at 425-26, 528 N.E.2d at 666.
  \item \textsuperscript{151} Id. at 478, 369 S.E.2d at 141.
  \item \textsuperscript{152} Id. at 482, 369 S.E.2d at 143-44.
  \item \textsuperscript{153} Id. at 482-84, 369 S.E.2d at 144.
  \item \textsuperscript{154} 488 U.S. 888 (1988).
  \item \textsuperscript{155} 490 U.S. 805 (1989).
  \item \textsuperscript{156} Id. at 806-07 (majority opinion); id. at 814-15 (O'Connor, J., dissenting).
  \item \textsuperscript{157} Id. at 807 (majority opinion); id. at 815 (O'Connor, J., dissenting).
  \item \textsuperscript{158} Id. at 815 (O'Connor, J., dissenting).
\end{itemize}
the attackers scattered on the ground during the attack.\textsuperscript{159} After knocking Haynes unconscious, Gathers' friends left, but Gathers stayed and continued to assault Haynes. Later, Gathers returned with a friend and stabbed Haynes to death.\textsuperscript{160}

At the trial before the General Session Court of Charleston County, South Carolina, witnesses testified that Haynes was a religious person, carried various religious items with him, and frequently spoke with people about religion.\textsuperscript{161} All of the religious items on Haynes at the time of the attack were introduced into evidence without objection at both the guilt and sentencing phases of the trial.\textsuperscript{162} The jury returned a verdict of guilty for the murder and sexual assault of Haynes.\textsuperscript{163} In his closing argument during the sentencing phase of the trial, the prosecutor read the contents of one of the prayer cards on Haynes' body at the time of the murder and referred to Haynes' voter registration card.\textsuperscript{164} The prayer card, entitled the "Game Guy's Prayer,"\textsuperscript{165} equated life with a sports game and asked God to grant the "player" the strength to handle adversities.\textsuperscript{166} The prosecutor then used the information to portray the victim as a religious, civic minded citizen.\textsuperscript{167} Based on the evidence introduced at sentencing, the jury recommended the death sentence for Gathers.\textsuperscript{168}

Gathers appealed the decision to the Supreme Court of South Carolina.\textsuperscript{169} He contended that the prosecution's reading of the contents of the prayer card and the references to the voter registration card during the sentencing decision of his trial violated his eighth amendment rights as interpreted by the United States Supreme Court in \textit{Booth}.\textsuperscript{170} The Supreme Court of South Carolina found that the prosecutor's closing argument at the sentencing phase violated Gathers' eighth amendment rights.\textsuperscript{171} Specifically, the court concluded that the reading of the prayer card and referencing the voter re-

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 816 (O'Connor, J., dissenting); State v. Gathers, 295 S.C. 476, 478, 369 S.E.2d 140, 141 (1988).
\textsuperscript{164} South Carolina v. Gathers, 490 U.S. at 808-10.
\textsuperscript{165} Id. at 808; State v. Gathers, 295 S.C. at 482-83, 369 S.E.2d at 143-44.
\textsuperscript{166} South Carolina v. Gathers, 490 U.S. at 809; State v. Gathers, 295 S.C. at 482-83, 369 S.E.2d at 143-44.
\textsuperscript{167} South Carolina v. Gathers, 490 U.S. at 808-10.
\textsuperscript{168} Id. at 816 (O'Connor, J., dissenting); State v. Gathers, 295 S.C. at 476, 369 S.E.2d at 141.
\textsuperscript{169} State v. Gathers, 295 S.C. at 476, 369 S.E.2d at 141.
\textsuperscript{170} Id. at 482-84, 369 S.E.2d at 143-44.
\textsuperscript{171} Id.
gistration card focused the sentencer on the personal characteristics of the victim, when the focus of the sentencing should have been on Gathers.\textsuperscript{172} The United States Supreme Court granted certiorari to determine whether victim-related information, as opposed to victim impact statements, was admissible during the sentencing phase of Gathers' trial.\textsuperscript{173}

\textbf{A. The Court's Opinion: Restricting the Admissibility of Victim-related Information}

In \textit{Gathers}, the prosecution argued that the contents of the prayer card and the voter registration card were admissible because they "relate[d] directly to the circumstances of the crime."\textsuperscript{174} The United States Supreme Court affirmed the decision of the Supreme Court of South Carolina. In a concise opinion,\textsuperscript{175} the majority held that the contents of the prayer card and voter registration card were inadmissible in the sentencing proceeding.\textsuperscript{176} The Court noted that its decision in \textit{Booth} left open the issue of whether victim impact statements and victim-related information are admissible if they "relate[d] directly to the circumstances of the crime."\textsuperscript{177} Nevertheless, the Court concluded that while the cards may be relevant, the contents of the cards could not have been "relevant to the 'circumstances of the crime' " because the defendant did not read the cards.\textsuperscript{178}

The majority began its analysis by asserting that, during the sentencing phase of the capital punishment proceeding, the jury must focus only on evidence and information "related to the moral culpability of the defendant."\textsuperscript{179} In addition, the Court stated that capital sentences must be imposed in a manner proportional to the "defendant's blameworthiness."\textsuperscript{180} The \textit{Gathers} Court determined that the prayer card and the voter registration card were relevant to the circumstances of the crime.\textsuperscript{181} The Court went on, however, to state that the \textit{contents} of the cards did not directly

\begin{footnotesize}
\textsuperscript{172} South Carolina v. Gathers, 490 U.S. at 816 (O'Connor, J., dissenting) (citing State v. Gathers, 295 S.C. at 482, 369 S.E.2d at 143).
\textsuperscript{173} \textit{Id.} at 810-12.
\textsuperscript{174} \textit{Id.} at 811 (quoting \textit{Booth v. Maryland}, 482 U.S. 496, 507 n.10 (1987)).
\textsuperscript{175} Aside from the facts that the Court discusses, the majority opinion's actual analysis is less than 3 pages in the United States Reports. \textit{Id.} at 810-12.
\textsuperscript{176} \textit{Id.} at 812. Justices White, Marshall, Blackmun, and Stevens joined Justice Brennan's opinion. \textit{Id.} at 805.
\textsuperscript{177} \textit{Id.} at 811 (quoting \textit{Booth v. Maryland}, 482 U.S. 496, 507 n.10 (1987)).
\textsuperscript{178} \textit{Id.} at 811.
\textsuperscript{179} \textit{Id.} at 810.
\textsuperscript{181} South Carolina v. Gathers, 490 U.S. at 811.
\end{footnotesize}
relate to the crime itself because the defendant had not read the cards. The Court supported its assertion on the basis that the defendant probably lacked knowledge of the contents of the cards at the time of the crime. Because the crime occurred at night, and the defendant only sifted through Haynes' belongings, the Court determined that it was improbable that Gathers saw the contents of the cards. The Court concluded that the contents of the prayer and registration cards and the inferences about the victim that the prosecution drew from the cards were not relevant to the commission of the crime and, therefore, not admissible during the sentencing phase.

The Court also found the contents of the cards irrelevant because they failed to provide any probative information regarding the moral culpability of the defendant. The majority claimed that allowing the jury to consider this information "could result in [the jury] imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." Accordingly, because the reading of the contents of the cards was sufficiently similar to a description of the victim's personal characteristics—one of the types of victim impact statements declared inadmissible in Booth—the Court held the contents of the cards inadmissible.

B. Justice O'Connor's Dissent: The Eighth Amendment Requires Consideration of Victim-Related Information

Justice O'Connor, writing one of the two dissents issued in Gathers, noted the confusion in the lower courts regarding the proper interpretation of Booth, and her willingness to overturn Booth. Justice O'Connor also argued, however, that the Court did not have to overturn Booth to allow the sentencer to consider the information in Gathers because the information in question in Booth and Gathers was different in nature. According to Justice O'Connor, the information in Gathers consisted of statements made by
the prosecution about the victim at the sentencing phase, while the information in *Booth* consisted of statements made by the victim's family about the harm caused to them.\(^{192}\) Therefore, Justice O'Connor advocated a narrow interpretation of both the eighth amendment and *Booth* with regard to the admissibility of victim-related information, and thus would have allowed the sentencer to consider the victim-related information during the sentencing phase.\(^{193}\)

Justice O'Connor favored a narrow interpretation of the eighth amendment because "‘the penalty imposed in a capital case [must] be proportional to the harm caused and the defendant’s blameworthiness.’"\(^{194}\) Justice O'Connor implied that a narrow interpretation of the eighth amendment comported with the proportionality requirement under the retribution rationale of sentencing because both the harm caused by the defendant to the victim and the victim's family, and the defendant's blameworthiness were relevant to the sentencing decision.\(^{195}\)

Justice O'Connor then criticized the present sentencing system as being one-sided because the sentencer routinely considers information unrelated to the crime when analyzing a defendant's background for mitigating circumstances, yet is prevented from considering similar information regarding the victim's background.\(^{196}\) Justice O'Connor acknowledged that, in accord with the eighth and fourteenth amendments, the sentencer must take into account "‘as a mitigating factor, any aspect of a defendant’s character or record . . . that the defendant proffers as a basis for a sentence less than death’"\(^{197}\) because the sentencer's decision is so "profoundly moral" and reflective of the "moral judgment of the community regarding the proper penalty to be inflicted."\(^{198}\) According to the Justice, however, some of the

\(^{192}\) *Id.* at 814.

\(^{193}\) *Id.* In addressing the impact of *Booth* on the scope of the eighth amendment, Justice O'Connor noted that under a broad interpretation of the eighth amendment, almost all information relating to the victim would be inadmissible during the sentencing phase. *Id.* In contrast, Justice O'Connor asserted that under a narrow interpretation of the eighth amendment, information relating to the victim would be admissible during the sentencing phase. *Id.; see Mills v. Maryland*, 486 U.S. 367, 398 (1988) (Rehnquist, C.J., dissenting) ("I do not interpret *Booth* as foreclosing the introduction of all evidence, in whatever form, about a murder victim.").


\(^{195}\) *Id.*

\(^{196}\) *Id.* at 817-18; *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (eighth amendment requires the court to consider the characteristics and record of the defendant as well as the circumstances of the crime in capital punishment proceedings).

\(^{197}\) *Gathers*, 490 U.S. at 817 (O'Connor, J., dissenting) (quoting *Lockett*, 438 U.S. at 604) (emphasis omitted).

\(^{198}\) *Id.* at 817.
information proffered by defendants is extraneous to the crimes committed by the defendants.\textsuperscript{199} Therefore, Justice O'Connor asserted that, because the sentencing decision is so moral and the sentencer considers all mitigating circumstances in favor of the defendant, the sentencer should also consider information proffered by the victim or the victim's family as a basis for a stronger punishment regardless of whether the information is directly relevant to the circumstances of the crime.\textsuperscript{200}

Justice O'Connor also argued that the sentencer should consider the harm caused by the defendant to the victim and the victim's family because society has long relied on the notion of retribution in reaching a just punishment.\textsuperscript{201} The Justice relied on Supreme Court precedent to state that the harm caused by the defendant in \textit{Gathers} was a component properly used to determine the defendant's culpability.\textsuperscript{202} Further, Justice O'Connor argued that, generally, the appropriateness of the imposition of the death sentence increases with the amount of harm done to the victim and the victim's family.\textsuperscript{203} Therefore, Justice O'Connor stated that, because the jury renders a "moral judgment" for society when sentencing a defendant, the harm caused by the defendant is a normal and relevant factor for the jury to consider in determining the appropriate sentence despite the possibility that the jury may become inflamed.\textsuperscript{204}

Justice O'Connor went on to refute Gathers' claim that the prosecutor's reading of the contents of the cards at the sentencing phase may have enticed the jury to impose the death sentence on impermissible grounds, such as the

\textsuperscript{199} Id.
\textsuperscript{200} Id. at 817-18, 820-21.
\textsuperscript{201} Id. at 818; see also \textit{Gregg} v. Georgia, 428 U.S. 153, 183 (1976) (capital punishment serves both the retribution and deterrence goals of sentencing); \textit{Ogletree}, \textit{supra} note 45, at 1940-41 (discussing the role of retribution versus rehabilitation in federal sentencing guidelines); \textit{Schulhofer}, \textit{supra} note 99, at 1514-17 (discussing the role of retribution in sentencing); Comment, \textit{supra} note 10, at 212-14 (discussing moral and social retribution); Note, \textit{supra} note 8, at 309-11 (harm caused by defendant is a factor in determining restitution); Note, \textit{Victim Restitution in the Criminal Process: A Procedural Analysis}, 97 Harv. L. Rev. 931 (1984) (criminal law considers societal and individual harm to fulfill the sentencing goals of retribution and restitution).
\textsuperscript{202} \textit{Gathers}, 490 U.S. at 818-20 (O'Connor, J., dissenting). In \textit{Tison} v. Arizona, 481 U.S. 137 (1986), the Court held that the sentencer may impose the death penalty based upon a "reckless indifference to the value of human life" which later results in death to the victim. \textit{Id.} at 157. In addition, the defendants "subjectively appreciated that their acts were likely to result in the taking of innocent life." \textit{Id.} at 152. But, the sentencer can only impose the death sentence where the "reckless indifference" later led to a loss of life, or a great amount of harm caused. In this case, the harm caused by the defendant was great because the victims were murdered. Therefore, the Court held that the death sentence may be appropriate. \textit{Id.} at 157-58.
\textsuperscript{203} \textit{Gathers}, 490 U.S. at 818-19 (O'Connor, J., dissenting).
\textsuperscript{204} \textit{Id.} at 819-20.
victim's religion, race, or political affiliation. Justice O'Connor first stated that a search of the record was necessary for "any allegedly erroneous or improper remarks [that] so infected the entire proceedings with unfairness as to render the resulting sentence a denial of due process." Then, Justice O'Connor noted that the prayer card and the voter registration card were already in evidence without objection, and that the jury would be able to read the prayer card anyway. Therefore, Justice O'Connor concluded that the reading of the cards constituted harmless error, and thus, a remand to the Supreme Court of South Carolina was the best alternative for determining whether the jury relied on impermissible grounds in the sentencing decision.

In concluding her dissent, Justice O'Connor stated that there is nothing in the eighth amendment requiring the victim to be a "faceless stranger," nor forbidding the sentencer from considering the harm caused by the defendant to the victim and the victim's family in capital cases. Noting that the eighth amendment prevents the imposition of cruel and unusual punishment, Justice O'Connor contended that the introduction of the contents of the prayer card and voter registration card did not cause the jury to render such a sentence.

C. Justice Scalia's Dissent: Harm Caused by the Defendant is a Relevant Jury Consideration

Justice Scalia, writing a separate dissent, began by stating that Booth was wrongly decided, and that the Supreme Court should overrule that decision. Justice Scalia urged the Court to overrule Booth because he could not see a recognizable distinction, for eighth amendment purposes, between information relating to the harm to the victim and the victim's family, and information relating to the personal characteristics of the victim. Therefore, Justice Scalia argued that courts should not attempt to distinguish be-

205. Id. at 821-22.
206. Id. at 822.
207. Id.
208. Id. Further, Justice O'Connor stated that the Supreme Court of South Carolina was the most appropriate forum to address Gathers' contention that his death sentence violated United States Supreme Court precedent because Gathers was not provided an opportunity to rebut the victim-related evidence. Id. at 822-23.
209. Id. at 821.
210. Id. at 820-21.
211. No Justices joined Justice Scalia's dissent. Id. at 823-25 (Scalia, J., dissenting).
212. Id. at 823-24.
213. Id. To illustrate this point, Justice Scalia gave the example of a victim who was a model husband and father. In this example, the courts, according to Justice Scalia, would have difficulty in discerning whether the description of the victim, as a husband and father,
between a description of the victim's personal characteristics, and the harm caused by the defendant to the victim and the victim's family for eighth amendment purposes. 214

Confronting the issue of overruling such a recent decision, 215 Justice Scalia noted that the Court was more likely to overrule a prior decision after a change in the Court's composition. 216 Moreover, because Booth was a decision based upon the "evolving standards of decency," Justice Scalia urged the Court to overrule Booth, sooner rather than later, to prevent Booth from becoming embedded in state and federal law. 217 Justice Scalia asserted that Booth must be overruled immediately to prevent legislators from tailoring laws to comply with the erroneous decision, and to disrupt the development of a societal consensus supporting the erroneous decision. 218 As Justice Scalia pointed out, once laws are modified and a new consensus is formed, action by the Court to overturn the decision would be less likely to succeed. 219

VI. THE EXTENSION OF BOOTH V. MARYLAND TO SOUTH CAROLINA V. GATHERS AND CAPITAL PUNISHMENT PROCEEDINGS

Precedent and stare decisis play important roles in the United States' legal system. 220 The courts rely on these principles to protect rights accruing under judicial decisions and to promote security and certainty. 221 Nevertheless, where a field of law is unsettled, as with the admissibility of victim-related information in capital cases, many issues remain undecided. The Court's decision in Gathers implicates, yet leaves unsettled, a myriad of issues, including the differentiation between admissible and inadmissible victim impact statements and victim-related information, the consideration of the harm caused by the defendant to the victim and the victim's family in capital cases, and the future of the victim's role in capital cases.

relates to the victim's personal characteristics or to the harm caused to the victim's family by the loss of such an individual. Id.

214. Id.

215. The United States Supreme Court decided Booth two years before Gathers.

216. Gathers, 490 U.S. at 824-25 (Scalia, J., dissenting).

217. Id. at 824 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

218. Id. at 824-25.

219. Id. Justice Scalia also referred to one of Justice Douglas' works which notes that a judge must uphold the Constitution and not the "'gloss which his predecessors may have put on it.'" Id. at 825 (quoting Douglas, Stare Decisis, 49 COLUM. L. REV. 735, 736 (1949)).

220. BLACKS LAW DICTIONARY 1176, 1406 (6th ed. 1990). Precedent is defined as the attempt by courts "to decide cases on the basis of principles established in prior cases." Id. at 1176. Stare decisis is the "[p]olicy of courts to stand by precedent and not to disturb settled point." Id. at 1406.

221. Id. at 1406.
A. Not All Victim Impact Statements and Victim-related Information are Detrimental to Capital Punishment Proceedings

In Gathers, the Supreme Court extended the Booth holding, which prohibited the introduction of victim impact statements, to include prohibiting the introduction of all victim-related information during the sentencing phase. The Gathers Court took the easy way out by not thoroughly analyzing the difficulties that victim-related information raises regarding a defendant's eighth amendment rights. In Booth, the victim's family and the Maryland Division of Parole and Probation composed the victim impact statement. The victim impact statement described the impact of the murders on the family, and the family's belief that the defendant could not be rehabilitated. In Gathers, the information included a prayer card and a voter registration card. The contents of these cards did not describe the impact of the crime on the victim or on the victim's family, nor did they declare that the defendant could not be rehabilitated. Instead, the contents of the cards constituted information that gave the court a "'glimpse of the life'... [the] defendant 'chose to extinguish.'" The information in Gathers did not contain the unfairly prejudicial and emotional statements present in Booth. Nevertheless, the Court declared the information in Gathers sufficiently similar to that in Booth, and drew a deceptive comparison between apples and oranges.

By eliminating this victim-related information from the sentencer's consideration, the Gathers decision contributes to the one-sided nature of capital punishment proceedings. The Court repeatedly allows the admission of information relating to the defendant's background without equal regard for the victim's background. The sentencer must consider information relating to the defendant's background that is irrelevant to the circumstances of the crime as a mitigating factor. Yet, the Supreme Court concluded in Gathers that the sentencer should not consider victim-related information that is irrelevant to the circumstances of the crime because of the possibility

222. Gathers, 490 U.S. at 810-12.
224. Id. at 512-13.
225. Gathers, 490 U.S. at 808-10.
227. Id. at 817 (O'Connor, J., dissenting); see supra notes 196-200 and accompanying text.
that this information might be unfairly prejudicial. This conclusion is unfortunate because an informed and individualized sentencing determination requires consideration of information relating to the backgrounds of both the defendant and the victim. Moreover, such an individualized determination is especially necessary in the imposition of the death sentence because the death sentence is so "unique in its severity and irrevocability," and is such a "profoundly moral [decision] . . . reflect[ing] the moral judgment of the community."

The Supreme Court's trend toward focusing exclusively on the defendant's background in sentencing decisions is contrary to the movement in the United States Congress and most state legislatures to broaden the use of victim impact statements in sentencing decisions. Congress and many state legislatures implicitly focus on victim characteristics in enacting laws extending the imposition of the death sentence for crimes where the victim is the President of the United States, a policeman, or someone holding a delineated governmental position. This legislative movement is indicative of the public's support for judicial consideration of the personal characteristics of the victim and the victim's family in capital punishment proceedings. Although the legislature has spoken regarding the proper consideration of victim-related information, and the Court traditionally defers to the legislature on matters related to sentencing, the Court has rejected the use of victim-related information based on its reading of constitutional limitations.

The constitutional limitations on the Court's deference to the legislature, with respect to sentencing procedures, arise from the Court's concern that sentencing procedures be consistent with the eighth amendment. In Booth, the Court declared victim impact statements inadmissible because of


231. McLeod, supra note 8, at 506-07. "Two lives—the defendant's and the victim's—are profoundly affected by a criminal sentence. The court cannot make an informed decision on a just punishment if it hears from only one side." Id. (quoting President's Task Force on Victims of Crime, Victims of Crime (1982)).


234. Booth, 482 U.S. at 516-17 nn.1 & 2 (1987) (White, J., dissenting); see supra notes 9, 10, 113-16 and accompanying text.

235. Booth, 482 U.S. at 517 n.2 (White, J., dissenting); see supra note 119 and accompanying text.

236. Booth, 482 U.S. at 502 (citing California v. Ramos, 463 U.S. 992, 1000-01 (1983)). In Gregg v. Georgia, the Court stated, "The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" 428 U.S. 153, 176 (1976) (citation omitted) (quoting Gore v. United States, 357 U.S. 386, 393 (1958)).

the possibility that using such statements would lead to arbitrary and capricious sentencing decisions which constitute cruel and unusual punishment under the eighth amendment.\textsuperscript{238} The Court then extended this reasoning to apply to the victim-related information in \textit{Gathers}.\textsuperscript{239} The elements in the victim impact statement in \textit{Booth} that gave rise to the possibility of an arbitrary and capricious decision, however, were not present in the information in \textit{Gathers}.\textsuperscript{240} For example, while the victim impact statement in \textit{Booth} described the effects of the murders upon the upcoming wedding in the family and the daily routine of the victims' family as well as the viciousness of the murders,\textsuperscript{241} the victim-related information in \textit{Gathers} contained only a prayer and voter registration card. If the Court continues to apply \textit{Booth} in the same fashion that it applied the decision in \textit{Gathers}, the Court will likely declare even more factual accounts of the victim inadmissible as being violative of the defendant's eighth amendment rights.\textsuperscript{242}

An alternative to the Court's decision to declare unilaterally all victim impact statements and victim-related information inadmissible is to evaluate the admissibility of such statements and information based on the content of the statement or information. If a victim impact statement advocates a particular punishment or gives an opinion concerning the defendant's ability to contribute to society, under \textit{Booth} the statement would be declared inadmissible. When a victim impact statement only describes the personal characteristics of the victim, the impact of the crime, and the harm caused by the defendant, however, the statement could be relevant to a sentencer's decisionmaking and, thus, should be admissible. Allowing the sentencer to consider only the latter type of victim impact statements provides the sentencer with an opportunity to weigh the impact of the defendant's behavior without causing the sentencer to be prejudicial to the defendant. This permits the sentencer to make a more informed and individualized sentencing determination and reduces the one-sided nature of the current sentencing process.\textsuperscript{243} This content-based alternative presents a compromise between the proponents and opponents of the admissibility of victim impact statements in capi-

\footnotesize
\textsuperscript{238} Id. at 508-09.
\textsuperscript{240} \textit{See supra} notes 89-90, 100-04, 161-68, 187-89, 205-08 and accompanying text.
\textsuperscript{241} \textit{Booth}, 482 U.S. at 511-13.
\textsuperscript{242} \textit{Gathers}, 490 U.S. at 812-14 (O'Connor, J., dissenting). An example of a more factual account would be a preprinted form which requests information such as the victim's employment, income, and number of dependents. While this type of form would neither be opinionated, nor advocate a particular sentence for the defendant, the Court would likely declare the form inadmissible because it is not relevant to the defendant's background.
\textsuperscript{243} \textit{See supra} notes 196-200 and accompanying text.
B. The Consideration of the Harm Caused by the Defendant to the Victim and the Victim’s Family in Capital Punishment Proceedings

The harm caused to the victim and the victim’s family is a measurement of the damage caused by the defendant’s actions.245 Support for the sentencer’s consideration of such harm has fluctuated over the years.246 In the past, the courts required that the sentence fit the crime.247 Because the judicial system classified crimes according to the amount of harm caused, for example, attempted murder as opposed to first degree murder, the severity of sentences was implicitly tailored according to the amount of harm caused by the defendant.248 More recently, the courts have attempted to make the sentence fit the criminal.249 Support is increasing among the courts and legislatures, however, for a return to sentences based upon a weighing of the crime and the amount of harm caused by the defendant’s actions.250

Whether the sentencer should consider the harm caused by the defendant to the victim and the victim’s family during capital punishment proceedings is an issue which has divided the courts.251 Some lower courts contend that the defendant should be held accountable for the harm resulting from his actions. One reason these courts advance for considering the harm caused by the defendant is that such harm is considered in non-capital crimes.252

Nevertheless, other lower courts and commentators hold that sentencers en-

244. See Booth, 482 U.S. at 518-19 (1987) (White, J., dissenting). Justice White stated:
To the extent that the Court determines that in [Booth] it was inappropriate to allow the victims’ family to express their opinions on, for example, whether petitioner could be rehabilitated, that is obviously not an inherent fault in all victim impact statements and no reason to declare the practice of admitting such statements at capital sentencing hearings per se unconstitutional.

Id.

245. Nevares-Muniz, supra note 2, at 272-73, 278-79; Schulhofer, supra note 99, at 1498.

246. Ogletree, supra note 45, at 1940-42.

247. Id.

248. Id.; Schulhofer, supra note 99, at 1498-99.

249. Ogletree, supra note 45, at 1940-42.

250. Id.


252. See Booth, 482 U.S. at 516-17 (White, J., dissenting); Comment, supra note 10, at 207-10.
counter too much difficulty in adequately considering the degree of harm caused by the defendant.253

Allowing consideration of the harm caused by the defendant's actions in sentencing decisions may, in fact, deter crime.254 If a potential criminal knows that a particular sentence will increase in proportion to the amount of harm caused, that individual might be less likely to commit the more serious crime. Of course, this assumes that the criminal will weigh the various expected costs and benefits of particular criminal behavior, and will decide whether the expected costs, and the expected sentence, outweigh the expected benefits of the criminal behavior.255

Including the degree to which the defendant's actions have harmed the victim, the victim's family, and society may also increase prosecutorial efficiency and permit individuals to contribute, or at least feel as if they are contributing, to the sentencing process.256 Prosecutorial efficiency may increase with this revision because the victim and the victim's family would now have a role in the sentencing decision and would likely cooperate with the prosecutor.257 Harm is difficult to measure, however, especially between people of different religious, social, and economic classes.258 Therefore, levying an appropriate sentence based upon such information will be even more difficult. In addition, due to the irrevocable nature of capital punishment, courts are likely to hesitate to consider such a subjective factor in the sentencing process.259

253. *Gathers*, 490 U.S. at 823 (Scalia, J., dissenting); Comment, supra note 10, at 207-10. No objective standard exists for the measuring harm caused. Therefore, considering the harm caused during sentencing may lead to an arbitrarily imposed death sentence. Comment, supra note 10, at 208.

254. *Gathers*, 490 U.S. at 819-21 (O'Connor, J., dissenting). Punishment has a two-fold deterrence on crime: it prevents the convicted criminal from committing more crimes, and it deters other potential criminals. A. CAMPBELL, supra note 45, § 5, at 24; H. GROSS, supra note 46, at 394-400; Comment, supra note 10, at 215.

255. Comment, supra note 10, at 215; see supra note 46.

256. *Booth*, 482 U.S. at 520 (Scalia, J., dissenting). Justice Scalia stated that the rule in *Booth* was inappropriate because society clearly desires more attention to "victim's rights" as seen in the actions of the state legislatures. Therefore, this was not a question for the Court, but rather for the legislatures which are more likely to incorporate the views of the people. Id.; see also Comment, supra note 10, at 216 ("A victim may be more willing to cooperate to the fullest with the prosecution of the defendant if he knows he will have a role at sentencing.").

257. This cooperation makes the prosecutor more efficient and increases the probability that a punishment will be imposed. The potential criminal sees this increase in the probability of punishment as a higher expected cost of committing the crime, and therefore, is deterred. See Comment, supra note 10, at 216.

258. See supra notes 251-53 and accompanying text.

259. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Id.
C. The Future of the Victim’s Role in Capital Sentencing

The future of the prohibition of victim impact statements and victim-related information in capital sentencing depends on a number of factors, including the lower courts’ interpretation of Gathers,260 the composition of the Supreme Court, and state and federal legislative sentiment toward the admissibility of such statements.261 Because of possible changes in the Court and in legislation permitting victim-related information, the victim’s role in capital sentencing could become more significant.

1. Changes in Judicial Decisions

Before the United States Supreme Court decision in Gathers, the lower courts disagreed over whether to admit information regarding the victim’s personal characteristics in the capital sentencing phase.262 This confusion is likely to continue even after Gathers. Already, some lower courts have held a victim’s personal characteristics admissible when the probative value of the information outweighed its prejudicial effect, and when such characteristics were relevant to the circumstances of the crime.263 Other lower courts have held that the eighth amendment must be strictly applied as in Gathers,264 and that victim-related information is irrelevant to capital punishment proceedings.265 The reactions of the lower courts to the Booth and Gathers decisions demonstrate that some of the lower courts either do not fully understand the scope of Booth and Gathers, or do not agree with the reasoning of the Supreme Court in the two cases.

The composition of the Supreme Court is also important for determining the future use of victim impact statements and victim-related information in capital punishment proceedings. The Supreme Court in Booth and Gathers was split five to four against the introduction of victim-related information.266 Justices Powell and Brennan delivered the opinions of the Court in


260. See infra notes 262-65 and accompanying text.
261. See infra notes 271-73 and accompanying text.
262. See supra notes 137-54 and accompanying text.
263. People v. Carrera, 49 Cal. 3d 291, 336-37, 777 P.2d 121, 149, 261 Cal. Rptr. 348, 376 (1989) modified, 49 Cal. 3d 956 (1989), cert. denied, 110 S. Ct. 1938 (1990); see also State v. Laws, 325 N.C. 81, 104, 117-18, 381 S.E.2d 609, 622-23 (1989), vacated, 110 S. Ct. 1465 (1990). In Laws, the court upheld the prosecutor’s references to the victims as “alcoholics” and “street people,” which were made during the sentencing phase, on the grounds that the references were an “admonition to the jury to uphold the law, regardless of any prejudices it might have.” Laws, 325 N.C. at 104, 381 D.E. 2d at 622-23.
266. See supra notes 12, 24 and accompanying text.
Booth and Gathers, respectively. Since then, Justices Powell and Brennan have retired, and Justices Kennedy and Souter have been appointed to the Court. Chief Justice Rehnquist, and Justices O'Connor and Scalia dissented in both Booth and Gathers, and were joined by Justice White in Booth and Justice Kennedy in Gathers.267

The split decisions in Booth and Gathers reveal an ideological division in the Court between recently appointed Justices and senior Justices.268 With the appointment of Justice Souter to the Court and the Court's desire to reevaluate victim-related information269 the Court might pull back from the blanket prohibition advanced under Booth and Gathers.270

2. Changes in Legislation

The Victim and Witness Protection Act of 1982 provided victims with a greater role in the criminal justice system by acting as model legislation for state legislatures.271 The Act, among other things, amended the Federal Rules of Criminal Procedure to include victim impact statements as a part of the presentence report.272 While this Act was a significant step forward for

267. Justice White concurred in Gathers stating: "Unless Booth is to be overruled, the judgment below must be affirmed. Hence, I join Justice Brennan's opinion for the Court." South Carolina v. Gathers, 490 U.S. 805, 812 (1989) (White, J., concurring). Justice White might be saying that, although he believed the Court should overrule Booth, the majority of the Court disagreed, and his only alternative was to follow Court precedent. It is interesting that Justice White did not file a dissenting opinion or join in one of the dissenting opinions.

268. In Booth, the dissent was composed of justices appointed after 1971 with the exception of Justice White; Justice Stevens, appointed in 1975, joined the majority. In Gathers, the dissent was composed of justices appointed after 1971. Justice Stevens joined the majority. But see Powell, Myths and Misconceptions About the Supreme Court, in THE SUPREME COURT AND ITS JUSTICES 202, 206-07 (J. Choper ed. 1987) (Former Justice Powell stated that there are no "blocs" or "discords" among the justices); Goldwater, Political Philosophy and Supreme Court Justices, in THE SUPREME COURT AND ITS JUSTICES 222, 234-35 (J. Choper ed. 1987) (Former Senator Barry Goldwater stating that one cannot tell how a Justice will vote once appointed to the Court).


270. See Tribe, What Difference Can a Justice or Two Make?, in THE SUPREME COURT AND ITS JUSTICES 236-44 (J. Choper ed. 1987). Lawrence Tribe discussed the effect of a change in the composition of the court on five to four decisions. Tribe concluded that a change of only one justice will have an impact upon previous five-to-four decisions. He stated that appointing one justice at a time may make a difference, but the impact is usually both progressive and conservative depending upon the issues. In addition, a "catalytic" justice could take control of the Court, negating any effect the newly appointed justice may have. Id.

271. See supra notes 79-85 and accompanying text.

victims' rights, state and federal legislatures can do more to protect these rights.

In particular, future legislation, unlike the Act, could expressly state that the sentencer should consider victim-related information. Although the courts will probably hold such legislation unconstitutional, the courts might uphold the legislation on grounds that "appropriate sentencing considerations are 'peculiarly questions of legislative policy.'"\textsuperscript{273} To limit the chances of judicial nullification, future legislation should be carefully drafted, reducing the likelihood that victim-related information would inflame the sentencer, and cause the sentencer to render a decision based on caprice or emotion. For example, the legislation could specifically delineate what information the victim impact statement can contain, such as the victim's employment, income, and number of dependents. Whatever the form, legislation is necessary to further the rights of victims in the criminal justice system.

VII. CONCLUSION

The eighth amendment to the United States Constitution requires that a sentence be proportional to the crime committed and that an individualized sentencing determination be made by the sentencer in capital punishment proceedings. The courts must closely scrutinize the information that the sentencer considers in imposing the death sentence. The United States Supreme Court held in \textit{Booth v. Maryland} that victim impact statements are not admissible during the sentencing phase of capital punishment proceedings because the statements may lead the jury to impose a death sentence arbitrarily and capriciously. The Supreme Court in \textit{South Carolina v. Gathers} extended this holding to declare victim-related information inadmissible during the sentencing phase of capital punishment proceedings.

The Court grappled with numerous sensitive and difficult issues regarding victim impact statements and victim-related information in \textit{Booth} and \textit{Gathers}. Although the victim-related information at issue in \textit{Gathers} lacked some of the subjective and biased views found in the victim impact statement in \textit{Booth}, the Court considered the information inadmissible because the victim-related information did not focus on the defendant, and because the introduction of such information might lead to an arbitrary sentencing decision. For the same reasons, the Court was reluctant to include an evalu-

ation of the harm caused by the defendant to the victim and the victim’s family as a sentencing consideration.

While *Booth* and *Gathers* are not representative of the current actions taken by the federal and state legislatures, the Court followed closely the constitutional limitations on sentencing procedures under the eighth amendment. Despite the Court’s decision in *Gathers*, disagreement remains over the proper interpretation of the eighth amendment, and confusion exists among the lower courts concerning the admissibility of victim impact statements and victim-related information. In terms of judicial precedent, however, the Court has solidified its position against the admissibility of victim impact statements and victim-related information during the sentencing phase of capital punishment proceedings. Although victim impact statements and victim-related information could potentially contribute to capital punishment proceedings by allowing the sentencer to consider the victim in the sentencing process, the Court, at least for the present, has decided that the value of such information is overshadowed by the possibility of arbitrarily imposed death sentences.

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