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Reply to Paul Cassell: What We Know About Victim Impact Statements

Susan Bandes*

In a 1996 article,¹ I argued that victim impact statements do not belong in capital sentencing hearings.² Paul Cassell, in his paper for this Symposium,³ takes issue with my position. I hope that readers of Cassell's critique will read my 1996 article, since it addresses in detail most of the issues he raises. Specifically, the article asserts that in the sentencing phase, the jury has the duty to shift its gaze from the question of the defendant's guilt for a heinous murder to the question of whether *this particular heinous murderer* ought to be killed or spared. Victim impact statements interfere with the jury's ability to discharge its duty in several ways:

- They evoke emotions toward the defendant like rage, hatred, and a desire for undifferentiated vengeance that deflect a jury already sympathetic toward the prosecution from its difficult task of focusing on the defendant as an individual.⁴
- They exacerbate existing inequalities in the jury's attitudes toward the parties, based not only on the spillover effect from the guilt phase, but on the fact that the defendant generally comes from a very different background from the jury's. Thus, victim impact statements further skew, rather than level, the playing field.⁵
- Rather than help to heal victims, victim impact statements may actually disempower, dehumanize, and silence them, as well as encourage irrelevant or invidious distinctions about the comparative

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¹See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996).

²See *id. passim*.

³Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479.

⁴See Bandes, *supra* note 1, at 393–402.

⁵See *id.* at 402–05.

worth of different victims,⁶ based on the social position, articulateness, and race⁷ of the victims and their families.⁸

- Victim impact statements do not supplement existing information. Instead they serve to block the jury's ability to hear important counternarratives that they are duty-bound to consider when deciding whether to exercise mercy during the sentencing phase.⁹

I do not wish to revisit these arguments, and I cannot here respond to all of Cassell's criticisms in any detail. However, I would like to briefly address the empirical assertions he offers in support of his argument, as well as his methodology. Cassell argues that victim impact statements do not

⁶An article that Cassell cites describes, with apparent approval, exactly the scenario I fear. It advocates a cost-benefit formula to determine whether the costs of executing criminals are outweighed by the benefits of deterring crimes against possible future victims whose lives are of a value commensurate with the victim's. It posits a formula in which H stands for a low-value victim and $2H$ for a high value victim. The author gives, as an example of a high value victim, a mother with small children, and of a low value victim, a ninety-year-old man with incurable cancer. See David D. Friedman, *Should the Characteristics of Victims and Criminals Count?: Payne v. Tennessee and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 748-52 & n.50 (1993).

⁷Cassell claims that the "race of victim" effect disappears when important control variables are added. See Cassell, *supra* note 3, at 491 n.62. However, the Baldus studies concluded that the race of victim effect was pronounced in "midrange" (as opposed to extreme) cases, even when all legitimate variables were considered. Their conclusions are widely respected, and have also been replicated by several other respected researchers. See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 221-31 (1994) (discussing methodology of study); *id.* at 290 n.5 (citing other studies); RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 330-31 (1997) (discussing methodology); *id.* at 450-52 nn.51-53 (citing other studies). Cassell's dismissal of the Baldus studies' results rests on the comments of the district judge, Owen Forrester. (The appellate and Supreme Courts assumed the validity of the studies.) Kennedy notes that several distinguished specialists in applied statistics have characterized Judge Forrester's own statistical methodology as "uninformed," "indefensible," and "wrong," KENNEDY, *supra*, at 451 n.53, and "implicitly reject[ing] the value of all applied statistical analysis," *id.* at 332. Kennedy charges that Judge Forrester also displayed a "glaring, self-discrediting hostility to the . . . study." *Id.* at 331-32.

⁸See Bandes, *supra* note 1, at 405-08. Cassell argues that it does not violate notice principles to permit the defendant's sentence to hinge in part on such fortuities, since defendants now have notice that victim impact statements are likely to be introduced at sentencing. See Cassell, *supra* note 3, at 497 n.90. However, notice that a sentence may rest on pernicious factors does not cure the factors' perniciousness. It would not, for example, cure an equal protection problem to give defendants notice that they are more likely to receive death sentences if they or their victims are black, rather than white. Moreover, in the capital sentencing context, even aggravating factors that are permissible must be specified in advance, by the legislature. See Bandes, *supra* note 1, at 396 n.177.

⁹See *id.* at 408-10.

divert sentencers from their focus on the harm the defendant has caused and the defendant's moral culpability for that harm, and that in fact judges and juries cannot comprehend the full harm caused by a murder without hearing testimony from the surviving family members.¹⁰ He exhorts the reader to take the "simple test" of reading an actual victim impact statement from a homicide case to "see if you truly learn nothing new about the enormity of the loss caused by a homicide."¹¹ His argument is that victim impact statements will help us comprehend the harm caused by the defendant, and, it seems, that we should infer that they will help capital juries in the same way. He further argues that victim impact statements will not increase the incidence of death sentences, but will instead aid victims in the healing process.

As to the first argument, that capital juries will receive crucial information from victim impact statements, Cassell offers no empirical support. Instead he suggests the aforementioned "simple test." As to the second argument, that victim impact statements will not increase the incidence of death sentences, he does make empirical claims. As to the third argument, that victim impact statements aid victims in the healing process, he offers no empirical support. I will address each of these issues in turn.

I. THE "SIMPLE TEST" FOR EVALUATING VICTIM IMPACT STATEMENTS

The emotional power of victim impact statements given by the families and friends of murder victims is irrefutable. The question, however, ought to be whether the statements assist or interfere with the task capital jurors must perform. Cassell's "simple test" for readers is poorly designed to determine how actual capital jurors will react to hearing victim impact testimony during the sentencing phase, and whether their reactions will aid them in their difficult task. As Cassell recognizes, there is a big difference between being a mock juror and actually being faced with deciding whether another human being should live or die.¹² Whatever rage, sadness, heartbreak, and desire for vengeance these statements might evoke in us, these emotions will likely be

¹⁰See Cassell, *supra* note 3, at 490.

¹¹*Id.* at 488.

¹²See *id.* at 491 n.63 (citing Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 LAW & HUM. BEHAV. 185, 191 (1992)) ("[T]he very nature of the [death] penalty decision may render it an inappropriate topic for jury simulation studies."); see also Edith Greene, *The Many Guises of Victim Impact Evidence and Effects of Jurors' Judgments*, PSYCHOL. CRIME & LAW (forthcoming 1999) (citing difficulties in simulating the inordinately difficult decision whether to sentence to death). Presumably the difference would be even greater between a spectator reading a victim impact statement out of context and a capital juror.

exacerbated in the context of the capital sentencing jury, and indeed may overwhelm the jury's capacity to decide whether or not to exercise mercy.¹³ Capital jurors are not reading a victim impact statement out of context, as we are. Significant empirical evidence shows that capital jurors tend to be biased in favor of the prosecution,¹⁴ or even to have made a decision to vote for death, *prior to the beginning of the penalty phase*.¹⁵ This bias has several components. As a general matter, jurors are more likely to share life experiences and racial, ethnic, and status characteristics with the victim than with the capital defendant. In addition, they have just voted to convict the defendant of a heinous crime which they have heard about in "minute and graphic detail."¹⁶ Thus, they are likely to come into the sentencing hearing feeling empathy toward the victim, and fear and horror toward the defendant.¹⁷ These perspectives are made more pronounced by the fact that capital jurors are death qualified. There is evidence that both the demo-

¹³In the McVeigh case, the court permitted two full days of victim impact testimony from survivors of the bombing. During the testimony, "[e]very one of the jurors cried. Reporters found themselves hugging each other for solace, saying they couldn't take it any more." Beth E. Sullivan, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 *FORDHAM URB. L.J.* 601, 622 n.87 (1998) (quoting Peter Garner, *Empathy vs. Impartiality In the Courtroom: Victims Leave Lasting Impact on the System*, CHI. TRIB., June 15, 1997, at 1). Even the judge wept. One reporter said, after hearing the testimony of the mother of a little girl killed in the explosion: "It was at this very moment that it seemed inconceivable that the jury could do anything but sentence him to death—and that anything but vengeance would be the reason why." *Id.* at 622 n.85 (quoting Eric Pooley et al., *Death or Life? McVeigh Could Be The Best Argument For Executions, But His Case Highlights The Problems That Arise When Death Sentences Are Churned Out In Huge Numbers*, TIME, June 16, 1997, at 31. For an example of such a scenario in a lower profile case, see the discussion in Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 *AM. CRIM. L. REV.* 93, 116–17 (1997).

¹⁴See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 *IND. L.J.* 1043, 1098 (1995) (relating study that showed "jurors' responses present a picture of stark pro-prosecution one-sidedness").

¹⁵See *id.* at 1089–90 (showing that half of jurors in study had already decided on appropriate penalty once defendant was found guilty); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 *STAN. L. REV.* 1447, 1457–58 (1997) (same); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 *IND. L.J.* 1183, 1192–93 (1995) (stating that only 34% of jurors interviewed were undecided as to sentence before sentencing phase).

¹⁶Bowers, *supra* note 14, at 1071.

¹⁷See Bandes, *supra* note 1, at 400 (jury has much easier time making empathetic connection with victim than with defendant); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 *CORNELL L. REV.* 1, 7–8 (1993) ("Over three-quarters of the jurors believed that . . . the defendant would be dangerous in the future.").

graphic results of death qualification,¹⁸ and the process of death qualifying itself,¹⁹ create a jury more likely to sentence to death. All of these factors contribute to the difficulty of the jury's formidable task of humanizing the defendant and understanding his perspective at least for long enough to decide whether he should live or die.²⁰ When deciding whether victim impact testimony exacerbates this difficulty, we need to keep in mind the significant distinction between our own out-of-context emotional reactions and the duties and characteristics of capital juries. For evaluating the latter, Cassell's seductively "simple" test is a poor vehicle, and indeed a dangerously misleading one.

II. THE EMPIRICAL CLAIM THAT VICTIM IMPACT STATEMENTS DO NOT INCREASE THE INCIDENCE OF DEATH SENTENCES

Cassell similarly elides important distinctions in his evaluation of the empirical studies on the effects of victim impact statements. Cassell's central argument refuting my critique of [victim impact] statements is that "sentence severity has not increased following the passage of victim impact legislation,"²¹ and that it is therefore unclear why we should conclude that victim impact statements hamper the defense of capital defendants.²² This is a surprising assertion given Cassell's own statement just previously that the realizations prompted by the victim impact statements "undoubtedly will

¹⁸See *Lockhart v. McCree*, 476 U.S. 162, 196–97 (1986) (Marshall, J., dissenting) (noting that death-qualified juries are significantly more conviction-prone than other juries); Haney, *supra* note 13, at 1463 ("Death-qualified juries are less likely to share the racial and status characteristics . . . [of] capital defendants."); see also Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 *LAW & HUM. BEHAV.* 31, 46 (1984) (describing research finding that death-qualified juries are more likely to assume guilt before hearing any evidence and are less remorseful over wrongful convictions). See generally Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 *CORNELL L. REV.* 1176 *passim* (1973) (arguing that death-qualified juries are skewed toward conviction).

¹⁹See Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 *LAW & HUM. BEHAV.* 133, 134–35 (1984) (discussing mechanisms by which death qualification process itself increases jury's tendency to convict); Haney, *supra* note 14, at 1482 n.183 (discussing research showing that death qualification produces conviction-prone juries).

²⁰See *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (emphasizing jury's obligation to treat each capital defendant with "that degree of respect due the uniqueness of the individual" when determining proper sentence).

²¹Cassell, *supra* note 3, at 492.

²²See *id.*

hamper a defendant's efforts to escape a capital sentence.²³ Empirically, there is little post-*Payne* data on the effects of victim impact statements on capital juries,²⁴ but what there is indicates that, contrary to Cassell's empirical claim, victim impact statements in capital cases do increase the likelihood of a death sentence. One of the two studies of which I am aware on the topic states the following:

Social psychological theory and research support the general proposition that increased empathy, salience, perception of severity, and attribution of responsibility would heighten jurors' tendency to vote for death [F]eelings of empathy can lead to helping when that is an option, . . . but there is clearly no direct way for the jury to help the victim or the victim's family. An indirect way to help the victim's family, however, is to punish the defendant.²⁵

The study, which used mock jurors, found a dramatic increase in willingness to sentence to death among those exposed to victim impact statements. It found that fifty-one percent of those exposed to the statements voted for death, compared to only twenty percent of those not exposed.²⁶ The other study of capital jurors found that victim impact testimony establishing a victim as highly respectable would lead jurors to rate that victim as more

²³*Id.* at 490. It remains unclear whether Cassell is arguing that it would be acceptable for victim impact statements to increase the likelihood of a capital sentence, but that there is no empirical evidence showing such an effect, or if he is arguing that victim impact statements both do not and ought not increase the likelihood of a capital sentence, and instead are meant solely to promote the healing of victims. The latter position would be surprising, both in light of his above-mentioned statement, and in light of his previous arguments that prosecutorial power generally serves victims' best interests because effective prosecution is good for victims. See Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1393. Prosecutors arguably see victim impact statements as helpful in obtaining a death sentence, and indeed have sometimes refused to permit statements from survivors opposed to capital punishment. See, e.g., *Robison v. Maynard*, 829 F.2d 1501, 1504 (10th Cir. 1987); see also Robert P. Mosteller, *Victims' Rights and the Constitution: Moving From Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1062 (1998) (citing *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 71-72 (1997) (statement of Marsha A. Kight) (recounting prosecutors' refusal to permit Marsha Kight, whose daughter was killed in Oklahoma City bombing, to give victim impact testimony, on ground that she opposed death penalty).

²⁴Stephen Garvey's study, cited by Cassell, is based on pre-*Payne* data. See Stephen Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1554 (1998).

²⁵James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 5-6 (1995).

²⁶See *id.* at 9.

valuable and worthy of compassion than others, and thus to rate the crime against him as more serious.²⁷ Cassell would respond, properly, that mock jury studies are of limited utility in capital cases. However, the studies he cites (some based on mock juries, some on interviews with actual jurors) have significant problems of their own. Their net results are entirely equivocal.²⁸ Moreover, they are all based on data from noncapital cases. This distinction between capital and noncapital cases is a crucially important one. First, the moral and emotional stakes are much higher when jurors are making a life-or-death decision. Many of the researchers Cassell cites were attempting to determine the effect of victim impact statements on jurors deciding whether to award restitution to a burglary victim, or whether a defendant ought to be given probation or incarcerated for crimes ranging from robbery to rape, or how long a defendant's sentence ought to be for such crimes. These are all weighty decisions, but they are different in kind from the decision facing a capital juror,²⁹ and none of the researchers claimed to draw any inferences at all from their results about the effects of victim impact decisions in capital cases other than to acknowledge that the statements seem to have a greater impact in capital cases.³⁰ Thus, the available empirical evidence contradicts Cassell's assertion that victim impact statements have no effect on the incidence of death sentences.

III. THE CLAIM THAT VICTIM IMPACT STATEMENTS HELP THE VICTIM'S HEALING PROCESS

In capital cases, the term 'victim impact statement' is a misnomer, since the statements are not those of the victim, but are given by family members, friends, and other survivors. This distinction between victim statements and

²⁷Edith Greene et al., *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 27 J. APPLIED PSYCHOL. 145, 147-48 (1998).

²⁸One study found an increased likelihood of incarceration correlated with the statements. See Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 451, 451 (1990). A second study found no such correlation. See Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT'L REV. VICTIMOLOGY 17, 21 (1994) [hereinafter Erez, *Victim Participation in Sentencing*]. Similarly, a third study found no correlation, but also found that *the statements did not produce sentencing decisions that more clearly reflected the effects of crime on victims*. See Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. Q. 453, 464 (1994). A full discussion of the variables in these studies is beyond the scope of this brief Reply.

²⁹I do not mean to imply that victim impact statements are appropriate in noncapital cases. Rather, I am responding to Cassell's argument that these studies support his claim that such statements do not hamper the defense in capital cases.

³⁰See Greene, *supra* note 12, at 6.

survivor statements becomes especially important in light of Cassell's major argument in favor of victim impact statements, which is that they promote the healing process for victims. The researchers on whom he relies talk about victim impact statements as giving victims a voice; as an experience that can be "positive and empowering" for a victim who wishes to participate and provide input.³¹ Cassell speaks of avoiding secondary harm—the trauma that can result when the system fails to recognize a victim's right to participate.³² He fails to note that the empirical evidence as to whether victim impact statements have the effect of increasing victim satisfaction is inconclusive, and in some cases shows that giving statements has led to a decrease in victim satisfaction.³³ Likewise, whether giving such statements helps victims with the healing process is very much an open question.³⁴

But more important, the value Cassell articulates, and the assumption these studies are examining, is that victim impact statements help increase *victim* satisfaction in the criminal process. Whatever the researchers' views on that topic, capital sentencing, in which statements are given by survivors rather than victims, raises separate issues. Specifically, is it worth increasing the (already high) risk that death sentences will be influenced by arbitrary and pernicious factors in order to use the sentencing hearing as a forum for healing the family and friends of the victim? If this is the question, it needs to be addressed—on legal, philosophical, psychological and empirical grounds—and not conflated with other issues.

In short, Cassell fails to offer empirical evidence that victim impact statements increase victim satisfaction with the criminal process. More important, he fails to address (and indeed conflates) the difficult issues raised by the separate question of whether the criminal sentencing hearing can or should be a forum for the healing of the friends and relatives of homicide victims.

³¹Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. (forthcoming 1999).

³²See Cassell, *supra* note 3, at 496–97.

³³See Erez, *Victim Participation in Sentencing*, *supra* note 28, at 24 (finding that some studies show some increased satisfaction, some show that certain victims suffer decreased satisfaction, and some show no discernible difference).

³⁴See Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 964–66 (1985) (discussing how victim's contact with criminal justice system may hinder victim healing); see also Deborah Kelley, *Victim Participation in the Criminal Justice System*, in VICTIMS OF CRIME: PROBLEMS, POLICIES, AND PROGRAMS 172, 182 (Arthur J. Lurigio et al., eds. 1990) (discussing possible harmful psychological effect on victims of receiving empty promises).