PLAYING THE VICTIM: THE DISCRETIONARY AND DISCRIMINATORY APPLICATION OF VICTIM IMPACT STATEMENTS BY FEDERAL PROSECUTORS IN THE USA

A thesis submitted to the University of Manchester for the Degree of

Doctor of Philosophy

In the Faculty of Humanities

2015

TAMMY KRAUSE

SCHOOL OF LAW
**Table of Contents**

1  Introduction  
   1.1 Overview  
   1.2 The Legal & Political Context of the Victim Impact Statement  
   1.3 The Research  
   1.4 Structure of the Thesis  

2  The Prosecutor & the Death Penalty  
   2.1 The Death Penalty  
   2.2 The Crime Victim in a Historical Context  
      2.2.1 British Common Law  
      2.2.2 American Colonial Law  
      2.2.3 The Emergence of the Public Prosecutor in the American Legal System  
   2.3 Today’s American Prosecutor  
      2.3.1 Federal Prosecutors  
      2.3.2 Prosecutorial Discretion  
      2.3.3 Questioning Prosecutorial Power  
   2.4 Conclusion  

3  The Politicisation of the Victim Impact Statement  
   3.1 The Victims’ Rights Movement  
   3.2 The President’s Task Force on Victims of Crime  
   3.3 Victim Impact Statement Discord  
      3.3.1 Empirical Research  
   3.4 Conclusion  

4  Law on the Books & Law in Action: An Assessment of Federal Law  
   4.1 Law on the Books: Federal Law and its Subsequent Debates  
      4.1.1 The Death Penalty and Victim Impact Evidence: Rulings by the United States Supreme Court  
      4.1.2 Victim and Witness Protection Act of 1982  
      4.1.4 The Crime Victims’ Rights Act  
   4.2 Law in Practice: Realities and Shortcomings  
      4.2.1 Penal Reform on Sentencing  
      4.2.2 The Victim Impact Evidence Debate  
   4.3 Conclusion  

5  Methodology  
   5.1 Research Design  
   5.2 Research Development  
   5.3 Development of Research Questionnaire  
   5.4 Collection of Data  
   5.5 Composition of Data  
      5.5.1 Processing the Data  
      5.5.2 Cases with Incomplete Data  
      5.5.3 Limitations of the Questionnaire and Data  
   5.6 Post-CVRA Data
5.7 Conclusion
6 Prosecutorial Inclusion of Victim Impact Evidence in Cases that Resulted in a Plea Agreement
6.1 Cases that Resulted in a Plea Agreement
6.2 Examination of Federal Capital Offences that Resulted in a Guilty Plea
6.2.1 Continuing Criminal Enterprise
6.2.2 Murder Committed During a Crime of Violence or Drug-Trafficking
6.2.3 Carjacking
6.2.4 Murder by a Federal Prisoner
6.2.5 Bank Robbery
6.2.6 Kidnapping
6.2.7 Murder for Hire
6.2.8 First-Degree Murder
6.2.9 Death Resulting from Offences Involving Transportation of Explosives, Destruction of Government Property, or Destruction of Property Related to Foreign or Interstate Commerce
6.2.10 Murder with the Intent of Preventing Testimony by a Witness, Victim, or Informant
6.2.11 Retaliating Against a Witness, Victim, or an Informant
6.2.12 All Other Offences
6.3 Conclusion
7 Prosecutorial Inclusion of Victim Impact Evidence in Capital Cases that Went to Trial
7.1 Examination of Federal Capital Offences that Went to Trial
7.1.1 Prosecutorial Use of Victim Impact Evidence Based on the Case Direction
7.1.2 Prosecutorial Use of Victim Impact Evidence Based Upon the Category of Victim Worthiness
7.1.3 Cases that Did Not Include Victim Impact as a Non-Statutory Aggravator in the Notice of Intent
7.1.4 The Categories of Offences, the Use of Victim Impact Evidence, and the Case Outcome
7.2 Individual Offences that Went to a Federal Capital Trial
7.2.1 Continuing Criminal Enterprise
7.2.2 Murder Committed During a Crime of Violence or Drug-Trafficking
7.2.3 Carjacking
7.2.4 Murder by a Federal Prisoner
7.2.5 Bank Robbery
7.2.6 Kidnapping
7.2.7 Murder for Hire
7.2.8 First-Degree Murder
7.2.9 Murder with the Intent of Preventing Testimony by a Witness, Victim, or Informant
7.2.10 Retaliating Against a Witness, Victim, or an Informant
7.2.11 Other Offences
7.2.12 Other Observations from the Data Analysis
7.3 Conclusion
8 Conclusion
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bibliography</td>
<td>225</td>
</tr>
<tr>
<td>Appendix A</td>
<td>243</td>
</tr>
<tr>
<td>Appendix B</td>
<td>245</td>
</tr>
<tr>
<td>Appendix C</td>
<td>248</td>
</tr>
<tr>
<td>Appendix D</td>
<td>253</td>
</tr>
</tbody>
</table>

**WORD COUNT: 82,984**
TABLE OF FIGURES

Figure 1 Prosecutorial Use of Victim Impact Evidence in All Adjudicated Federal Capital Cases................................................................. 192
Figure 2 Prosecutorial Use of Victim Impact Evidence Based upon the Category of Victim Worthiness in All Adjudicated Federal Capital Cases ........................................ 194
Figure 3 The Adjudication Outcomes and Use of Victim Impact Evidence for Each Category of Offence ................................................................. 196
Figure 4 Prosecutorial Inclusion of Victim Impact Evidence in the Sentencing Phase of All CCE Trials ............................................................................. 203
Table 5.1 U.S. Federal Criminal Statutes ................................................................. 141
Table 5.2 Analysed Time Periods for the US Federal Death Penalty ......................... 144
Table 5.3 US Attorneys’ Notice of Intent to Include Victim Impact Evidence (NOIVIE) in Federal Capital Cases ................................................................. 145
Table 5.4 Cases Excluded from Final Body of Analysis ............................................ 153
Table 5.5 Post-CVRA Prosecutorial Use of Victim Impact Evidence Between Cases that Resulted in a Plea and Those that Went to Trial (2004-2009) ........................................... 157
Table 6.1 General Comparison of Prosecutorial Use of Victim Impact Evidence Between Cases that Resulted in a Plea and Those that Went to Trial ........................................... 161
Table 6.2 The Case Direction of CCE Capital Offences ............................................ 164
Table 6.3 The Inclusion of Victim Impact Evidence in CCE Cases ............................. 164
Table 6.4 The Case Direction of Murder Committed During a Crime of Violence or Drug-Trafficking Capital Offences ................................................................. 166
Table 6.5 The Inclusion of Victim Impact Evidence in Murder Committed During a Crime of Violence or Drug-Trafficking Cases that Resulted in a Guilty Plea ........................................... 166
Table 6.6 The Case Direction of Carjacking Capital Offences ................................... 168
Table 6.7 The Inclusion of Victim Impact Evidence in Carjacking Cases ..................... 168
Table 6.8 The Case Direction of Prison Inmate Murder Capital Offences .................... 170
Table 6.9 The Inclusion of Victim Impact Evidence in Prison Inmate Murder Cases that Resulted in a Guilty Plea ................................................................. 171
Table 6.10 The Case Direction of Bank Robbery Capital Offences ............................ 172
Table 6.11 The Inclusion of Victim Impact Evidence in Bank Robbery Cases that Resulted in a Plea ................................................................. 172
Table 6.12 The Case Direction of Kidnapping Capital Offences .................................. 173
Table 6.13 The Inclusion of Victim Impact Evidence in Kidnapping Cases ................... 173
Table 6.14 The Case Direction of Murder for Hire Capital Offences ......................... 174
Table 6.15 The Inclusion of Victim Impact Evidence in Murder for Hire Cases that Resulted in a Plea ................................................................. 174
Table 6.16 The Case Direction of First Degree Murder Capital Offences .................... 176
Table 6.17 The Inclusion of Victim Impact Evidence in First Degree Murder Cases that Resulted in a Plea ................................................................. 176
Table 6.18 The Case Direction for the Death Resulting from Offences Involving Explosives Capital Offences ................................................................. 178
Table 6.19 The Inclusion of Victim Impact Evidence in the Death Resulting from Offences Involving Explosives Cases that Resulted in a Plea ........................................... 178
Table 6.20 The Case Direction for the Murder of Pre-Trial Witness Capital Offences ...... 179
Table 6.21 The Inclusion of Victim Impact Evidence in the Murder of Pre-Trial Witness Cases that Resulted in a Plea ................................................................. 180
Table 6.22 The Case Direction for the Murder of Post-Trial Witness Capital Offences .... 181
Table 6.23 The Inclusion of Victim Impact Evidence in the Murder of Post-Trial Witness Cases that Resulted in a Plea ................................................................. 181
Table 6.24 The Inclusion of Victim Impact Evidence in Additional Capital Cases that Resulted in a Plea ................................................................. 182
Table 6.25 Victim Worthiness & the Prosecutorial Use of Victim Impact Evidence in Guilty Plea-sentencing Hearings ................................................................. 183
Table 7.1 Prosecutorial Use of Victim Impact Evidence in All Adjudicated Federal Capital Cases ........................................................................................................ 192
Table 7.2 Prosecutorial Use of Victim Impact Evidence Based upon the Category of Victim Worthiness in All Adjudicated Federal Capital Cases ........................................... 193
Table 7.3 Prosecutorial Use of Victim Impact Evidence in Unworthy Victim Cases and Case Outcomes ........................................................................................................ 197
Table 7.4 Prosecutorial Use of Victim Impact Evidence in Worthy victim Cases and Case Outcomes ........................................................................................................ 199
Table 7.5 The Inclusion of Victim Impact Evidence in CCE Cases that Went to Trial ...... 201
<table>
<thead>
<tr>
<th>Table</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.6</td>
<td>The Inclusion of Victim Impact Evidence in Murder Committed During a Crime of</td>
<td>203</td>
</tr>
<tr>
<td></td>
<td>Violence or Drug-Trafficking Cases that Went to Trial</td>
<td></td>
</tr>
<tr>
<td>7.7</td>
<td>The Inclusion of Victim Impact Evidence in Carjacking Cases that Went to Trial</td>
<td>204</td>
</tr>
<tr>
<td>7.8</td>
<td>The Inclusion of Victim Impact Evidence in Prison Inmate Murder Cases that</td>
<td>227</td>
</tr>
<tr>
<td></td>
<td>Went to Trial</td>
<td></td>
</tr>
<tr>
<td>7.9</td>
<td>The Inclusion of Victim Impact Evidence in Bank Robbery Cases that Went to</td>
<td>229</td>
</tr>
<tr>
<td></td>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>7.10</td>
<td>The Inclusion of Victim Impact Evidence in Kidnapping Cases</td>
<td>229</td>
</tr>
<tr>
<td>7.11</td>
<td>The Inclusion of Victim Impact Evidence in Murder for Hire Cases that Went to</td>
<td>230</td>
</tr>
<tr>
<td></td>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>7.12</td>
<td>The Inclusion of Victim Impact Evidence in First-Degree Murder Cases that</td>
<td>231</td>
</tr>
<tr>
<td></td>
<td>Went to Trial</td>
<td></td>
</tr>
<tr>
<td>7.13</td>
<td>The Inclusion of Victim Impact Evidence in the Murder of Pre-Trial Witness</td>
<td>232</td>
</tr>
<tr>
<td></td>
<td>Cases that Went To Trial</td>
<td></td>
</tr>
<tr>
<td>7.14</td>
<td>The Inclusion of Victim Impact Evidence in the Murder of Post-Trial Witness</td>
<td>232</td>
</tr>
<tr>
<td></td>
<td>Cases that Went to Trial</td>
<td></td>
</tr>
<tr>
<td>7.15</td>
<td>The Inclusion of Victim Impact Evidence in Additional Capital Cases that Went</td>
<td>233</td>
</tr>
<tr>
<td></td>
<td>to the Penalty Phase of a Federal Capital Trial</td>
<td></td>
</tr>
</tbody>
</table>
# Table of Statutes and Legislation

18 U.S.C. § 24
18 U.S.C § 32, 33, 34
18 U.S.C. § 36
18 U.S.C. § 37
18 U.S.C. § 115(b)(3)
18 U.S.C § 241
18 U.S.C § 242
18 U.S.C § 245
18 U.S.C § 247
18 U.S.C. § 351
18 U.S.C. § 794
18 U.S.C. § 844 (d), (f), (i)
18 U.S.C. § 924 (j)
18 U.S.C. § 930
18 U.S.C. § 1091
18 U.S.C. § 1111
18 U.S.C. § 1114
18 U.S.C. § 1116
18 U.S.C. § 1118
18 U.S.C. § 1119
18 U.S.C. § 1120
18 U.S.C. § 1121
18 U.S.C. § 1201
18 U.S.C. § 1203
18 U.S.C. § 1503
18 U.S.C. § 1512
18 U.S.C. § 1513
18 U.S.C. § 1514
18 U.S.C. § 1716
18 U.S.C. § 1751
18 U.S.C. § 1951
18 U.S.C. § 1959
18 U.S.C. § 2113
18 U.S.C. § 2114
18 U.S.C. § 2119
18 U.S.C. § 2241, 2242, 2243, 2244, 2245
18 U.S.C. § 2251
18 U.S.C. § 2261
18 U.S.C. § 2280
18 U.S.C. § 2281
18 U.S.C. § 2332
18 U.S.C. § 2332a
18 U.S.C. § 2332b
18 U.S.C. § 2340, 2340a
18 U.S.C. § 2381
18 U.S.C. § 3261
18 U.S.C. § 3551
18 U.S.C. § 3592(c)
18 U.S.C. § 3593(a)
18 U.S.C. § 3593(d)
18 U.S.C. § 3771
18 U.S.C. § 3771(a)(4)
18 U.S.C. § 2332b
21 U.S.C. § 841
21 U.S.C. § 846
21 U.S.C. § 848
21 U.S.C. § 848(h)(1)
49 U.S.C. § 46502

Federal Death Penalty Act of 1994
Federal Victim and Witness Protection Act of 1982
Sentencing Reform Act
Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn
Violence Against Women Act of 1994
**Table of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA</td>
<td>American Bar Association</td>
</tr>
<tr>
<td>CCE</td>
<td>Continuing Criminal Enterprise</td>
</tr>
<tr>
<td>CVRA</td>
<td>Crime Victims’ Rights Act</td>
</tr>
<tr>
<td>FDPA</td>
<td>Federal Death Penalty Act</td>
</tr>
<tr>
<td>FDPRC</td>
<td>Federal Death Penalty Resource Counsel</td>
</tr>
<tr>
<td>FJC</td>
<td>Federal Judiciary Center</td>
</tr>
<tr>
<td>GAO</td>
<td>General Accounting Office</td>
</tr>
<tr>
<td>NOI</td>
<td>Notice of Intent</td>
</tr>
<tr>
<td>PACER</td>
<td>Public Access to Court Electronic Records</td>
</tr>
<tr>
<td>SPSS</td>
<td>SPSS Statistics</td>
</tr>
<tr>
<td>VCCLEA</td>
<td>Violent Crime Control and Law Enforcement Act</td>
</tr>
<tr>
<td>VIE</td>
<td>Victim Impact Evidence</td>
</tr>
<tr>
<td>VIS</td>
<td>Victim Impact Statement</td>
</tr>
<tr>
<td>VPS</td>
<td>Victim Personal Statement</td>
</tr>
<tr>
<td>VWPA</td>
<td>Victim Witness Protection Act</td>
</tr>
</tbody>
</table>
ABSTRACT

The apex of participatory rights for the crime victim in America is the right to give a victim impact statement in death penalty sentencing hearings. Whilst the ‘law in books’ gives all murder victims’ families the right to make a statement, in practice, this right is contingent upon the prosecutor, a fact overlooked in previous scholarship. This thesis explores the role prosecutorial discretion plays in the use of victim impact testimony through the first census of victim impact statements in federal death penalty cases. It suggests that prosecutors use the victim impact statement in an essentially instrumental way to affect sentencing, rather than as an expression of the victim’s right to participate in criminal trials. It is argued that the prosecutors determine the utilisation of the victim impact statement based on their characterisation of offences—and therefore victims—as worthy or unworthy, concluding that the death penalty hearings on this basis are arbitrary and arguably thus unconstitutional.
DECLARATION

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.
i. The author of this thesis (including any appendices and/or schedules to this thesis) owns certain copyright or related rights in it (the “Copyright”) and s/he has given The University of Manchester certain rights to use such Copyright, including for administrative purposes.

ii. Copies of this thesis, either in full or in extracts and whether in hard or electronic copy, may be made only in accordance with the Copyright, Designs and Patents Act 1988 (as amended) and regulations issued under it or, where appropriate, in accordance with licensing agreements which the University has from time to time. This page must form part of any such copies made.

iii. The ownership of certain Copyright, patents, designs, trade marks and other intellectual property (the “Intellectual Property”) and any reproductions of copyright works in the thesis, for example graphs and tables (“Reproductions”), which may be described in this thesis, may not be owned by the author and may be owned by third parties. Such Intellectual Property and Reproductions cannot and must not be made available for use without the prior written permission of the owner(s) of the relevant Intellectual Property and/or Reproductions.

iv. Further information on the conditions under which disclosure, publication and commercialisation of this thesis, the Copyright and any Intellectual Property and/or Reproductions described in it may take place is available in the University IP Policy (see http://documents.manchester.ac.uk/DocuInfo.aspx?DocID=487), in any relevant Thesis restriction declarations deposited in the University Library, The University Library’s regulations (see http://www.manchester.ac.uk/library/aboutus/regulations) and in The University’s policy on Presentation of Theses.
I would like to take this opportunity to thank the University of Manchester School of Law granted me the School of Law scholarship to be able to pursue my doctoral studies. This generous gift allowed me both the time and the space to reflect on an important issue that developed into this thesis.

The Federal Death Penalty Resource Counsel Project kindly assisted me with my questions and the case data for the federal capital cases analysed in this research.

Jackie Boardman and Mary Platt were wonderful cultural emissaries and translators whose door at the law school was always open.

Judith Aldridge assisted with me during the months of my empirical research.

Susan Casey played an essential link of support, wisdom, and ideas throughout the writing of my thesis. She provided crucial editing and support at the finish line. She saw the vision on the horizon and helped me get there.

Over the years, David Bruck has provided invaluable guidance to many questions about the history of the death penalty and the law.

The Inouye family opened their door for me every time I knocked. Bryce found himself in the role of coach, statistician, and map-reader with skill, patience, and grace. Kristen provided invaluable assistance with the detail work that my eyes could not see. I am indebted to their enduring kindness.

Hannah Quirk, thank you for the many years of support. I appreciate your kindness and wisdom. Your words of encouragement sustained me through the years that I struggled to find my own. Thank you.

The boys: Sam, Noah, and Jeff. Your patience, love, and encouragement allowed me to live for years with these ideas. I look forward to living more fully with you once again and learning from your wisdom.

Thank you all.
1 Introduction

Do prosecutors include victim impact testimony in death penalty cases as an acknowledgement that the victim should be able to address the court? Or does the prosecution choose to use this evidence when such testimony will support its argument that a defendant should be sentenced to death? The victim impact statement is the one chance in the formal legal proceedings that the victim has to address the court about his or her experiences and the ramifications of the crime. This sanctioned testimony is part of the prosecution’s evidence given to the jury for its sentencing considerations. Yet the propriety of this evidence remains deeply debated between legal practitioners responsible for defending their clients and victims’ rights proponents convinced that victims’ rights should be equal to defendants’ rights. Nowhere is this issue more pronounced than in capital cases.

The United States Supreme Court ruling, Payne v. Tennessee, allowing prosecutors to use victim impact testimony in death penalty cases set a new—and controversial—standard. The Court reversed its prior decisions that protected defendants from the introduction of emotionally compelling but evidentially questionable victim testimony that may have led the jury to “impose the death penalty in an arbitrary and capricious manner.” Instead, Payne ruled that prosecutors can use victim impact evidence as long as it is not so “unduly prejudicial” that it violates a defendant’s constitutional right to due process. Because “unduly prejudicial” is so ill-defined as a legal standard, defence counsel continue to litigate for judicial clarity about what victim impact evidence is permissible and when it calls for judicial protection. Likewise, courts must take care to ensure that inconsistent and arbitrary factors are not injected into this process, as that would render the administration of the death penalty unconstitutional. However, as this thesis demonstrates, arbitrariness

---

3 Booth 482 U.S. at 503.
4 Payne 501 U.S. at 825.
concerns continue to persist despite Payne’s holding. This is because the inclusion of victim impact evidence in capital cases can lead jurors to identify with victims’ they deem ‘worthy,’ thereby leading to an arbitrary death sentence.

With the sustained push from victims’ rights proponents to ensure victims are heard during sentencing proceedings and the resulting concern by defence attorneys over the inclusion of unduly prejudicial victim impact evidence, legal practitioners and scholars have concentrated on the propriety of victims’ rights versus defendants’ rights in criminal proceedings. Despite such a contention, it is for the prosecutor to decide who gets to make a statement and whether it is used at trial. With Payne’s dismissal of the notion that victim impact statements may lead capital juries to compare the defendant and victim’s characteristics, the defence must contend with prosecutors being able to use victim impact testimony to call attention to the victim’s goodness. The inference of such evidence is that the defendant does not value the sanctity of life and killed an “innocent,” “ideal,” “worthy,” or “respectable” member of society. In order to challenge the victim impact evidence in a particular case, defence counsel must prove that the government’s evidence violates the unduly prejudicial legal standard set forth by Payne. As such, defence counsel and scholars concentrate on what emotionally gripping details prosecutors include in victim impact evidence that constitutes a violation of the defendant’s Fourteenth Amendment right.

---

7 For the remainder of the thesis, the terms ‘survivor,’ ‘victim,’ ‘crime victim,’ and ‘surviving family member’ ‘family member’ refer to the deceased victim’s family.
8 Payne 501 U.S. at 817-30.
14 Payne 501 U.S. at 825.
15 Id.
No empirical attention has been given to cases when victim testimony has not been admitted due to prosecutors’ discretion. This thesis argues that prosecutors do not primarily concern themselves with the individual victim; rather, prosecutors determine their level of engagement with victims based on the type of crime committed – in an ‘unworthy’ case, they will not even tell the family that they have the right to make a victim impact statement. Based on a census of federal death penalty cases, this thesis demonstrates that the prosecution excludes victim impact testimony from specific capital trials based upon categorical assumptions about victims in light of the crime that caused their death. This research categorises federal capital crimes as likely to have a worthy victim or unworthy victim and demonstrates that such predictors show a pattern of discriminatory practice in federal prosecutorial use of victim impact evidence.

Victims’ rights proponents have proclaimed the rise of crime victims’ legal rights as a triumphal “re-balancing” of the American criminal justice system. Politicians, victims’ rights proponents, and crime control advocates declare that the law is fairer when victims have the right to participate in criminal proceedings. It is the state, and not the individual victim, that is named as the aggrieved party in criminal cases. Therefore, prosecutors represent the state’s interests in the administration of criminal cases, not those of the victim. To respond to this perceived disparity, victims’ rights proponents presented to Congress, which then passed, the Crime Victims’ Rights Act (CVRA) in 2004. The CVRA gives victims the right to be “reasonably heard” at

---

16 Sundby, Problem of Unworthy Victims 370 ft 52; 373-4. See also: Susan Bandes, When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government Ninth Annual Stein Center Symposium on the Role of Forgiveness in the Law, 27 FORDHAM URB. L.J. 1599 1602 (1999).(writing that there is little empirical-based answers, as researchers and society believe we know what the appropriate responses to victimisation are); Susan Bandes, Reply to Paul Cassell: What We Know about Victim Impact Statements Symposium: Crime Victims Rights in the Twenty-First Century, 1999 UTAH L. REV. 545 (1999).
any public proceeding in federal court regarding the defendant’s bail, plea, sentencing, and parole hearings.

Defence practitioners and legal scholars have expressed concern that providing victims with such unprecedented participatory rights might violate defendants’ constitutional rights and encourage personal vengeance. Despite the CVRA’s apparent success, however, this federal legislation does not give victims party status in criminal proceedings. The succession of judicial rulings related to the CVRA in cases brought against the government by victims’ rights proponents on behalf of crime victims suggests that federal judges also resist legislation giving victims “power over any prosecutorial decision.” Prosecutors do not seek victim input or include victim impact evidence is not used in every case. Cases such as Rubin, in which prosecutors dismissed the victims’ opinions, raise the question of why prosecutors oppose input from victims. In particular, if the inclusion of victim impact evidence is of ‘no cost’ to the prosecution, it would seem that government attorneys would introduce this legally mandated evidence in every case. Instead, the jurisprudence suggests that federal prosecutors chiefly consider the relevance—and possible repercussions—of victim testimony. Once federal prosecutors make the decision to seek the death penalty, it appears that they only include evidence that

19 Id. at § 3771 (a)(3)(4)(5). (Of the eight rights afforded to the crime victim, three give victims ‘active’ participation: (3) and (4) ensure the right to be heard and (5) gives victims the right to confer with the prosecution).
22 United States v. Rubin, 588 F. Supp. 2d 411 424 (E.D.N.Y. 2008). But see: United States v. Degenhardt, 405 F. Supp. 2d 1341, 1347 (D. Utah 2005). (ruling that the sentencing process cannot be two-dimensional as the CVRA “commands” that victims be treated equally with the defendant.); Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011 (9th Cir. 2006). (ruling that the CVRA gives victims “the same footing” as defendants).
they are confident will support a death sentence for the defendant. It can thus be argued that the victim impact statement is not about the victim giving voice to their experiences; it is about giving juries only an “ideal victim” to relate to in their sentencing considerations. ‘Justice’ therefore has become equated with what society can do to the offender, rather than what society—and the law—can do for the victim.

1.1 Overview

This thesis analyses prosecutors’ use of victim impact statements in federal death penalty cases. The research contributes to the legal and scholarly discussions of whether the use of this evidence results in discriminatory applications of the law against defendants facing capital punishment. It begins with the legal and socio-legal development of crime victims’ rights in order to understand how the use of victim impact evidence became mired in a contentious three-way debate about prosecutorial discretion, defendants’ rights, and victims’ rights. The empirical research conducted for the thesis is a quantitative analysis of the practical use of victim impact evidence. The legal challenges brought by victims’ rights proponents or defence counsel on individual cases diverts attention from the examination of institutional prosecutorial practices. The objections come from both defence counsel who seek to limit victim impact testimony and victims’ rights proponents who seek to ensure its incorporation into sentencing considerations. Because this litigation contrasts with traditional criminal law, it is necessary to know the social-legal construction of victims’ rights and how they challenge the American legal system. This thesis provides a critical

24 Christie, The Ideal Victim.
26 Throughout this thesis, the terms ‘statement’, ‘evidence’, and ‘testimony’ will be used interchangeably regarding the victim impact statement.
27 GARLAND, Culture of Control preface. (writing about the challenge to analyse a criminal justice (or legal) practice derived from a “complex set of practices and institutions.”).
understanding of how the conservative narrative of ‘rebalancing’ the legal system exploited the idea that every American citizen will be a victim of crime as a moral directive for greater societal control and order.\textsuperscript{28} Victims’ rights proponents maintain this narrative by demanding greater protection for victims and their participation in criminal justice proceedings. The nature of criminal law is that defence practitioners look at the criminal charges and facts that are pertinent to their case. There is no incentive for attorneys to look at the bigger picture of prosecutorial practices. This thesis fills a void between defence attorneys’ practical knowledge of prosecutors’ discretionary practices and (the lack of) empirical research regarding prosecutors’ application of victim impact evidence.

Determining whether prosecutors intentionally select which victims to engage as witnesses during criminal proceedings is inherently challenging. Of primary concern is that this research could be considered antipathetic to crime victims. In fact, however, the impetus for this analysis is concern about how criminal justice professionals treat victims. The axiom of prosecutorial discretion has supporters and detractors.\textsuperscript{29} Yet, its accepted practice limits academic or practical analysis into the inner workings of how prosecutors develop and present their cases.\textsuperscript{30} In the United States, the federal government and individual states each have their own laws, jurisdiction, and prosecutors. This limits our ability to analyse victim engagement within differing classes of misdemeanours or felonies. It also makes it difficult to determine whether discriminatory practices that exist in one jurisdiction also exist in another. This thesis therefore focuses only on federal death penalty cases to control some of the variables that would otherwise make analysis of prosecutors’ inclusion of victim impact evidence indefensible.

### 1.2 The Legal & Political Context of the Victim Impact Statement

A victim impact statement gives crime victims, who were directly harmed by the crime, the opportunity to address the court after a defendant has been convicted to

\textsuperscript{28} SIMON, Governing Through Crime 109.
\textsuperscript{29} See Chapter Two, examining prosecutorial discretion
share their experiences and the ramifications of the crime as part of the defendant’s sentencing proceedings. Courts will often allow family members and loved ones who are affected by the crime to give testimony as well. Such statements and testimony can inform the judge or jury’s determination of the defendant’s sentence. In crimes that result in the victim’s death, family members and loved ones are considered the primary victims who will provide this impact testimony. Lawyers for the defendant and the prosecution often contest what type of information will be permitted in a victim’s statement. In most states and in federal cases, victim impact testimony includes testimony as to the emotional and economic damage suffered, as well as any physical harm caused by the crime. Victims only give this testimony if the defendant is found guilty. If the jury convicts the defendant, the victim gives their impact statement as part of the prosecution’s evidence for sentencing considerations. Ordinarily, this is the only time a victim addresses the court throughout the criminal proceedings, unless the victim is called as a witness during the trial.

Victim impact testimony is highly controversial in death penalty cases. Although victims are prohibited from expressing any thoughts or feelings about the appropriate sentence for the defendant in capital cases, defence proponents argue that the act of providing testimony on behalf of the prosecution infers that the victim’s surviving family members support the death penalty. This restriction is warranted since testimony from a murder victim’s family member about their desired sentencing could be unduly prejudicial. This would be especially true in a case in which jurors identify strongly with the victim’s family, either because of the circumstances of the offence or the characteristics of the victims. Nevertheless, victims’ rights proponents argue that victims should not be barred from expressing their opinion on the

31 Payne 501 U.S. at 817-30. (ruling that victim impact evidence can relay the victim’s personal characteristics and the emotional impact of the murder on the victim’s family). This ruling and other United States Supreme Court decisions regarding the victim impact statement will be discussed at length in Chapter 4.  
appropriate sentence in capital cases, as victims are allowed to do so on non-capital cases.

The paradox of the victim impact statement is that it is supposed to make the criminal justice system more respectful of and responsive to the victim. Yet, the victim impact statement is complicated by its function as part of the evidence for sentencing considerations. The question of its purpose heightens antagonistic attitudes toward victims rather than recognising their basic interests in the legal proceedings. This is due in part to increased expectations and newly invested participants. By and large, victims consider prosecutors as ‘their’ attorneys in the case against the accused. Both parties are interested in ensuring that society is safe from the defendant, that society deems a law was broken, and that justice is served. Yet, the American judicial system only recognises the government and the defendant, with defence counsel as their legal representative, as the parties with legal standing in a criminal case.

Victim impact testimony can be relevant testimony in a criminal case but is not always used by prosecutors at trial. The prosecutors’ charge to “seek justice” has modest regulatory standards. Such discretion gives prosecutors the agency to influence the court’s perception of the victim, whether or not the victim actually testifies. This calls into question the true role of the victim impact statement—is it an opportunity for the victim to be a part of the criminal justice proceedings or is it an

33 Meg Garvin, Why Sentencing Recommendations in Victim Allocution are Permissible and Desirable, NCVLI NEWSLETTER OF CRIME VICTIM LAW May 2011.
35 See infra ft. 407-419 accompanying text.
36 American Bar Association, Guidelines for Criminal Justice Standards 4-1.2(c), Defense Function Part I General Standards at http://www.abanet.org/crimjust/standards/dfunc_blk.html#1 (11/23/09). (“The duty of the prosecutor is to seek justice, not merely to convict.”)
instrument for the prosecution to selectively use for sentencing purposes against the accused? Prosecutorial discretion obscures understanding of what shapes their decisions to use victim impact evidence in a case. Because it is within a prosecutors’ authority to present victim impact evidence at trial, it can be argued that prosecutors use such evidence for their own ends rather than out of respect for the victim’s surviving family members. The current debate among practitioners, advocates, and academics does not consider whether a prosecutor’s discretion may result in discriminatory usage of the victim impact statement.

One reason that prosecutors’ use of this evidence has not been examined is due to victims’ rights proponents continue to call for crime victims to have greater participatory rights. Victims’ rights proponents’ forthright campaign for victims to have party status and “an unfettered voice at sentencing” markedly differentiates their role from the objectives of victim advocates who work within prosecutors’ offices. Whereas victim advocates, who work with the victim throughout the legal proceedings, are the prosecutor’s official representatives, victims’ rights proponents do not have an official capacity within the criminal justice system. Increasingly, victims’ rights proponents act as victims’ ‘advocates,’ or legal counsel, by interjecting themselves more fully into the adversarial proceedings. This adds a new layer of contention between the defendant and the victim that historically has been managed by the prosecution through victim advocates. Victims’ rights proponents

38 BELOOF, Vicfims’ Rights Guide 268-9; Douglas E. Beloof, The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review, 2005 BYU L. Rev. 255 (2005); Paul S. Hudson, Crime Victim and the Criminal Justice System: Time for a Change, The Symposium: Victims’ Rights, 11 PEPP. L. Rev. 23 36, 41 (1983). But see: Rubin 588 F. Supp. 2d 411 417. (stating that under the CVRA, victims “are not accorded formal party status, nor are they even accorded intervenor status as in a civil action. Rather, the CVRA appears to simply accord them standing to vindicate their rights as victims under the CVRA and to do so in the judicial context of the pending criminal prosecution of the conduct of the accused that allegedly victimized them.”); Id. at 428, (ruling that the Court cannot “compromise its ability to be impartial to the government and defendant, the only true parties.”); United States v. Hunter, No. 08-0410 1311 (10th Cir. 2008). (ruling that a victim has no right to appeal a defendant’s sentence because a victim is not a party to the case).


40 See: ROACH, Due Process and Victims’ Rights.
are not beholden to prosecutors. Rather, they will collaborate with prosecutors when that office makes the crime victim central to the proceedings, yet they may litigate against prosecutors on behalf of the victim when they feel that the victim’s rights are being denied.\footnote{Cassell, In Defense. See also: National Crime Victim Law Institute, http://law.lclark.edu/centers/national_crime_victim_law_institute/}

policies.\textsuperscript{46} Victims’ rights proponents argue that the primary push for victim standing is to protect victims’ rights from being denied by the government, and not merely to “speak against defendants’ positions.”\textsuperscript{47} Yet, when proponents discuss the potential outcomes of victim input at trial, they cite the “pragmatic reasons”\textsuperscript{48} of how such testimony can “enhance sentence accuracy and proportionality.”\textsuperscript{49} Such advocacy signifies an intent to reduce defendants’ constitutional rights, not to protect the victims’ rights from the government.\textsuperscript{50} Rather than advocate that legal professionals assist the defendant in accepting responsibility and addressing the needs of the victim that have arisen from the crime, victims’ rights proponents insist that the judicial system ensures that the defendant be held responsible for the victim’s suffering.\textsuperscript{51}

Defence attorneys are the “obligation zealously to protect and pursue a client’s legitimate interests.”\textsuperscript{52} With the formidable task of protecting their client’s rights, defence counsel sees each legal overture to victims as a potential violation of a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{47} BELOOF, Victims’ Rights Guide 268.
\item \textsuperscript{48} Lois Haight Herrington, Victims of Crime: Their Plight, Our Response, 40 Am. Psychol. 1 at 103 (1985). (writing that prosecutors need to work with the victim in order to hold the defendant accountable).
\item \textsuperscript{49} Paul G. Cassell, Barbarians at the Gates—A Reply to the Critics of the Victims’ Rights Amendment, 1999 Utah L. Rev. 479 493 (1999). (“Correcting this misimpression [that VIS are prejudicial] is not distorting the decision-making process, but eliminating a distortion that would otherwise occur…if a victim impact statement makes a difference in punishment, the description of the harm sustained by the victims is the crucial factor…the general tendency of victim impact evidence is to enhance sentence accuracy and proportionality rather than increase sentence punitiveness.”) (emphasis added; citations excluded).
\item \textsuperscript{50} An example of this is in United States v. Rubin, 558 F. Supp. 2d 411, 417, 429 (E.D.N.Y. 2008), in which the victims’ attorney implored the judge to order the prosecutor to take into account how the victim wanted the case to proceed. The response came, “As for actual clashes between victim and government over the best way to convict, punish, and seek restitution from a criminal wrongdoer, how can the court presiding over the prosecution of the defendant referee any spat between government and victim about how best to make the accused pay for his, at that point, only charged criminal conduct?” See also: amicus curiae brief in Utah v. Ott, Case No. 10-490.
\item \textsuperscript{51} Martha Minow, Surviving Victim Talk, 40 UCLA L. Rev. 1411 1416 (1992-1993).
\item \textsuperscript{52} American Bar Association, Model Rules of Professional Conduct: Preamble & Scope, 9a t http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html (accessed 09/15/2015)
\end{itemize}
\end{footnotesize}
defendant’s right to due process. Given the adversarial context of a criminal trial, defence attorneys view the “enshrined” victim statement as potentially damaging evidence against their client. Thus, defence counsel look for ways to prevent such testimony from being introduced to the judge or jury. When prosecutors do not include victim impact testimony as evidence against the accused, defence attorneys are typically relieved of the jury not hearing such emotional testimony and do not question why this client is spared. Yet, defence attorneys may want to consider why the prosecution left it out: that the prosecutor did not consider the victim testimony favourable to their sentencing strategy. Without such critical analysis, prosecutorial discretion may lead to the discriminatory application of such evidence for both the victim and the defendant.

Viewing victim impact evidence as a threat distracts defence attorneys from a critical analysis of prosecutors’ inclusion the victim impact statement. When the prosecution decides to seek the ultimate punishment for a defendant, its objective is to persuade the jury that the defendant deserves to be executed for the crime he or she committed. The prosecution, therefore, is likely to use only the evidence it believes will produce a death sentence. A limitation to the analysis of prosecutorial use of victim impact evidence has been the paucity of legal practitioners who have bridged their experience with academic research. Although lawyers may ‘research’ an issue related to a particular case, there is a “clear responsibility to one’s client” rather than to scholarly reflection or systemic confrontation. On the other hand, courts have resisted attorneys’ attempts to prove fundamental prejudice through the inclusion of academic research. In a seminal case, McCleskey v. Kemp, the United States Supreme Court rejected quantitative data defence attorneys presented as statistical evidence that a murder victim’s ethnicity was indicative of racial discrimination in the sentencing process, preferring to work with case law for its

54 Cassell, In Defense 611.
56 Id. at 13-5.
findings.” Whilst the Court argued that it “has accepted statistics as proof of intent to discriminate in certain limited contexts,” it held that because “discretion is essential to the criminal justice process, exceptionally clear proof is required before this Court will infer that the discretion has been abused.” Taking cues from McCleskey, defence attorneys have largely kept away from statistical data to support their arguments regarding arbitrariness and due process violations. Rather, attorneys focus their arguments to anecdotal arguments and case law regarding victim impact evidence. As such, defence practitioners overlook possible quantifiable patterns of victim participation in capital cases that could indicate prosecutorial selectivity and bias.

1.3 The Research

This research comes from a decade of working on federal capital cases as part of a novel process called defence-initiated victim outreach – an attempt to facilitate elements of restorative justice to address questions and concerns victims may have about the defendant within the confines of the criminal justice system. During that time, I worked at the request of defence teams to provide a bridge of communication with surviving family members that had been historically non-existent. There were many reasons for this lack of communication: defence attorneys ignored the surviving family members out of fear of the family’s pain, anger, and grief over the murder of their loved one; defence attorneys assumed that the families would not appreciate any expression of sympathy from the defence team; law schools do not always teach attorneys to consider the effects of the crime and how they might

57 McCleskey v. Kemp, 481 U.S. 279 281 (1987). (arguing that such data was “insufficient to support an inference that any of the decisionmakers in this case acted with discriminatory purpose.”). See also: id. at 292-6. Warren McCleskey was convicted and sentenced to death for the murder of a police officer during an armed robbery. McCleskey was African American and Police Officer Schlatt was white. On appeal, McCleskey presented empirical evidence that indicated that in capital cases both the prosecutors’ decision to seek and jurors’ recommendation for the death penalty were linked to the race of the victim.
58 Id. at 293.
59 Id. at 280. See also: id. at 297.

27
address the victim’s concerns; and defence team members came to mistrust victims in the courtroom with the increased politicisation of victims’ rights.

During the legal proceedings, my observations of prosecutors’ engagement with the same families raised the question about an inconsistent role that victims held in legal proceedings. The lack of systemic incorporation of the victim impact statement was in line with several long-held legal arguments of practitioners and scholars. In the decade of working on capital cases, I learned that defence attorneys often assume that prosecutors can be indifferent to victims but will engage them when it benefits the case. At first, my assessment of prosecutors’ engagement with victims corresponded with defence attorneys’ opinions and with researchers’ assertion regarding ‘ideal’ victims’ characteristics. Yet, there were cases in which the deceased victim and their family would have been characteristically ‘ideal,’ but the crime in which the victim was killed was inconsistent with a representation of ‘innocent’ or ‘ideal’.61 These experiences raised the question: with overwhelming caseloads, do prosecutors make pre-emptive distinctions about victims based on the crime that led to the victim’s death in whether or not to include victim impact testimony on each case? Discussing the peculiarities of prosecutors’ engagement with victims’ families, defence counsel did not regard the omission of victim impact evidence as significant as I did. Rather, defence proponents consider prosecutors’ inclusion of victims in capital cases for potential bias. First, scholars examine individual victim characteristics such as race,62 gender,63 social status,64 and socioeconomic status65

61 This will be discussed in Chapter Five.
63 Marian R. Williams, et al., Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-Related Victimization, and Jury Decision Making, 45 CRIMINOLOGY 865 (2007); Steven F. Shatz & Naomi R. Shatz, Chivalry is Not Dead: Murder,
from past capital cases for possible patterns that would show disparities and inequities in prosecutors’ charging decisions. Also, as mentioned, because victim impact evidence is considered a clear and present danger to a defendant’s life, defence proponents investigate whether a correlation exists between juror sympathy for the victim by way of victim impact statements and the jury’s sentencing decisions in capital cases. Despite the body of empirical evidence produced by researchers, judges continue to resist social science or empirical data and instead rely on their own theories and the harmless error rule as justification.

One study in particular reflected my capital case experiences with the level of prosecutors’ engagement with crime victims in the pre-trial and trial proceedings. Sundby analysed correlations of capital jurors’ perceptions of the crime victims’ attributes and sentencing outcomes. Sundby connected that jurors made distinctions about the crime victim based on their actions that led to his or her death. For example, in reflecting on giving a defendant a life-sentence, a juror reflected about a victim’s death— not the defendant’s actions. The juror said, “The victim was a wheeler-dealer type, a very conniving person. At the time of the killing, he was being investigated for murdering his girlfriend—do you believe that? Isn’t that interesting?”


69 Id. at 355-9.

70 Id. at 367.
different frame of references, but our analysis has similar conclusions. Whereas Sundby’s examination of juror impressions of victim characteristics and behaviour led to distinguishing worthy and worthy victims, my case experiences prompted the focus on whether the crime committed was an initial determining factor of prosecutors’ inclusion of victim impact evidence in capital cases. Considering that victim impact statements are of ‘no cost’ to prosecutors in the legal proceedings and that federal legislation gives victims the right to make these statements in federal cases, it can be argued that prosecutors should incorporate this evidence in every death penalty trial. Yet prosecutors may know that victim impact testimony may be detrimental or have little benefit to specific cases and therefore intentionally choose not to include this evidence.

This thesis does not seek to support or refute defence scholars or attorneys’ arguments that individual victim characteristics create patterns of arbitrary and capricious sentencing.71 Rather, by extrapolating Sundby’s work, this thesis classifies each federal capital crime as worthy victim and worthy victims to test whether prosecutors predetermine victim involvement based on the type of crime committed. With this categorisation of worthy and worthy victim crimes, the thesis then examines if prosecutors initially indicate that they will include victim impact evidence at trial and whether they do. The research examines federal capital cases because the legal debate surrounding the purpose of victim impact testimony centres on the current apex of victims’ participatory rights in criminal proceedings, which is the ability to give such testimony in death penalty cases. Also, because of my access to the legal documents and community, I was able to examine the entire history of federal death penalty cases. Its contribution is distinct because in an attempt to achieve a true measure regarding systemic incorporation of the victim impact statement, this thesis conducted a census of federal capital cases instead of a sampling. By focussing on capital cases, rather than a combination of varying levels of federal misdemeanours and felonies, this thesis deduces whether there are patterns in federal prosecutors’ decision-making discretion and whether such actions limit the

jury’s “consideration of any relevant circumstance[s]” in their decision about the defendant’s sentence.\(^{72}\)

Examining all federal death penalty cases between 1992 and 2008, this thesis tests the notion that prosecutors use the victim impact statement for particular offences—worthy victim offences—as a way to increase the likelihood that a jury will sentence a defendant to death. Previous empirical research has focussed on victim satisfaction, juror and mock juror emotional responses, and case outcomes on lower-level felonies regarding the inclusion of victim impact testimony.\(^{73}\) The empirical research conducted for this thesis provides an important finding with its examination of actual cases of federal prosecutors’ use of victim impact evidence. The implications of this study’s findings contribute to the on-going policy debate within the victimological discussions regarding the purpose of the victim impact statement. Additionally, the empirical research supports the argument that certain defendants are sentenced to death by arbitrary and capricious means, an argument previously unexamined by the legal community.

1.4 Structure of the Thesis

I develop my argument in two parts. Part I analyses how politicians and crime control advocates used the platform of victims’ rights to advance penal policies in America. Chapter Two explains the capital trial process in America and how this differs from other criminal cases. It then discusses the historical role of the prosecutor and ends with the current role of the American prosecutor and how this person has become the figurehead for the American legal system. This section also explains the differences between state and federal prosecutors. Unlike state and local prosecuting attorneys, U.S. Attorneys are appointed rather than elected and thus less beholden to the politics of crime control. Chapter Three examines the politicisation of the victim impact statement, continues with the grassroots call from victims’ groups for better treatment by criminal justice officials, and how this movement became politicised with a pro-law enforcement emphasis. As the apex of victims’

---

\(^{72}\) McCleskey 481 U.S. at 280.

\(^{73}\) See infra: ft. 420-432 and accompanying text.
participatory rights in criminal proceedings is the ability to give victim impact testimony in death penalty cases, the chapter then analyses victim and defence proponents’ positions on the victim impact statement. The chapter ends with my assessment that the victims’ rights proponents’ campaign to ensure victims the right to give victim impact testimony in all criminal cases has more to do with penal reform policies than addressing victims’ needs that arose from the crime. Chapter Four examines the judicial rulings and legislative acts that sanction victim participation in the criminal case against the accused. Part I explains how adherents of crime control use the victim as a powerful symbol for ‘Justice’ as part of the rationale for retributive penal policies, including an offender’s criminal sentencing. Such policies focus the debate on the propriety of victims’ rights to participate in the criminal proceedings versus the accused’s constitutional rights. Chapter Four examines the prosecutors’ ability to manage victim involvement in capital cases as they see appropriate. Notwithstanding the laws that compel federal prosecutors to incorporate victims’ rights in the judicial proceedings, it is well known that the ‘law in action’ can differ greatly from the ‘law in books.’ Thus the chapter examines federal prosecutors and judges’ actions regarding victims’ rights legislation. Braiding the fundamental concepts of victims’ rights, penal policies, and prosecutorial discretion together, Part I lays the foundation for why, if defence attorneys challenge prosecutors’ inclusion of victim impact evidence in capital cases, the public discourse becomes an attack on defence counsel as denigrating the victim and trying to deny victims their participatory rights. Rather, this thesis argues that the legal actors need to silence the political noise and critically examine prosecutors’ patterns of exclusion of victim impact testimony on federal capital cases.

Part II presents and analyses an empirical study of the inclusion of the victim impact statement in federal death penalty cases. It begins with an explanation of the development of the research method. I explain my work with surviving family members and about how my assumptions were challenged when ‘model’ families experienced the unfairness of the criminal justice system. Although the American legal system is considered a model for common law practices, these ‘unequal’ experiences made me question many presumptions about the legal system. The question that concerned me most was how legal professionals consider victims in
criminal proceedings. Chapter Five explains the criteria I developed for the two categories of crime based on Sundby’s supposition of *worthy* and *unworthy victims*. Chapters Six and Seven analyse the empirical data collated from the census, which demonstrate that there is a hierarchy of offences in federal capital cases regarding the use of the victim impact statement. The data shows a clear pattern of selective instrumental use of victim impact testimony by federal prosecutors. Offences labelled in this thesis as *worthy victim*, such as bank robberies, incorporate the victim impact statement in the capital proceedings against the defendant at very high levels. Conversely, two patterns emerge from *unworthy victim* cases. First, the prosecution often does not state its intent to use victim impact in its official notification to seek the death penalty against the accused.74 Second, when the prosecution does state its intention to include this evidence at trial, its does so to a lesser degree than cases of *worthy victim* crimes. The research indicates that prosecutors’ discretionary practices regarding the victim impact evidence exclude such testimony in cases that the crime was designated *unworthy victim*. This thesis establishes that patterns of prosecutorial inclusion and exclusion of victim impact evidence based upon the type of crime committed can violate a defendant’s right to be free of arbitrary and capricious imposition of the death penalty.75

The Conclusion reiterates the tensions caused by crime control advocates’ use of the public’s sympathy for crime victims to further their penal policies. The interjection by victims’ rights proponents into the criminal proceedings forces a debate over defendants’ versus victims’ rights. This antagonism and the dispute between victims’ rights proponents and prosecutors over the victim’s party standing distract the traditional legal parties from the very real issues confronting them in a capital case. Such challenges prevent analysis of prosecutorial patterns of use of the victim impact statement. Yet, the research findings cast doubt upon the rhetoric that has driven criminal justice policy in America. As the apex of victims’ rights is the ability to provide victim impact testimony in death penalty cases, it is vital to determine whether the present use of the victim impact statement in federal capital cases is arbitrary and violates a defendant’s right to due process. Additionally, if

74 21 U.S.C. § 848(h)(1); 18 U.S.C. § 3593(a). The official federal death penalty process will be explained in detail in Chapter Two.
75 Gregg v. Georgia 428 U.S. 153 (1976)
prosecutorial selectivity of victim impact evidence occurs in death penalty cases, it is likely similar practices and consequences occur in less serious crimes. Thus, the thesis proposes suspending the use of victim impact statements in all federal criminal proceedings. This thesis also recommends that an Executive Order be issued to create a nonpartisan Task Force on Victims of Crime that includes crime victims, judges, prosecutors, defence attorneys, legal academics, mental health and trauma experts, and community members to examine the legislative policies and prosecutorial practice regarding victim impact evidence.
2 The Prosecutor & the Death Penalty

Prosecutors command great power in the American legal system. Prosecutors are commissioned to “seek justice” on behalf of the government’s role as a savant and protector of society. In America, this role has evolved from citizens’ individual responsibility to perform the duties of a prosecutor to a governmental function in a professional capacity largely out of sight from society’s daily interactions. Whilst the function of the victim–prosecutor attended to both the victim’s need for redress and the state’s need for social control, the government prosecutes crimes on behalf of the state’s interest rather than out of specific concern for the individual victim. This shift indicates how the government and the crime victim’s judicial interests are not necessarily congruent, as the emphasis of criminal cases centres on the state’s interests rather than the victim’s needs. With the government’s decision to be in charge of the role as the prosecutor and to take control of the legal responsibilities for criminal cases, the concept of the crime victim having a central role in the legal proceedings is aberrant in modern American criminal law.

---


78 In the United States, victims can bring civil suits against parties, but very few states allow or acknowledge the victim to bring criminal charges against the accused. States that allow private citizens limited legal action in criminal cases are: Georgia, Ga. Code. 17-4-40, a private citizen may request that a criminal process be investigated, at which time the accused can argue why charges should not be issued; Idaho, Stat. 19-501 et seq., Maryland, Md. Stat. § 2-607(c)(6), a private citizen may issue a summons or arrest warrant in limited circumstances; New Hampshire, State v. Matineau, 808 A.2d 51 (2002), for minor offences in which incarceration is not a possible penalty may be initiated and prosecuted by private citizens; North Carolina, G.S. 15A-304, allows a citizen to file a criminal complaint with a magistrate, as long as the citizen provides “sufficient information, supported by oath or affirmation” to find probable cause; Ohio, Ohio Code § 2935.09, a victim may file an affidavit requesting legal review to determine if a complaint should be filed with the
The precedent of criminal trials being between the state and the accused has given unparalleled power to criminal justice officials. Society hears little about the daily workings of the prosecutor’s office, unless it involves a high profile crime and the ensuing trial. This is partly due to the “virtually unlimited” discretion prosecutors enjoy in deciding whether and what charge to bring against the accused. With the power to control whether to pursue criminal charges, what crimes to accuse a defendant of, and if the criminal case will go to trial or will be settled through a plea agreement, prosecutors have both the authority determine the criminal justice policy for their jurisdiction as well as shape public perceptions of criminals, victims, and legal professionals. As the highest elected legal official, prosecutors also influence the criminal justice policies and practices of punishment in their jurisdiction. Lawmakers and prosecutors advance crime control as best practices for society and the reduction of crime. As a result, scholars debate whether justice has moved away from the traditional theories of punishment such as deterrence, reformatory, and

prosecuting attorney. This was enacted in 2006 to replace previous law in which a private citizen could charge a crime without review by a law enforcement or legal official; Pennsylvania, Pen. R. Crim. P. 506, a private citizen may file a complaint with a prosecutor and if the prosecutor disagrees with the complaint, the victim may seek judicial review of the decision; South Carolina, S.C. § 22-5-110, a private citizen may initiate a criminal case and request a magistrate issue a summons, but not an arrest warrant related to the complaint; Virginia, Va. Stat. § 19.2-110, a private citizen may file a complaint in writing.


82 MARC MAUER, RACE TO INCARCERATE. (The New Press, 1999).(analysising crime control policies and the connections to high incarceration in America); ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA (critically examining the crime control policies of the past twenty-five years) (Picador, 1998).

retribution\textsuperscript{85} and towards revenge.\textsuperscript{86} Although punishment practices have little regard for or engagement with the victim, prosecutors imply that the defendant’s sentence is ‘justice’ for the victim.\textsuperscript{87}

Given that prosecutors have a responsibility to uphold the law on behalf of the government and society, many see their role as the standard-bearers for truth\textsuperscript{88}, fairness,\textsuperscript{89} and justice.\textsuperscript{90} Part and parcel to such beliefs, prosecutors consider it their duty to maintain a higher ethical standard than other professions.\textsuperscript{91} As attorneys for the government, prosecutors also distinguish that their duty is to ‘do justice’ whereas the defence attorneys’ task is to zealously represent their client at whatever cost.\textsuperscript{92} Although such depictions do not explicitly compare or differentiate the prosecutor’s code of conduct to that of defence attorneys, given the parameters of the adversarial


\textsuperscript{86} See p 60.

\textsuperscript{87} Bennett L. Gershman, The Prosecutor's Duty to Truth, 14 GEO. J. LEGAL ETHICS 309 (2001); Fred C. Zacharias & Bruce A. Green, The Uniqueness of Federal Prosecutors, 88 GEO. L. J. 207 (1999-2000); MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (Bobbs-Merrill, 1975).


\textsuperscript{89} See supra note 2.

\textsuperscript{90} Meilili, Prosecutorial Discretion in an Adversary System 670; Fitzgerald, Ethical Culture 16-7, 22-3. See also: Green, Prosecutors Seek Justice 636-7; Zacharias & Green, Uniqueness, 226-8; STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (Oxford University Press, 2012).

\textsuperscript{91} Fitzgerald, Ethical Culture 21, 27. See also: HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 163-8 (Stanford University Press, 1968). (writing that the due process model of criminal justice is to present “formidable impediments to carrying the accused any further” in the legal proceedings.)
legal system, the context is apparent. Both legal professionals have the duty to uphold and protect the law. Yet, the public and criminal justice professionals perceive the manner in which both parties go about their roles differently.

As leaders of the criminal justice system, a prosecutors’ responsibility is to both ethically balance the public need for safety and justice and to protect the innocent defendant. Yet some acknowledge that early influences, such as law school and early stages of one’s career as a rising prosecutor, foster the belief that the adversarial system is a contest about ‘winning.’ In capital cases, this notion is more pronounced.

2.1 The Death Penalty

Death penalty cases differ from other criminal cases. In its history, the US Supreme Court has vacillated on whether the death penalty is constitutional. In the early 1970’s, the US Supreme Court imposed a moratorium on the death penalty, ruling that it was being imposed arbitrarily and was therefore unconstitutional. Four years

---

93 See generally: PACKER, The Limits of the Criminal Sanction 149-73. (describing the two models within the criminal justice system: crime control and due process. Packer wrote that the crime control model argues that police and prosecutors should have the power that enables swift fact-finding, detection, and adjudication of the accused. Crime control proponents favour “minimizing” challenges to criminal justice officials’ investigations and would argue that protecting society has greater importance than the protection of the rights of the accused, which the due process model emphasises. Additionally, the due process model stipulates an exhaustive fact-finding process as part of the accused’s protection from the law.)

94 JAMES KUNEN, HOW CAN YOU DEFEND THOSE PEOPLE? THE MAKING OF A CRIMINAL LAWYER 30 (Random House, 1983).(writing it is a "defense attorney's job is to keep the truth from coming out, or to keep the jury from recognizing it if it does."); Gary Goodpaster, Criminal Law: On the Theory of American Adversary Criminal Trial, 78 CRIM. L. & CRIMINOLO. 118, 118 n.1 (1987).(noting "Scholars support the practitioners' view that the defense attorney's aim is not truth or fairness, but the most favorable outcome for his or her client."); FREEDMAN, Lawyers' Ethics in an Adversary System 75.(writing that defence attorneys may provide advice that is beneficial to their client, but may not be truthful.)


96 Melilli, Prosecutorial Discretion in an Adversary System 685-6, 694. (describing how law schools teach students to see the adversarial process in terms of ‘victory,’ ‘zealous advocacy’ and ‘unconcerned about the truth’). See also: R.J. Gerber, Victory vs. Truth: The Adversary System and Its Ethics, 19 AM. ST. L.J. 3, 4 (1987).

97 Furman 408 U.S. at.
later, however, the Court ruled that if the individual state or the federal government implemented bifurcated trials and automatic appeals for a defendant sentenced to death, such procedures were in accordance with the Eighth Amendment prohibiting cruel and unusual punishment.\(^98\) In the Court’s continued effort to establish that capital trials did not violate a defendant’s rights, the Court ruled that the jury must “not be precluded from considering … any aspect … that the defendant proffers as a basis for a sentence less than death.”\(^99\)

A bifurcated trial means that a criminal or death penalty trial has two distinct phases in which the jury must consider the defendant’s culpability without regard to punishment the first phase. In order for the defendant to be eligible for the death penalty, the prosecution must prove certain threshold factors as part of the defendant’s guilt.\(^100\) If the jury agrees with the government’s arguments in their determination that the defendant is guilty of a crime punishable by death, then the trial moves to the second phase of the capital trial. The second phase of the trial is heard and considered by the same jury who then determines whether the defendant should be sentenced to death or a life sentence without the possibility of parole. In this separate part of the trial, the jury must decide whether the prosecution has proven the aggravating circumstances of the crime in order to justify the death penalty. At the same time, the jury must consider the mitigating circumstances presented by the defence as a justification for not sentencing the defendant to death.\(^101\) The jury’s verdict must be unanimous; if one person is against sentencing the defendant to death, the decision is automatically a life sentence.

As discussed in Chapters One and Four, the US Supreme Court’s ruling in Payne v. Tennessee brought immediate reactions from scholars and practitioners. The Payne

\(^98\) Gregg 428 U.S. at. The Court ruled on four other capital cases at the same time, yet the shorthand name for the Court’s decisions is ‘Gregg v. Georgia.’ The other cases are: Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).
\(^100\) The statutory and non-statutory aggravators, as well as the mitigating factors are explained in Chapter Four.
ruling prompted a vociferous response from the defence community that such testimony was intended to “recast public sympathies,” which could result in sentencing decisions based on revenge not reason. Additionally, defence proponents argued that victim impact testimony shifted the attention from a defendant’s responsibility to a victim’s suffering. Prosecutors counter such arguments by reminding the court that the US Supreme Court authorised the use of victim impact evidence in all criminal cases.  

As the legal scholarship and case law on the issue of victim impact presented throughout this thesis show, however, there is much debate as to what is clear and objective. Given that a conviction in the first phase of a capital trial must be secured for a victim to even have the chance to speak, it must be assumed that their representations are intended to influence sentencing. With the legal teams diametrically opposed to what is the appropriate sentence for the defendant, each team works to convince the jury that the mitigating or aggravating factors exhibited at the penalty phase of the trial are the correct version of the defendant’s history and justify the appropriate sentence of life or death. Prosecutors prepare this testimony to fit with their message: the death sentence is justice. Victims’ rights may have been successful in gaining a voice in the courtroom, but the prosecutors set the parameters.

Until recently, if the victim’s family member had a role in the capital proceedings, it was usually at the behest of the prosecution. The American legal system eradicated

104 Payne.
106 For example, see: Utah v. Ott, Case No. 10-490 amicus curiae (arguing that victims should be allowed to opine on a defendant’s sentence in capital cases).
107 See: Booth, Gathers, Payne (the core of the arguments and the Court’s ruling is the government’s right to include victim impact statements as part of their evidence in capital cases.) But cf: Krause, *Reaching Out to the Other Side*; Tammy Krause, *Finding Light in Broken Hope*, in *MUTUAL TREASURE* (Harold Heie & Michael King eds., 2009); Tammy Krause, *Murder, Mourning, and the Ideal of Reconciliation*, in *ROADS TO RECONCILIATION: CROSS-DISCIPLINARY APPROACHES TO*
any meaningful role for the crime victim in the legal proceedings. Thus, the criminal proceedings became, and remain, between the State and the accused. With the emerging influence of victims’ rights groups, victims’ rights proponents have demanded assurance that victims have an active and vocal role in the legal actions taken against the accused.108 With the passage of federal victims’ rights, prosecutors were expected to incorporate the victim’s right to participate in the judicial proceedings. Yet, federal prosecutors do not view the victim as a new, discrete legal category. Given that the state remains in the position as the victim, prosecutors do not view the actual crime victim as a distinct individual, rather they continue to recognise the crime victim as a witness in its case. As such, prosecutors do not readily accept politicians’ decision to interject the victim as an agent into the judicial proceedings.109

2.2 The Crime Victim in a Historical Context

Many people, including lawyers,110 do not know that the United States, the crime victim commonly held the essential and powerful role of prosecutor in the adjudication process into the nineteenth century.111 As a British colony, America inherited its common law legacy from England and part and parcel of this tradition

109 Id. at 285-7. (arguing that victims are no longer witnesses, but “participants” in the legal proceedings against the accused).
111 J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 271 (Princeton University Press, 1986); Douglas Hay, Property, Authority and the Criminal Law, in ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 40 (Douglas Hay, et al. eds., 1975). (“...the right of any private citizen to initiate and conduct a prosecution through to conviction, whether he was the victim or not, was so constantly exercised in the eighteenth century that it needed no comment. It was in fact the paradigm of prosecution.”). See also: Hay, Pros. p.167; See also: FRANK MCLYNN, CRIME & PUNISHMENT IN EIGHTEENTH-CENTURY ENGLAND 21 (Routledge, 1989); DOUGLAS HAY & FRANCIS SNYDER, POLICING AND PROSECUTION IN BRITAIN 1750-1850 18, 23-6 (Oxford University Press, 1989); Douglas Hay, Controlling the English Prosecutor, 21 OSGOODE HALL L.J. 165 167 (1983); Barry Godfrey, Changing Prosecution Practices and their Impact on Crime Figures, 1857-1940, 48 BRIT. J. CRIMINOLO. 171 172 (2008).
was the victim–prosecutor. The lawyer-free criminal trial was directly between the two parties most affected by the crime—the victim and the accused—without the assistance of legal counsel. Although cases were entered in the name of the Crown, the victim was responsible for financing and carrying out case.

The public prosecutor, or district attorney, is referenced as “largely an American invention” whose role “quickly” evolved in colonial America and was firmly established as the standard legal practice by 1789. Yet, this commonly held assumption it is not historically accurate. Langbein contends that the lack of recordkeeping of criminal proceedings infers that citizens were representing themselves at this time. Yet, contemporary legal practitioners and writers do not question public prosecutors because, “[l]awyers incline to project modern practice backwards unless there is a clear contradiction.” Contemporary legal professionals do little, if any, research about the historical legal roles or responsibilities of their profession as such analysis is not relevant to their casework. Rather, for practicing attorneys, the “law moves with its times and is eternally new.” Yet, “a dearth of accurate historical analysis” has allowed an inaccurate ‘factual’ assumption about government prosecutors to dominate today’s legal outlook. This prevalent notion has more to do with the invested interests in greater societal and legal control than with

---

112 A victim-prosecutor refers to a victim, or a representative for the victim, who pressed criminal charges against an individual in lieu, or absence, of the police and a public prosecutor and tried the case in court.


116 JACOBY, The American Prosecutor at 10, 36.

117 Kress, Progress and Prosecution at 100.

118 Ramsey, Prosecutors in Historical Perspective 1325. (writing that such presentation of ‘facts’ “does not bear scrutiny.”) See infra 204-221 (providing empirical data about the active role of the victim-prosecutor well into the nineteenth century).


120 Id. at 316. See also: Elizabeth Gaspar Brown, British Statutes in American Law, 1776-1836, 9 THE AM. J. OF LEG. HISTORY 260 18 (Jul., 1965).(writing that the lack of records and difficulty of understanding English chancery pleadings stymie legal scholars and professionals from understanding the importance of the victim-prosecutor’s role).

121 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 18 (Simon & Schuster, Inc. 2 ed, 1985).

122 Ramsey, Prosecutors in Historical Perspective 1315.
protecting the crime victim or the defendant’s rights. To consider how the law limits, and often denies, the judicial interests of the accused and crime victim, the evolution of the public prosecutor must be better understood.

2.2.1 British Common Law

From the seventeenth century into the nineteenth century, it was a crime victim’s duty to act as both the police and the prosecuting attorney on behalf of the Crown.\(^{123}\) Since England did not have a police force, the Crown relied upon its citizens to maintain order.\(^{124}\) English criminal law—known as the Bloody Code—was severe and promoted terror to keep the masses obedient and separate from the ruling class.\(^{125}\) The English government was indifferent to the individual victims of crime and offered little, if any, support or resources. If the English government did engage in criminal prosecutions, its priorities were forgery, treason, and sedition cases—matters in which the government considered itself the victim.\(^{126}\)

Whether because of the inconvenience and burden for the victim or out of concern over the severity of the law, formal prosecutions against the accused were the exception. Rather, negotiations between the two parties with reparations to the victim were the norm.\(^{127}\) Victims commonly sought an apology,\(^{128}\) restitution,\(^{129}\) or the recovery of his property from the offender (often through servitude to work off the loss).\(^{130}\) One legal scholar argued that if a victim pressed formal charges, it pushed a trial from “an option to an obligation” regardless of any further actions between the

---


\(^{124}\) See generally: McLynn, Crime & Punishment in Eighteenth-Century England; Peter King, CRIME, JUSTICE AND DISCRETION IN ENGLAND 1740-1820 (Oxford University Press, 2000); Hay & Snyder, Policing and Prosecution; Hay, Controlling; Hay, Property; Beattie, Crime and the Courts.


\(^{126}\) Hay, Property 167; Beattie, Crime and the Courts 353.


\(^{128}\) King, Crime and Discretion 92; Beattie, Crime and the Courts 8, 268.


acquitted and himself.\textsuperscript{131} Others viewed the legal process as discretionary and prime for negotiation until the case reached the grand jury hearing.\textsuperscript{132} When assistance from officials was necessary, citizens used local magistrates to resolve their disputes; the courts were considered a drastic option.\textsuperscript{133}

When victims did go to the court, a trial was “an oral conflict between two unprepared amateurs, one asserting the guilt of the other, the accused proving his innocence to the jury by the force and sincerity of his denials.”\textsuperscript{134} Like the crime victim, the accused was also forbidden defence counsel.\textsuperscript{135} Due to the victim and accused’s inexperience, judges took it upon themselves to question all parties to ascertain the facts of the case.\textsuperscript{136} Yet doing so was entirely discretionary and depended upon the judge and the circumstances of the case. The burdens placed upon the crime victim, as well as the need for consistent procedures and outcomes, led the Parliament to provide crime victims with financial assistance and allow attorneys to assist in the prosecution of the cases. Such actions came before the government turned its attention to the rights of the accused. Henry Fielding, helped with the passage of the Act of 1752, which required the country to partially fund a prosecution that resulted in a successful conviction.\textsuperscript{137} This eventually included assistance to ‘poor persons’ and ultimately, in 1778, judges were formally allowed to order the government to reimburse victims for the prosecution, regardless of whether the accused was convicted.\textsuperscript{138} Thus, victims were more willing to prosecute a case against the accused and the courts reimbursed close to seventy-five per cent of prosecutors for their case-related expenses.\textsuperscript{139} Parliament’s financial assistance to victim–prosecutors continued to increase, but the victim’s responsibility to act as


\textsuperscript{132} King, Crime and Discretion 125, 242, 355.

\textsuperscript{133} Id. at 83-103; Beattie, \textit{Scales of Justice} 229; Beattie, Crime and the Courts 36-9.

\textsuperscript{134} Beattie, \textit{Scales of Justice} 271-2.

\textsuperscript{135} Langbein, \textit{Origins of Public Prosecution} 2; Beattie, \textit{Scales of Justice} 223; Beattie, Crime and the Courts 348.

\textsuperscript{136} King, Crime and Discretion 223; Beattie, \textit{Scales of Justice} 222-3; Beattie, Crime and the Courts 342-5.

\textsuperscript{137} Beattie, Crime and the Courts 42, 196. (noting that both John and Henry Fielding were crusaders for legal reform, petitioning for a professional police force as well as assistance in the prosecution of criminals).

\textsuperscript{138} Id. at 42-4.

\textsuperscript{139} King, Crime and Discretion 51, 81.
both police officer and prosecutor remained for much of the nineteenth century.\textsuperscript{140} By mid-eighteenth century, judges began to see that defendants were at a disadvantage without any outside help. Similar to the assistance to the victim–prosecutor, such assistance was incremental, but ultimately legal reformers lobbied Parliament to pass the Prisoner’s Counsel Act of 1836, entitling full defence counsel to the accused.\textsuperscript{141}

Unlike continental European countries, which had professional prosecutors and police forces, the English authorities did not support having these positions as the government’s responsibility. Officials were of the opinion that it was the responsibility of the people to control crime amongst them. This position came from a long-held English belief that Englishmen inherited liberty to be free from arbitrary authority.\textsuperscript{142} With such libertarian values, many in power resisted calls for the Crown to implement a public professional police force and prosecutors. The Parliamentary Act of 1829 created the Metropolitan Police and put in motion the role of the uniformly trained police force.\textsuperscript{143} Ten years later, Parliament broadened police powers to include the right to prosecute public order offences.\textsuperscript{144} By the 1870s, victims considered the Metropolitan Police as “convenient substitutes for private prosecutions.”\textsuperscript{145} Yet, the cases in the Metropolitan Police’s control “lay like a layer of cream”\textsuperscript{146} over the bulk of cases still initiated by the victim–prosecutor.\textsuperscript{147} Fifty years later in 1879, Parliament created the Office of the Director of Public Prosecutions (DPP).\textsuperscript{148} Initially, this office did not have control over the direction of criminal cases; rather it consulted the police prosecutors on legal matters related to their criminal prosecutions and prosecuted cases of significance to the Crown.\textsuperscript{149}

\textsuperscript{140} Hay, \textit{Controlling} 172.
\textsuperscript{141} KING, Crime and Discretion 227-8; Beattie, \textit{Scales of Justice} 231, 250.
\textsuperscript{142} BEATTIE, Crime and the Courts 67, 314, 636.
\textsuperscript{143} Id. at 636.
\textsuperscript{144} HAY & SNYDER, Policing and Prosecution 399.
\textsuperscript{145} Hay, \textit{Controlling} 175.
\textsuperscript{147} Godfrey, \textit{Changing Prosecution} 172-4.
\textsuperscript{148} Paul Rock, \textit{Victims, Prosecutors and the State in Nineteenth Century England and Wales, 4 CRIM. JUST.} 331, 332, 342-3 (2004); CLIVE EMSLEY, CRIME AND SOCIETY IN ENGLAND, 1750-1900 188 (Longman 4th ed, 2009).(citing that more than eighty per cent of criminal cases were prosecuted by private citizens). \textit{See also:} HAY & SNYDER, Policing and Prosecution 36-7; Hay, \textit{Controlling} 171-6.
\textsuperscript{149} See generally: Jay A. Sigler, \textit{Public Prosecution in England and Wales}, 642 CRIM. L. REV. (1974); Rock, \textit{Prosecutors and the State}. 
A legal shift occurred with the development of public prosecutors. Where crime had once been considered a dispute between two parties, it was now viewed as a threat to social order. Likewise, although criminal cases had been the responsibility and the ‘right’ of the victim, legal advocates began to claim that the English legal system was based on public prosecutions, not private, in that any citizen may prosecute. Believing the Metropolitan Police had too much vested power and responsibility for the enforcement of law, criminal investigations, and prosecutions of criminal acts, critics called for structural changes to develop a prosecution office fully independent of the Metropolitan Police. In 1985, the government acted upon the recommendations of the Royal Commission on Criminal Procedure and created the Crown Prosecution Service. Today, this office oversees the criminal prosecutions brought by the government in England and Wales. Parliament, mindful of the country’s libertarian values, kept intact the citizen’s right to privately prosecute a case against another party.

2.2.2 American Colonial Law

It is difficult to divorce American legal history from its English influence. Although the population of the New World included communities such as the Dutch, French, and Irish, the English were the largest colonial presence and their laws became the law of this new land. Without much official recordkeeping during the colonial American period, American legal history scholars face many challenges in attempting to ascertain the development of “modern American law from its 150 LUCIA ZEDNER, CRIMINAL JUSTICE 8 (Oxford University Press, 2004).
151 FREDERIC MAITLAND, JUSTICE AND POLICE 141 (Macmillan & Co., 1885).
152 Rock, Prosecutors and the State 343-4.
156 Greenberg, Social Control in Colonial America 2.(quoting Milton M. Klein, “New York in the American Colonies: A New Look,” New York History, 53 (1972), 140 who wrote that New York and Pennsylvania were considered ‘heterogeneous’ in population, both in ‘ethnic and religious diversity.’)
antecedents during the half century following the American Revolution.”

Historians have relied on documents such as newspapers and people’s journals, letters, and personal documents. Yet the “incompleteness of the records” compounds the disagreements between historians’ positions and theories on the development of American law. Academics whose scholarly work in early American law was specific to an American colony or city tied that region’s legal developments to the legal characteristics and traditions of its European ancestry. Similarly, scholars whose research examined the historical role of the prosecutor in particular focused on the influence of the legal practices of the ‘mother’ countries. Yet still, some legal scholars did not see how the law’s origin was relevant focusing instead on how American society’s readiness for innovation and willingness to adapt to new ideas has required the law to change with such ingenuity.

One issue that most historians agree with is that although colonial leaders had the duty to ensure that colonial law conformed to the law of England, in practical terms


158 Greenberg, Social Control in Colonial America 48.

159 An amusing example of this is Zechariah Chafee’s comments regarding Julius Goebel’s insistence that English provincial law was the strongest influence of American law. Chafee wrote, “Goebel’s theory seems a bit like drinking only the vermouth in a well-mixed Martini and avoiding the gin.” See: Zechariah Chafee Jr, Colonial Courts and the Common Law, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 78 (David H. Flaherty ed. 1969). In another example, David Flaherty disagrees with Roscoe Pound’s assertion that the chief developments in American law are post-Revolutionary, stating that such a position this “interpretation bears little relation to the facts of the matter and contributes greatly to the neglect of colonial legal history.” See: David H. Flaherty, An Introduction to Early American Legal History in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 18 (David H. Flaherty ed. 1969).


the law was an amalgamation borne out of familiarity, necessity, and innovation. Most English citizens did not have direct judicial experience with the king’s law or the unwritten law, only local custom or community law. The English precedent of private prosecutions carried over to Colonial America. Crime continued to be viewed as “an injury to the individual victim, not an attack against the state or society.”

Colonial America provided communities with the right to govern themselves. Some local governments were proprietary and focussed on business, while others broke from English secular law and based their law on Biblical precepts. The local governments accepted local practices as long as they were not viewed to rebuke English common law. This sort of decentralised government was necessary for the colonies, but strained their relationships with England. One factor that made it difficult for British authorities to comprehend the necessity of a decentralised government in Colonial America was the unique circumstances presented by the land. The sheer geographical size and colonies’ isolation from other colonies and Britain prevented—or aided—colonists from strict adherence to British common law. Such factors required authorities to develop laws that protected society’s


164 HOFFER, Law and People 122.

165 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 1 (Callaghan and Compan, 1884); Chafee Jr, Colonial Courts and the Common Law 54.

166 Richard B. Morris, Foreword, in LAW AND AUTHORITY IN COLONIAL AMERICA vii (George Athan Billias ed. 1965).


168 McDonald, Towards a Bicentennial 650.


171 Gaspar Brown, British Statutes in American Law 1-5.

172 HURST, Conditions of Freedom 7.

173 HASKINS, Law and Authority 4; FRIEDMAN, A History of American Law 34; Chafee Jr, Colonial Courts and the Common Law 70.
interests of cohesion, survival, and stability.\textsuperscript{174} As will be discussed in the next section, in geographically expansive colonies such as New York, individuals could not always enforce the law as victim–prosecutors because the land impeded colonists from attending court. This necessitated a move toward the local authorities assisting citizens in prosecuting crimes in order to ensure community accord.

Whilst ideology may have been the predominant governing power in many of the colonies, ultimately, economics played a decisive role. Colonies were financially responsible for those who were unable to provide for themselves in situations such as bastardy, drunkenness, unemployment, and petty theft.\textsuperscript{175} As the colonies grew and lost familial and moral homogeneity, this liability proved to be untenable to those in power.\textsuperscript{176} At the same time, growth brought opportunities to expand competitive markets, businesses, and colonial infrastructure.\textsuperscript{177} And as Colonial America grew more prosperous, the law focussed less on moral crimes and more on property crimes.\textsuperscript{178} In colonies where the emphasis had been on immorality, the same judges began to view their role as an “advocate of public order” rather than as a “passive arbiter … between private citizens.”\textsuperscript{179} Such standards culminated with the American Revolution as the newly formed federal government’s priorities went toward a market society, property interests, and social control.\textsuperscript{180}

English colonists did not consider themselves ‘Americans’ until the Revolutionary era. The American Revolution “exploded the relationship between crown and people but not that between law and people.” The difference was that after the war if an English law went against American Constitutional ideas of republicanism, English law was discarded. Government officials and lawyers developed ‘new’ law by adopting English law or laws from other countries that better suited America’s wants and needs. “American law continued, in short, to borrow.”

2.2.3 The Emergence of the Public Prosecutor in the American Legal System

In today’s American legal system, the victim–prosecutor is a relatively unknown—but not forgotten—historical role. The daily preparations for litigation require an understanding of relevant case law, not the history of the profession. Multiple forces such as the needs of a developing country to devise a consistent legal system, the influence of legal innovation, and the power of legal precedent, have shaped attorneys’ working knowledge of the American legal system, its rules, and roles. It is not surprising that most attorneys consider the crime victim simply as a witness, because that is what the victim has been considered for over a century. Yet, the origin of the American public prosecutor is “a puzzle,” in that no definitive legislative action or judicial decision altered the course of how the prosecution of criminal cases would be handled. Despite some advocates’ belief that the public prosecutor “quickly” assumed control of criminal cases from the victim–prosecutor, the more recent empirical research conducted by legal historians

182 HOFFER, Law and People 122; Nelson, Emerging Notions of Modern Criminal Law 447.(writing "English common law was the predominant practice and there was little American precedent, professionals continued to use British precedent.”)
184 STEINBERG, Transformation of Criminal Justice 6.(quoting Pennsylvania Chief Justice William Tilghman in Poor v. Greene, “By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length...we had formed a system of our own.”
185 FRIEDMAN, Law and Society 112-3.
186 As FRIEDMAN writes, “The strongest ingredient in American law at any given time, is the present...The history of law has meaning only if we assume that at any given time the vital portion is new and changing, form following function, not function following form.” Id. at 19.
187 William F. McDonald, The Prosecutor’s Domain, in THE PROSECUTOR 27 (William F. McDonald ed. 1979); McDonald, Towards a Bicentennial 659-61.
188 McDonald, Towards a Bicentennial 659.
189 Kress, Progress and Prosecution 100; JACOBY, The American Prosecutor 10, 36.
demonstrate a different account. Such research provides an essential understanding to this ‘brackish’ time in America as colonists began to identify as Americans and as substantive changes to the law and legal practices gradually took root.

Although American legal historians occasionally remark on the victim as prosecutor, little attention has been given to the question as to what caused authorities to take up the practice of public prosecution. This could simply be that for some traditional scholars, the role of the prosecutor was not their area of interest or expertise. Thus, when confronted with the issue of the public prosecutor, some made observations about the law and society in general and speculated as to the reasons why this role changed, but otherwise, it went unremarked. Among traditional legal historians, some suggest that vested state interests such as social control, increased governmental propertied interests, and a burgeoning market society increased the government’s involvement in criminal proceedings to assure they were fully adjudicated. Additionally, the constraints of a geographically larger and less-developed infrastructure than that of England made it difficult for citizens to attend court sessions to prosecute cases, which prompted authorities to step in and take over the legal case against the accused. Other American legal history scholars suggest that the responsibilities placed a financial burden on the victim, and strained relationships between the victim and the wider community regarding the decision to prosecute could have been factors in the eventual elimination of the victim–prosecutor. Similarly, authorities were compelled into providing public prosecutors because the reluctance or ineptness of victims to prosecute criminal cases went against the public interest in law enforcement. In 1930, the U.S. government commissioned research to present the development and present state of law

---

190 Langbein, Origins of Public Prosecution 315.
192 Nelson, Emerging Notions of Modern Criminal Law.
193 HURST, The Law Makers; HURST, Conditions of Freedom; Flaherty, Crime and Social Control.
195 Flaherty, An Introduction to Early American Legal History; Haskins, Law and Colonial Society.
196 Haskins, Reception of the Common Law; HASKINS, Law and Authority
197 Langbein, Origins of Public Prosecution 318.
enforcement. This report adduced that after the American Revolution an anti-English backlash led the federal government to combine the essence of American common law with the manner of the office of the French procureur de roi, the public prosecutor.

The Dutch schout is one hypothesis in the development of the public prosecutor that is rooted in the historical understanding of the colonial limitations of the geography, the relevance of necessity, and cultural adaptability. The Dutch, who originally populated the colony New Netherland, employed a system of law enforcement different from the English method of private prosecution. Dutch law included the role of the schout, who was both the sheriff and the prosecutor for the citizens of the territory. Despite the eventual English legal dominance in New Netherland, the Governor’s Council allowed the role of the public prosecutor to maintain a presence alongside the private prosecutor. Whilst implementing aspects of English law, English authorities made concessions toward Dutch and Puritan autonomy. In doing so, these populations began to assimilate to the English rule and common law. Whilst realistically not the only influence on the development of the American public prosecutor, Van Alstyn[e’s research on the schout put forward compelling evidence the Dutch practice had a substantive influence on this role.

The developing role of the prosecutor after the American Revolution has been the subject of several contemporary American legal historians. Relying on local archives kept after America gained independence, these scholars conducted empirical research to assess the societal and governmental pressures on and the development of a more formal criminal justice system. Such research bridges American legal history with

---

199 Id. at 7. Yet this report has many similar shortcomings as it makes definitive statements about the development of the public prosecutor without documentation. This supports Langbein’s premise for the scarcity of historical research in this area.
200 See generally: Van Alstyn[e, A Historical Puzzle; Ramsey, Prosecutors in Historical Perspective.
203 See: STEINBERG, Transformation of Criminal Justice Appendix 233. (researching the Docket Books of Philadelphia Country Court of Quarter Sessions, the Philadelphia City Mayor’s Court, the
a greater understanding of the forces that necessitated changes to the legal system in a developing country. Researchers discovered that the victim–prosecutor was an active force well into the nineteenth century, as people viewed resolving their disputes as something in their control. Whereas once the victim was expected to prosecute a criminal case, these decisions solely came to rest with the public prosecutor’s office.

According to McConville and Mirsky’s research of the New York City District Attorney’s files, in 1850, sixty per cent of criminal cases involved victim–prosecutors. This changed in the latter half of the nineteenth century when the District Attorney’s office became the only prosecutor in criminal cases. With increased power and the rise of politics, the public prosecutor, now called the District Attorney, became an elected official. Steinberg concluded that rising violence forced elected officials to amend the already contentious role of the private prosecutor. Some viewed the private system as undemocratic and susceptible to corruption as victims could approach the city alderman to lodge charges and settle disputes, all outside of the courts. Ultimately, legislative acts restricting efforts by the alderman and citizens gave rise to centralised control by the public prosecutor and the police. By the mid-1870’s, the local government restricted the access victims had to the judiciary, giving power to city authorities. Ramsey’s analysis of both sets of District Attorney records and corresponding newspaper articles revealed that...
public prosecutors were at odds with the public. The public pressured the District Attorney’s office to take homicide cases to trial, but Ramsey also discovered the ‘complex’ relationship the public and prosecutors had regarding defendants facing the death penalty. Similar to allegations confronting the legal system today, Ramsey found that public prosecutors pleaded out murder cases with defendants whom society considered more respectable whilst taking those perceived as contemptible to trial. Whilst in both circumstances prosecutors achieved convictions, they did so through discretionary power conferred in that role. Ramsey also points out the contradiction that “the desire for vigorous crime control” in the nineteenth century led to the call for public prosecutions whereas current victims’ rights proponents advocate of for stronger crime control through the enforcement of official standing for victims in criminal proceedings. Ramsey, Steinberg, and McConville and Mirsky based their conclusions based on the empirical findings of their research. Although the investigative purpose of the research differed among the scholars, their findings were similar in regard to the development of the public prosecutor. Such findings included the changing societal and political expectations of government authorities, the public pressure to control crime, questions of fairness towards the accused regarding malicious prosecutions and the advent of public prosecutors, that attempts to professionalize the role of the public prosecutor were inconsistent, and that the resolution of cases remained predominantly in the hands of the prosecutor. The researchers acknowledged that societal reliance of private–prosecutors created an inconsistent justice system, and the desire to have more consistent legal outcomes moved government authorities toward eradicating the victim–prosecutor. Additionally, the state’s interests in greater crime control and a stronger market society were factors in this decision as the ‘ideological purpose’ of America changed over time.

213 Ramsey, Prosecutors in Historical Perspective 1390.
214 Id. at 1337-1347.
215 Id. at 1393.
216 Id. at 1312, 1393; STEINBERG, Transformation of Criminal Justice 119-20; McConville & Mirsky, The Rise of Guilty Pleas 460, 468.
Over the next century, American law saw “massive change.” The socioeconomic change with the industrial economy meant that law became more about protecting market interests and the emerging corporations that were uncommon in the eighteenth century. The government met the rapid change with codifying laws, similar to France and Germany that was new to a common law system and helped both businesses and the government chart new economic and legal territory. Criminal law also became codified in the nineteenth century, which helped with the checks and balances to safeguard a defendant’s rights against the government. The arc of the legal practice in the nineteenth moved toward a more professional and fulltime career for attorneys and judges. The increased professionalization of the American legal system created greater distance between citizens and the law.

2.3 Today’s American Prosecutor

Despite the “slow and uneven” transition, the government’s power was eventually secured with state-controlled public prosecution. Today, local and state officials hold this publicly elected position as administrators of justice. The prosecutor is called to put the rights and interests of society forward rather than that of the individual crime victim. Yet elected prosecutors must navigate public interest, upholding the law, and maintaining the support of the electorate. As discussed in Chapter Three, the move toward the state’s interests negated victims’ interests, ultimately prompted victims and victim advocates into civic action. The attention garnered by the victims’ rights movement regarding greater involvement in criminal proceedings created strategic alliances between state and federal politicians, rather than between state and federal prosecutors. Because the federal government is constitutionally limited in the application of criminal law, local and state district attorneys handle the bulk of

---

221 FRIEDMAN, Law and Society 51-3.
222 HURST, Conditions of Freedom 7-8, 24.
223 FRIEDMAN, Law and Society 52.
225 STEINBERG, Transformation of Criminal Justice; FRIEDMAN, A History of American Law. See also: Greenberg, Social Control in Colonial America.
226 Ramsey, Prosecutors in Historical Perspective 1311. But see: JACOBY, The American Prosecutor 7, 10. 15-8. (stating that as the private prosecutor was inconsistent with the ideals of a democratic process, it had a short life span in the American colonies. Yet Jacoby contradicts herself when she writes that public prosecution do not root quickly in America, see 6).
criminal cases in America. Despite the fact that state governments have greater ability to legislate criminal law and the state prosecutors largely set the criminal justice agenda in their jurisdiction, local politicians have greater scrutiny from their constituents than national leaders. As such, national leaders and politicians are better positioned to escalate the crime rhetoric and campaign for “common sense attitudes” for harsher penal policies because there is more distance between them and voters. This alliance has created more of a political agenda rather than a legal discourse about criminal justice. Although this thesis does not examine state laws or state prosecutors’ decisions in criminal cases, it is important to understand that the national dialogue about crime control and penal policies largely arises from the political campaigns of elected officials such as state attorney generals, local district attorneys, and federal congressional and presidential politicians. Federal prosecutors typically avoid the political or public policy debate, as this post has long been considered apolitical.

2.3.1 Federal Prosecutors

The federal prosecutor holds a unique role in the American legal system. Federal prosecutors are not elected officials and do not have the same political pressure to appease constituents as do state and local district attorneys. The President of the United States appoints the ‘local’ U.S. Attorney. U.S. Attorneys oversee ninety-four judicial districts that cover the United States and are the chief federal law enforcement officers within each district. Although accountable to the U.S. Attorney General, the U.S. Attorney has broad discretion to determine the priorities for their office and district. Assistant U.S. Attorneys are the staff attorneys that manage the federal prosecutions within their district. These career positions do not...

227 SCHEINGOLD, The Politics of Street Crime 30-5.
228 GARLAND, Culture of Control 112.
229 SCHEINGOLD, The Politics of Street Crime 36; GARLAND, Culture of Control 146.
231 Id.
terminate with a new U.S. Attorney or President and do not require political appointment or affiliation.232

With less pressure to answer to the public’s emotive, cyclical responses to crime, federal prosecutors work “under the theory of protecting ‘the State’ or ‘the People,’”233 which has traditionally tempered the pressure to prosecute cases due to public outcry. Such a detached perspective can have both positive and negative effects. On the one hand, federal prosecutors could be viewed as upholding the law without political or emotional influence. It could be argued that federal prosecutors see their responsibility as benefiting the best interests for the public good rather than toward individual victims. On the other, as federal prosecutors do not have the same political pressure as locally elected officials, they may have less accountability to their constituents and can therefore set their own legal agenda.234

Federal prosecutors and legislators may often have similar goals for crime control, but tension can arise between the two parties due to perceptions of power, enforcement, and politics of the law.235 As mentioned, federal legislators experience similar public pressure to state and local prosecuting attorneys, in that they rely on constituents’ support to be re-elected. Federal representatives and senators need voters to believe that they follow through with campaign promises and positions. This can create laws or a political agenda effectively placing the responsibility on federal prosecutors to carry out in practice. Specific to this thesis, lawmakers’ policies have affected federal prosecutors on several fronts. On the one hand, federal legislators’ criminal statutes were aimed at strengthening penal reform with the belief that such legislation would limit charging and sentencing discretion. However, whilst


235 Bibas, Prosecutorial Accountability, 966.
criminal statutes may have appeared to limit prosecutorial discretion, what may have happened was force prosecutors to become even more opaque with their charging decisions. Although penal reformists declared victory with each subsequent ‘zero tolerance’ policy, federal prosecutors used such statutes as they saw fit: “as threats to extract pleas, not as punishments to be imposed on defendants who deserve them.”

Using the constraint of the law, federal prosecutors can communicate how a case would proceed with specific criminal statutes. Yet, if a prosecutor chose not to indict the accused under a specific statute, there are a myriad of possibilities for the accused to plead guilty to different charges. On the other hand, Congress effectively bound criminal reform with the plight of crime victims, thereby precipitating public opinion that the federal government needed to do more to ensure greater public safety, a reduction in crime, and more decisive legal actions against the accused to demonstrate better acknowledgment of the crime victim. With this, federal prosecutors experienced political and public pressure to become the “political authority” rather than the legal authority of American law.

Whilst prosecutors need to maintain the position of a disinterested party to ensure an impartial assessment of an offence, in recent history the hyperbolic media has sensationalised cases so that the public outcry has forced the U.S. Attorney to be the ‘political voice’ against such anomalistic acts of violence. Reluctantly or not, federal prosecutors have simultaneously donned the role as protectors of citizens as well as the ‘victims’ in federal capital offences. Nowhere is this more apparent than

238 Henderson, Wrongs; BECKETT, Making Crime Pay.
240 For critique on media cultivating society’s everyday perceptions of victims and crime, see: Chris Greer, Crime and Media, in CRIMINOLOGY 174-8 (S. Hale, et al. eds., 2005); Gabe Mythen & Sandra Walklate, Communicating the Terrorist Risk: Harnessing a Culture of Fear?, 2 CRIME, MEDIA, CULTURE: AN INTERNATIONAL JOURNAL 123 (2006); RI. MAWBY & SANDRA WALKLATE, CRITICAL VICTIMOLOGY (Sage, 1994).
in federal capital cases. Federal prosecutors, who had traditionally been more restrained with public statements or pronouncements about specific crimes or cases, discovered a national audience was waiting and listening to how the federal government would respond to grave injustices and uphold America’s image as the protector of its citizens and freedom.\footnote{For example: David Johnston, \textit{At Least 31 Are Dead, Scores Are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building: Clues Are Lacking, Reno to Ask Death Penalty}, NY TIMES, A1, April 20, 1995 (the day after the bombing in Oklahoma City and a suspect had not yet been named, U.S. Attorney General Reno already declared that she would seek the death penalty against the person(s) responsible); Ross Kerber and Hilary Russ, \textit{Boston Marathon Case Prosecutor Known for Aggressive Record}, nationwide wire, REUTERS, April 21, 2013 (writing that U.S. Attorney Ortiz “has taken heat for being tough to a fault and coming down too hard on some defendants” but that locals see that as appropriate); We Will Find Out Who Did This, 3 Killed, Scores Hurt in Boston Blasts, Bombs explode near marathon finish line in apparent terror attack, CHICAGO TRIB., A1, April 16, 2013 (the day after the bombings, the paper referred to US Attorney Carmen Ortiz and her willingness to seek the ultimate punishment).} Yet such public attention and demand for ‘justice’ conflicts with the U.S. Attorney’s duty to pursue the goals of criminal justice.\footnote{GARLAND, Culture of Control 112.} Although federal prosecutors are the law enforcement, the fact that they also represent themselves as the victim while protecting the crime victim creates an inappropriate role as a ‘citizen’ vigilante. This, combined with the lure of national attention, may explain the prosecutor’s adversarial mind-set regarding discretionary decisions to win a case regardless of whether the victim’s surviving family members are involved in the legal proceedings. In America’s resolute march toward penal reform, the death penalty came to “represent a kind of populism in governance … a willingness to define key aspects of law to accommodate popular feelings and fears, with the implications far beyond criminal justice.”\footnote{SIMON, Governing Through Crime 119.}

2.3.2 Prosecutorial Discretion

Prosecutors may scrutinise cases – and the evidence – with an eye on whether the case is winnable.\footnote{See: Ferguson Jr., \textit{Anatomy of Discretion} at Note 1; Celesta A. Albonetti, \textit{Prosecutorial Discretion: The Effects of Uncertainty}, 21 L. &. SOC’Y REV. 291 (1987).} As many prosecutors believe the primary purpose of their job is to secure convictions,\footnote{George T. Felkenes, \textit{The Prosecutor: A Look at Reality}, 7 SW. U. L. REV. 98, 109 (1975). See also: Ramsey, \textit{Prosecutors in Historical Perspective} 1311 (writing that the dominant societal expectation of prosecutors was to seek convictions). See generally: Melilli, \textit{Prosecutorial Discretion in an Adversary System}.} they often consider a plea-bargain with an accused as ‘winning.’ As the decision-making process and the case outcomes can give the
perception that prosecutors are indifferent to and detached from society’s interest in ‘justice,’ there has been a call to regulate prosecutorial discretion by creating professional guidelines that subject prosecutors to bar review, fostering stricter ethical standards amongst fellow prosecutors, regulating plea-bargaining, or developing greater public and judicial review. Despite such proposals, prosecutors’ power over the direction of criminal cases largely remains intact due to an acceptance of legal precedent.

Part and parcel of a prosecutor’s discretion is the ability to communicate with the crime victim and to take into consideration victim input. Although a prosecutor’s duties are to convict the guilty, enforce the rights of the public, and protect the rights of the accused, prosecutors may have an interest in having discussions with victims “with whom all can identify,” or at least those who will serve as jurors. Yet, early research showed that before such politics, prosecutors unofficially took the crime victim into account at multiple stages throughout the legal proceedings including when determining which criminal charges to bring, as well as the victim’s interests in either a seeking a plea agreement or going to trial. Hall confirmed that in homicide cases in particular, prosecutors gave ‘great weight’ to victims when deciding whether they would pursue a case. At the same time, prosecutors acknowledged that it often


247 See: Fitzgerald, Ethical Culture.

248 See: Bibas, Prosecutorial Accountability; Barkow, Policing Prosecutors.

249 Vorenberg, Decent Restraint 1555, 1563-4; Stuntz, Pathological Politics 505; Fisher, Plea Bargain's Triumph 208-29.


251 Ferguson Jr., Anatomy of Discretion 507, 509, 511.


254 Hall, Prosecution and Disposition 945-56. See also, LaFave, Discretion in the US 534.) (citing Frank Miller, Prosecution: The Decision to Charge a Suspect with a Crime Ch. 9 (Little, Brown & Co., 1969).

255 Hall, Prosecution and Disposition 948.
took an ‘adamant’ victim to prompt prosecutors to pursue charges in less-serious

cl.

es. Additionally, in those circumstances, prosecutors decided whether such cases

would move forward without regard for the victim’s interests.256 Although Hall did

not analyse capital cases or the use of victim impact statements, his findings suggest

similar parallels regarding prosecutorial perception and engagement of victim in

capital cases. Whilst victims have long held a symbolic importance in criminal

cases,257 Hall’s interviews with prosecutors showed that the degree to which victims

influenced prosecutors depended upon the severity of the crime and the status of the

victim.258 Hall’s analysis that the hierarchy of a victim’s influence based on the

seriousness of crimes “conflicts with the goals of treating victims fairly.”259 Despite

the rights that have been achieved for victims in the four decades since Hall’s

research, the discretionary patterns that Hall observed are relevant today. Federal

prosecutors’ approach to victim inclusion in capital cases has similar hallmarks to

Hall’s research, which conflicts with ensuring that the defendant’s sentence is not

decided in “an arbitrary and capricious manner.”260

Judges and the American Bar Association have been reluctant to restrict the

discretion of prosecutors. One area in which courts have been willing to intervene is

when it is determined that prosecutors have compromised the integrity of the legal

system with the improper acquisition and use of evidence.261 Yet, as discussed in

Chapter One, few courts have been willing to overturn a death sentence based upon

improper use of victim impact evidence. A law professor and former prosecutor

256. Id. at 949.

257. Henderson, Wrongs 948.

258. Hall, Prosecution and Disposition 948, 952-3, 956-8. (comparing the significance of homicide
cases to “non-serious” crimes regarding prosecutors’ assessments of victim input); 942, 963
(discussing the consideration given to the status of the crime victim)

259. Id. at 984. (“The policy of according weight to a victim’s feelings depending on the victim’s status,
wealth, race, sex, or age does not forward any worthy objective and clearly conflicts with the goals of
treating victims fairly…” (emphasis not original)

260. Booth 482 U.S. 503. See also: Hall, The Need for Restraint 235.(arguing that "the fundamental
evil" associated with victim impact evident is the "disparate sentencing of similarly situated
defendants"); Joseph L. Hoffman, Revenge or Mercy? Some Thoughts About Survivor Opinion
Evidence in Death Penalty Cases, 88 CORNELL L. REV. 530 532-3 (2002-2003). (writing that jurors
might base their decision to sentence the defendant to life or death dependent upon the perceived
value of the victim).

261. Zacharias & Green, Uniqueness 241. (citing United States v. Hammad, 858 F.2d 834, 841 (2d Cir.
1988) (criticizing use of sham subpoena); In re Friedman, 392 N.E.2d 1333 (111. 1979) (overturning
discipline of prosecutor for deceiving court as part of sting operation); In re Malone, 480 N.Y.S.2d
603 (N.Y. App. Div. 1984) (censuring prosecutor for instructing police officers to testify falsely), affd,
482 N.E.2d 565 (N.Y. 1985)
examined courts’ admonitions to prosecutors to maintain ethical standards and restraint. He notes that courts have overturned defendants’ sentences due to prosecutors’ overzealousness and blatant attempts to bias a jury’s sentence. In one case in which the defendant was accused of rape, the prosecutor was found to have “knowingly, intentionally, and blatantly” biased a jury by personalising the crime in asking the jurors to imagine being the victim. Whether or not this sort of evidence was given as victim testimony or a prosecution soliloquy, the intent was to lessen the gap between the juror and the victim. The prosecutor was asking the jury to identify with the emotions and experiences of the victim. Whilst this was not a capital or a federal case, the actions by the prosecutor exposes a tactic used by prosecutors for sentencing purposes. Civil law researchers have long discussed the ‘identifiable’ victim and how victims to whom people relate are treated differently than statistical victims. Although the emphasis, rules, and law vary between civil and criminal cases, both involve jurors who are responsible for making a judgment about a devastating event that will have significant consequences on person’s life. If scholars understand that a sense of familiarity may prompt citizens to assist victims in crises, than this inclination may also be true in criminal cases. Conversely, in federal death penalty cases, the United States Code lists one mitigating factor as the “victim’s consent” to the criminal conduct that led to their death. Is it possible that prosecutors consider this tacit acknowledgement of victim culpability as a reason to not include victim impact testimony in cases in which the victim’s criminal behaviour had a possible role in their death? Whilst the question of whether the mitigating factor of the ‘victim’s consent’ could have a direct correlation prosecutors’ use of the victim impact statement, it was not addressed by this thesis.

262 Green, *Prosecutors Seek Justice.*
263 Id. at 623 ft 70. (citing State v. Long, 684 S.S. 2d 361, 365 (Mo. App. 1984).
264 Karen E. Jenni & George Loewenstein, *Explaining the "Identifiable Victim Effect",* 14 J. RISK & UNCERT. 235, 236 (1997). *See also:* Thomas C. Schelling, *The Life You Save May Be Your Own, in PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS* (Samuel Chase ed. 1968). (Schelling’s seminal article discussed when people are confronted with the death of a particular person, we are more willing to act than when confronted with ‘statistical deaths’ of unknown people.
266 18 U.S.C. § 3592 (a)(7)
Some scholars argue that although prosecutors enjoy discretion, such discretionary power is regulated by professional codes. Green and Zacharias argue against regulating prosecutorial discretion because it would expose both the facts and thinking that go into prosecutors’ decisions. Such regulation “casts light onto the types of decisions that the deference tradition seeks to protect.” Courts have generally agreed with this position, ruling that the prosecution has the “full power to employ the full machinery of the state in scrutinizing any given individual.” This, combined with the Court’s ruling in McCleskey v. Kemp that in order to prove prejudicial intent against a defendant, defence counsel had to limit such arguments to the circumstances of a defendant’s specific case, makes it unfeasible for defence counsel to prove prosecutorial bias. By restricting arguments to a characteristic, decision, or outcome on a specific case, defence counsel cannot prove that anomalies exist. This unrealistic standard, combined with the institutional support for discretionary powers signifies that institutional support has allowed prosecutors the use of victim impact evidence with little accountability to the courts. The court’s reluctance to question or limit prosecutors’ use of victim impact evidence also restricts the defence from examining whether there are possible patterns of use that lead to arbitrarily sentencing a defendant to death. Paradoxically, Green and Zacharias argue that courts should regulate “the emphasis that prosecutors may place” on the victim impact statement in capital cases so as to not prejudice a jury. Yet, the authors cite Payne as an assurance of due process to capital defendants. Nevertheless, the authors argue against examining an individual defendant’s complaint of improper prosecutorial motivations because investigating the defendant’s entire case would be time-consuming and costly. But this is precisely what Payne assured would be afforded to each capital defendant should the defendant believe that the prosecutor’s actions fundamentally violated his due

270 McCleskey 481 U.S. at, 294, 303. See also: Green & Zacharias, Regulating Ethics 461.
271 Green & Zacharias, Regulating Ethics 466.
272 Id. at 461 ft 286.
273 Id. at 467.
process rights. The authors’ argument to protect prosecutor offices’ internal decision-making from being exposed is precisely how prosecutors have maintained control over victim impact evidence and denied certain victims access to this role.

2.3.3 Questioning Prosecutorial Power

Despite suggestions for prosecutorial oversight through legislative mandate, judicial review, greater bar oversight, prosecutors’ offices establishing better clarity and uniformity in plea bargaining practices to limit unbridled discretion, or creating ethical offices through hiring and modelling good praxis, none have received critical the support necessary to produce changes that would ensure justice is achieved for all concerned parties. Thus, prosecutors maintain the authority to act as investigators, adjudicators, and enforcers of criminal cases. Some suggest that this “superior experience, expertise, and knowledge” provides federal cases greater continuity and fairness, as federal prosecutors understand the many facets of law better than legislators and judges. Yet, it is also argued that such authority may produce biased, less-equitable decisions than would judges’ rulings. The insularity of prosecutorial discretion cultivates prosecutors’ proclivity that once an opinion against the defendant is determined, all evidence is filtered to support that position.

This vacuum of discretionary power could be seen as a grant of latitude for a prosecutor to act with self-interest and “absolute power.” For instance, Stuntz and

---

274 Payne 501 U.S. at 825, 831.
275 Peter Krug, Prosecutorial Discretion and Its Limits, 50 AM. J. COMP. L. 643 (Autumn, 2002); Misner, Recasting Prosecutorial Discretion.
277 Sandra Caron George, Prosecutorial Discretion: What's Politics Got to Do with It., 18 GEO. J. LEGAL ETHICS 739 (2004-2005).
279 Fitzgerald, Ethical Culture
280 Barkow, Policing Prosecutors 883.
281 Green & Zacharias, Regulating Ethics 441-3.
282 Barkow, Policing Prosecutors. See also: Green & Zacharias, Regulating Ethics 443 ft 217.
284 Hall, Prosecution and Disposition, 968 ft 202. (citing several federal cases that have ruled that the U.S. Attorney can “dismiss or refuse to prosecute, any of them at his discretion.”).
others note that federal prosecutors may pursue specific crimes or cases due to personal political ambitions or future aspirations to work at prestigious law firms.\(^{285}\) Additionally, scholars express concern for prosecutors’ “will to win”\(^{286}\) and how this will, combined with one’s self-interest for his or her career can avert justice for the accused, the victim, and society.\(^{287}\) If a prosecutor is invested in professional motivations or a defendant’s culpability, or both, it follows that the evidence used at trial is predetermined to produce the desired outcomes. Prosecutors can threaten stiffer charges or entice suspects to enter into plea agreements to ensure a conviction. Alternatively, prosecutors can refuse a defendant’s willingness to accept responsibility for their offences and force cases to trial with the expectation of furthering their professional stature. Such ambition can drive a prosecutor to act in a manner that, when viewed objectively by regulating authorities, might reveal unethical or inappropriate use of official power.

This thesis does not speculate on whether prosecutors might violate *Brady* issues, in which prosecutors withhold exculpatory evidence from the defence or jury, to win a case.\(^{288}\) Rather, this thesis returns to the possibility that in federal capital cases, prosecutors categorically discount victims’ families of certain offences from the sentencing phase of the trial as such testimony does not support the prosecution’s goal of achieving a death sentence. If judges are reluctant to question a prosecutor’s investigative and adjudicative capacities\(^{289}\) or overrule a prosecutor’s use of evidence to reinforce their capital sentencing position,\(^{290}\) than it is fair to assert that prosecutors


\(^{286}\) Id. at 889, 897.


\(^{288}\) *Wayte v. United States*, 470 U.S. 598, 607-8. (ruling that the "the decision to prosecute is particularly ill-suited to judicial review"). *See also:* Krug, *Prosecutorial Discretion and Its Limits* 645.

\(^{289}\) See: *Humphries v. Ozmint*, 397 F.3d 206 (4th Cir. 2005). (en banc) (holding that a comparative worth argument between the defendant and victim did not violate Payne); People v. Kelly, 171 P.3d 548, 570 (Cal. 2007). (allowing a twenty minute video compilation of the victim's life played to soft music); People v. Zamudio, 181 P.3d 105, 134 (Cal. 2008). (permitting a fourteen minute video that showed over one hundred photos of the victims as victim impact evidence); *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994). (en banc) (showing a videotape of a family Christmas gathering); *State v. Ard*, 505 S.E.2d 328, 331 (S.C. 1998). (allowing prosecutors to introduce into evidence a photograph of an unborn child, who did not survive when his mother was killed, wearing the outfit chosen by his
are incentivised to use or deny the inclusion of victim impact evidence for strategic purposes with little fear of judicial rebuke or the vacatur of a defendant’s conviction or sentence.

Despite state and federally enacted rights, prosecutors have wilfully disregarded victims’ interests in participating in trials or sentencing hearings when the victim impact evidence did not fit with their strategy. In one case, the parents of Vanessa Quinn petitioned the federal courts to allow them to address the court at a defendant Mackenzie Hunter’s sentencing hearing.291 Although Hunter was not directly involved in the murder, he was charged with illegally selling the gun to a minor, Sulejman Talovic, and for knowing that Talovic planned to use the gun in a criminal act that could result in a shooting. Talovic, was killed at the crime scene and Hunter was the only person legally associated with Talovic’s actions. Ms. Quinn’s parents, Sue and Ken Antrobus, wanted to address the impact Hunter’s illegal actions had on their lives.292 Federal prosecutors did not support the Antrobus’ request, as the prosecution had negotiated a plea agreement with Hunter related to the illegal gun sale and his resulting prison term.293 To the contrary, prosecutors would not give Mr and Mrs Antrobus the pre-sentence report that could have helped their family understand Hunter’s background, his culpability in the killer’s criminal acts, and the relevant sentencing criteria. Prosecutors went further, stating that they would only permit the family’s participation in the sentencing hearing only if the judge requested for victim impact testimony.294 Additionally, prosecutors argued against the Antrobus family’s writ of mandamus in the Court of Appeals.295

In a Colorado case, the District Attorney filed a pleading with the court to bar the victim’s family members from testifying at the retrial of a defendant who had

---

291 Hunter No. 08-0410 Ct. of Ap. at.
292 Cassell, In Defense 617.
293 Id.
295 Hunter No. 08-0410 Ct. of Ap. at.
previously confessed, been convicted, and sentenced to death for the crime. In 2002, inmate Edward Montour killed Eric Autobee, a state prison guard. Following the crime, the Autobee family supported the prosecution’s decision to seek—and obtain—the death penalty for Montour. After a decade of appeals and a new trial was ordered for the defendant, the family urged the District Attorney to accept the defendant’s offer to plead guilty in exchange for a life sentence without parole rather than consider another capital trial. The District Attorney disagreed and attempted to block all testimony from the Autobees at Montour’s retrial, denying the family their state legislated rights. Ultimately, the judge denied the prosecutor’s pleading.

The two cases indicate that individual victim circumstances, characteristics, or judicial interests do not necessarily sway the prosecutors. Rather, they demonstrate that prosecutors are more concerned with their ability to determine and present evidence that is most likely to result in a death sentence.

There is an emerging pattern revealing that some believe has the capacity to make the adjudication process more fundamentally fair for the accused. Whereas at one time a federal Assistant U.S. Attorney position was part of one’s career trajectory, now many are opting to make careers as federal prosecutors. Many believe that this trend, combined with better institutional accountability, can change federal prosecutors’ work ethics and emphasis on winning cases. Whilst career prosecutors also raise concerns about the potential for hardened negative relationships with defence counsel, overgeneralizations of defendants or emphasis on particular crimes

299 Colorado Revised Statutes, Title 24, Article 4.1 Crime Victim Compensation and Victim and Witness Rights, Part 3. Guidelines for Assuring the Rights of Victims and of Witnesses to Crimes; C.R.S.§ 24-4.1-302.5 (1)(d) “the right to be heard at any court proceeding” in which the defendant “convicted of a crime against the victim is sentenced” and §24-4.1-303(12) “express an opinion at the sentencing hearing of any sentence proposed to the court for consideration.”
300 Barkow, Policing Prosecutors 914; Green & Zacharias, Regulating Ethics 449.
301 Mary Patrice Brown & Steven E. Bunnell, Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia, 43 AM. CRIM. L. REV. 1063, 1079-80 (2006); Barkow, Policing Prosecutors 903-04. See also: Lochner, Strategic Agenda Setting in United States Attorneys' Offices 285-7.(using separate adjudicators than ‘careerist’ prosecutors, who may not have the incentive to pursue time-consuming cases, can give an office more professional accountability).
over others, this change in career perspectives may produce better standard of care for both the accused and the crime victim.

2.4 Conclusion

With the rapid development of a market society and the professionalization of the legal system after the American Revolution, American jurisprudence placed the state into the position historically occupied by the victim in its pursuit of justice against the accused. This removed the crime victims out of their central role in the legal proceedings in modern American criminal law. When the government took responsibility for prosecuting crimes, which it did on behalf of the state, its role as public prosecutor was substituted for the victim without an express obligation to the actual crime victim.

Although the statutory changes to ensure the government is responsible for criminal prosecutions was necessary, it is clear that the government’s primary concerns were to secure social control, not to ease the burden that victims experienced. Now, the crime victim is tethered to the government’s position on the accused, the crime, and on the victim himself. And though it may seem obvious, it merits emphasis that the needs of the government and the victim are not necessarily congruent. The goal of the prosecutor is to achieve a conviction in the criminal proceedings against the accused, but as officers of the court, prosecutors also must consider the needs of the state when deciding how to best proceed in a case. Like the victim–prosecutors before them, who often settled cases ‘in the shadow of the courthouse’\(^{302}\) to address their needs, public prosecutors have the discretion to resolve cases as they see appropriate to the State’s interests. Indeed, the majority of criminal cases today result in plea agreements, which do not provide victims with a formal role to address their needs in the judicial proceedings.

Regardless of one’s opinion on the proper place of victims in a trial and their corresponding rights, historic understandings of the role of the victim–prosecutor

\(^{302}\) King, Crime and Discretion 29, 57.
shed light on how the victims’ needs were addressed by their participation in the legal process. With the government defining ‘justice’ in each case, the victim is no longer able to directly interact with the offender to address their needs: to receive an apology, answers to questions related to the crime, restitution, or the recovery of his property from the offender. Tensions arose within victim communities because of the lack of recognition and redress that was once integral to legal proceedings—and remains imperative to the crime victim. Rather, such interests by victims cause concern about potential arbitrariness in defendant sentencing; thus, the defence community’s resistance to any consideration given to the victim. Opposition to greater victims’ rights stems from the notion that public prosecution “does away with private vengeance.” It could be argued that victims’ rights proponents’ insistence on victim participation in the defendant’s sentencing resembles the private vengeance that was a factor in the elimination of the victim–prosecutor and the subsequent introduction of the public prosecutor. If the judicial system conducted a systematic approach to attend to victims’ needs that arise from the crime, it could produce less arbitrary outcomes.

With the passage of various federal victims’ rights legislative acts, federal prosecutors have become more aware of victims’ rights and more sympathetic to victims’ circumstances. Yet, how prosecutors apply such recognition to inform and include the victim throughout the legal proceedings is speculative. As federal legislation increased the types of crimes for which federal prosecutors could seek the death penalty, the government’s use of the victim impact statement also dramatically increased. In the federal government’s decision to see the death penalty, federal prosecutors use the seriousness of the offence and the harm caused to the victims as reasons to seek the death penalty in specific cases. As discussed in Chapter Four, Payne does not present as a victims’ rights issue, but is rather a ruling on prosecutors’ discretion to use this evidence in capital cases. With prosecutors’ right to include victim impact evidence and their greater recognition of victims’ rights raises the question as to why federal prosecutors do not make include the victim impact statement in all capital cases.

303 Krause; Zehr
304 Friedman, 293
Defence counsel has overlooked this particular issue. Defence attorneys accept that prosecutorial discretion is part and parcel of their jobs. They have focussed on the jurisprudent arguments against victim impact evidence or on identifying what signifies such evidence as unduly prejudicial, the standard set by Payne. Whilst defence attorneys may have anecdotal or personal-based experience of how – or whether – federal prosecutors implement victim impact evidence in their cases, there has been no empirical analysis produced to determine whether any patterns of selective utilisation of such evidence is used. As such, little challenge has been raised whether such inclusion or exclusion of victim impact evidence creates different categories of arbitrariness that may affect the sentence of one’s client.
3 The Politicisation of the Victim Impact Statement

The development of criminal trials between the State and the accused gives unparalleled power to criminal justice officials. Politicians and law enforcement advocates appeal to the public by both listening to constituents and crafting the dialogue about crime. This strategy allows politicians to ‘affirm’ that they have heard their constituents’ concerns and ‘inform’ the community as to what needs to be done to combat crime. There are two central aspects of this approach. First, penal populists proclaim they have “no ideological affiliation.” Instead, they present themselves as administrators facilitating society’s desire for safer communities. Second, once penal policies are in place, criminal justice officials maintain power through the rubric of the collective consciousness calling on them to protect society.

Protecting the potential crime victim is the central justification for the penal policies and the subsequent support. Yet, victims have been critical of the criminal justice policies and officials. Victims have admonished politicians, prosecuting attorneys, and the police for their poor treatment by criminal justice officials. Victims often felt as though authorities had taken too far the mandate to safeguard and preserve societal and individual rights. Crime victims were left wanting, which has in turn prompted various grassroots organisations to call for better treatment and more rights for victims. At the same time, politicians masterfully espoused the very criticism levelled at them to argue for policy change. The misaligned victim was no longer pointing the proverbial finger at the lawmakers and practitioners; they were standing alongside them pointing their fingers at the defendant and calling for victims to have greater influence in the legal proceedings against the accused.

305 SCHEINGOLD, The Politics of Street Crime 32.
306 BECKETT, Making Crime Pay 103.
307 SIMON, Governing Through Crime.
Criminal justice officials have not always sidelined victims. Historically victims played an integral role in the legal proceedings in which they had more control and an invested interest in the outcome of the case. Today, victims are more often than not merely spectators, sometimes witnesses, in the criminal proceedings against the accused, as a result of the development of the present-day American prosecutor as a public official, which changed the role of the crime victim.\(^{309}\)

Extracting the victims’ rights campaign from the larger ‘tough on crime’ movement is difficult. The victim impact statement has become the bellwether for victims’ rights, and many assume that this statement provides the victim with a literal right to speak in criminal proceedings against the defendant. Without going into the letter of the law in this chapter, it is important to understand the underpinnings of the American criminal justice policies that have gotten the country to this point. Because the marriage of these two issues has become so much a part of the political and criminal justice landscape, it has become nearly impossible to have a meaningful discussion about what might be most important to a victim in the aftermath of a crime, and how this will differ from person to person, because of the assumption that all any victim wants to do is have an impact on a defendant’s sentence.\(^{310}\)

The central element to this thesis is the victim impact statement. The difficulty in critically examining this testimony is the dichotomous view of this simple act. One perspective is that it gives the victim’s the opportunity to participate in the case and to have their voice included in the process. The other is that the purpose for this evidence is to be prejudicially used against the defendant in the punishment considerations. This debate – both in the academic setting and in court – has created a cacophony that rarely includes the victim’s voice. Rather, victims’ rights proponents’ representation of the victim in court and in legislative testimony suggest that they know what is best for the victim and fight to have ‘their’ voice heard. Upon examination, the emphasis of the proponents’ arguments is less about addressing victims’ judicial needs than about ensuring the victim’s right to give victim impact

\(^{309}\) Henderson, *Wrong* 942; ELIAS, Politics of Victimization 25-6, 32-3; Goldstein, *Defining the Role of the Victim* 520.

evidence. Some proponents say that the intention of the impact statement needs be considered more as an opportunity for the victim to communicate to the court and the defendant than as an influence on the defendant’s sentence. Yet proponents maintain that this ‘expressive’ communication must remain a part of the sentencing considerations, otherwise it “denudes the VIS of much of its significance.”

The approach of using victims as part of the sentencing considerations was fostered in the early stages by the law-and-order movement and then astutely capitalised on by President Ronald Reagan who established victims’ rights as a national imperative. The amalgamation of crime victims’ rights and penal reform policies created a maelstrom that has frustrated any attempt by critics to separate the two. The media attention and public outcry culminated in a political fervour that pre-empted analysis as to the reasons behind the demand for legislative action or change. As one scholar wrote, by binding a victim’s experience of crime with society’s fear of crime, penal reformists were able to use victims’ rights as a justification for stronger crime control measures.

Yet the debates in academic and legal circles over the victim impact statement do not often cross-pollinate. As the victim’s role is mostly irrelevant in a criminal case, defence counsel has historically not connected with the importance of engaging the victim throughout the legal proceedings. Defence practitioners do not always understand the criticism levelled at defendants’ rights as an affront to victims’ rights; as they see constitutional safeguards as protection for the accused.


312 Roberts & Erez, Expressive Communication in Sentencing 251 n.21.


315 Henderson, Wrongs 953. See also: ROACH, Due Process and Victims’ Rights at 5, 16, 19, 20, 28.

316 ROACH, Due Process and Victims’ Rights 4-5, 15-29.
By and large, federal prosecutors are not leading the charge to challenge defendants’ rights on behalf of victims’ participatory rights. The introduction of victims’ rights legislation has been less influential than some might have predicted or hoped. The institutional response to victims’ judicial interests is largely correlated with public engagement in the debate.\textsuperscript{317} After the initial attention from the media and legal experts subsided, none of the successive piece of victims’ rights legislation have yet modified the legal practice as advocates expected.\textsuperscript{318} Instead, it is generally acknowledged that the prosecution continues to view the victim as “legally irrelevant to the state”\textsuperscript{319} except when beneficial to the government’s interests.\textsuperscript{320} Aware of the disparity between the federal legislation and prosecutorial discretion, penal reform and victims’ rights proponents continue to push for guaranteed procedural rights with a Victims’ Rights Constitutional Amendment.\textsuperscript{321} An understanding of the conservative narrative of ‘rebalancing’ the legal system is essential to make sense of how these proponents have exploited the idea of victims’ rights as moral directive to influence lawmakers for greater crime control measures. Congress has been reluctant to pass such an amendment, however, believing that these issues will or should be resolved by the courts. As such, the legal propriety of victim participation in the sentencing of the accused continues to be fiercely debated by three parties: victims’ rights proponents who want to ensure that victims can provide input to determine both the direction and outcome of the case, as an independent party, if necessary; prosecutors who defend their legal right to use victim impact evidence; and defence attorneys who argue against inclusion of the perceived prejudicial statements. As this debate focuses on the relevance of victim impact evidence in sentencing considerations in each particular case, practitioners overlook whether a prosecutors’ discretion may result in discriminatory usage of this evidence. As will be discussed later in this chapter, victims’ rights proponents have filed pleadings against


\textsuperscript{320} See Hall, \textit{Prosecution and Disposition}.

prosecutors for denying victims’ participatory rights and, in extraordinary circumstances, prosecutors have asked courts to deny victims the right to testify in the legal proceedings against the accused.

Separately, defence counsel will address legal issues such as victim impact evidence or institutional challenges to their client’s procedural rights when the matter pertains to their case. Yet, as legal practitioners do not readily consider socio-legal issues as part of their case considerations, a critical understanding of how the combination of victims’ rights and a crime control agenda has created powerful criminal justice policies is lacking within legal defence communities. Victims’ rights proponents, on the other hand, use the law, politicians’ vow to make criminal justice policies fairer to victims, and the public’s notion of society as the victim in their legal pleadings and public pronouncements to ensure victim participation in criminal proceedings. By understanding how the agenda of victims’ rights proponents and penal reformists has significant reverberations for the defendant, defence counsel will be better able to represent their client. This, in turn, could lead to an examination as to how the law can more wisely consider the interests of all affected parties.

Society has lost a lot of ground in understanding crime victims. Early modern penologists simply overlooked the victim in the penal welfare campaign of deterrence, confinement, and rehabilitation. Much of contemporary criminologists’ research has been an attempt to understand victims’ rights as an important, but

---

323 Mythen, Cultural Victimology: Are We All Victims Now? 469. See generally: SIMON, Governing Through Crime; Mythen & Walklate, Communicating the Terrorist Risk: Harnessing a Culture of Fear?
325 GARLAND, Culture of Control 27-30; Paul Rock, Theoretical Perspectives on Victimisation, in THE HANDBOOK OF VICTIMS AND VICTIMOLOGY 38 (Sandra Walklate ed. 2007); Mythen, Cultural Victimology: Are We All Victims Now? 479.
neglected, facet to criminal law.\textsuperscript{326} Whether in conjunction with or by coincidence, academic attention to crime victims increased as the conservative penal reformist’s campaign asserted that “wicked” people put the innocent victim at greater risk.\textsuperscript{327} The “political utility of crime and criminals as symbolic enemies”\textsuperscript{328} of society has justified the ideologically driven penal policies. The Executive Committee of President Reagan’s Task Force on Victims of Crime who established the national victims’ rights agenda mirrored this perspective.\textsuperscript{329} In turn, the war on crime has “everything and nothing to do with victims and their rights.”\textsuperscript{330} The ideological perspectives of victims’ rights proponents have helped shape the arguments about the defendant, the defendant’s rights, and the victim’s role in the sentencing determinations.

### 3.1 The Victims’ Rights Movement

Beginning in the early 1970s, the criminal justice system faced several events that led to critical changes in public policy. Crime control adherents criticised the U.S. Supreme Court decisions that had afforded the accused greater due process protections.\textsuperscript{331} These protections are a constitutional promise that the government will act in accordance with law and that a defendant is assured that the government follows fair procedures.\textsuperscript{332} Such protections also placed greater restrictions on the


\textsuperscript{329} The Task Force on Victims of Crime is discussed in Chapter Three. One Task Force Executive Committee member, Frank Carrington, also served on the 1981 Attorney General’s Task Force on Violent Crime with James Wilson.

\textsuperscript{330} Dubber, Victims in the War on Crime 13.

\textsuperscript{331} Scheingold, The Politics of Street Crime at 76, 92; Garland, Culture of Control 57. (The U.S. Supreme Court from 1952 and 1969 was a time of civil transition and is referred to as the Warren Court, when Earl Warren was Chief Justice.)

\textsuperscript{332} Cornell University Law School, Legal Information Institute, Wex: Due Process at https://www.law.cornell.edu/wex/due_process
police with regard to the arrest, detention, and questioning of suspects.\textsuperscript{333} Whilst civil rights proponents hailed such protections as providing better and fairer treatment to all merely suspected of a crime, crime control advocates argued that such restrictions made it more difficult for the police to protect society at large. Another tension that confronted criminal justice officials was that victims were thought to be less willing to assist in the investigation and prosecution of crimes when law enforcement officers treated them poorly.\textsuperscript{334} Additionally, the national crime rate had increased exponentially during the 1970s, as did public dissatisfaction due to perceived governmental ineffectiveness and low convictions rates.\textsuperscript{335} The public pressured police departments, district attorneys, and politicians to reduce crime as local victims’ rights groups garnered support for greater victim assistance and awareness. The call for such rights arose from both liberal and conservative groups who advocated for better access to, as well as better treatment from, the criminal justice system.\textsuperscript{336} Although the impetus for the call for legal reform varied amongst the groups, their concerns were germane. Feminists were disturbed about the blame and responsibility placed on victims of rape and domestic violence;\textsuperscript{337} civil rights groups were alarmed by hate crimes experienced against minorities;\textsuperscript{338} and legal activists

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{333} Miranda v. Arizona, 384 U.S. 436 (1966).(ruling that statements made during a police interrogation can only be used against a defendant if it can be proved that the accused was notified of his right to have a lawyer present during questioning, but voluntarily waived this right); Escobedo v. Illinois, 378 U.S. 478 (1964).(ruling that suspects had the right to counsel during police questioning); Gideon v. Wainwright, 372 U.S. 335 (1963).(ruling that indigent defendants had the right to defence counsel paid for by the state); Brady v. Maryland, 384 U.S. 83 (1963).(ruling that the prosecution cannot withhold exculpatory evidence from the defendant); Mapp v. Ohio, 367 U.S. 643 (1961).(ruling that evidence obtained during unreasonable search or seizures may not be used against a defendant)
\item\textsuperscript{334} F. Cannavale & W.D. Falcon, Improving Witness Cooperation U.S. Department of Justice, 1976; Goldstein, Defining the Role of the Victim 518; Lawrence E. Cohen & et al, Social Inequality and Predatory Criminal Victimization: An Exposition and Test of a Formal Theory 46 AM. SOC. REV. 505 514 (1981); Kelly, Victims' Perceptions 16; Kelly, How Can We Help the Victim at 15. See also: Frank Carrington, The Victims (Arlington House, 1975).
\item\textsuperscript{336} Goldstein, Defining the Role of the Victim.
\item\textsuperscript{337} Michelle Wasserman, Rape: Breaking the Silence, 37 THE PROGRESSIVE 19 (1973); Robert Elias, Transcending Our Social Reality of victimization: Toward a New victimology of Human Rights, 10 J. INTL VICTIMOLOGY 6 (1985); Noreen Connell & Cassandra Wilson, Rape: The First Sourcebook for Women (New American Library, 1974); Duncan Chappell, Forcible Rape and the American System of Criminal Justice, in VIOLENCE AND CRIMINAL JUSTICE (Duncan Chappell & John Monahan eds., 1975).
\end{enumerate}
\end{footnotesize}
were concerned with the judicial emphasis on the defendant’s rights rather than the lack of legal standing for victims in the adjudication of a case. One common factor amongst the groups was their objection to criminal justice officials, prosecutors in particular, show of “traditional indifference” towards crime victims. With state prosecutorial discretion as the accepted legal norm, the call for greater victims’ rights was to draw attention to the impropriety of prosecutors’ entitlement to exclusively resolve a case or to exclude the crime victim as deemed necessary. This appeal could have produced greater accountability for prosecutors’ regard for victims in the legal proceedings, and thus their inclusion. Yet, as will be shown with two significant actions, the seminal work of President Reagan’s Task Force on Victims of Crime focussed on changing the procedural rights of the accused and with Payne v. Tennessee, the United States Supreme Court ushered the victim into capital proceedings at the discretion of the prosecutor.

Adept politicians recognised the sympathetic value of crime victims and created affiliations with law enforcement-oriented victims’ rights groups to bolster their crime control agenda. Conservatives began to call on Congress to supplant the perceived “mindless permissiveness” of liberal criminal procedures put in place by the Warren Court, with ‘tough on crime’ policies. Yet, in gaining political exposure, many grassroots victims’ rights groups became co-opted as the symbol of justice by penal populists and subsequently lost their focus on victims’ concerns and needs. Instead, the new alliance of victims’ groups and penal populists shifted its concentration to the defendant’s procedural rights, which was further perceived as denying victims the legal right to participate in the proceedings. This argument is a false dichotomy, as the defendant must be presumed innocent until proven guilty.

341 Task Force Final Report; McDonald, Towards a Bicentennial at 662.
342 SCHEIN, The Politics of Street Crime at 32-3, 51; SCHEIN, The Politics of Law and Order 87; ELIAS, Politics of Victimization 25-6, 32-3; GARLAND, Culture of Control at 105; SIMON, Governing Through Crime at 24; Henderson, Wrongs 951.
344 SIMON, Governing Through Crime at 56-8, 114-6; GARLAND, Culture of Control at 57, 97-8; ELIAS, Victims Still 1-2. See also: CARRINGTON, The Victims at 187-8 (discussing the Warren Court's expansion of defendant's rights).
345 Henderson, Wrongs at 951.
346 Id. at 948-51; GARLAND, Culture of Control 143-4; 159.
Moreover, the victim is not accused of a crime, does not face detention whilst awaiting trial, and does not face the risk of a prolonged jail sentence or possible death sentence. These procedural and substantive rights aim to protect the accused from false allegations and an overarching reach of criminal justice officials.

The U.S. Constitution guarantees the person accused of a crime “unalienable Rights”347 that cannot be subjected to political exploitation, rancour, or opportunities. This guarantee is a testament to the government’s obligation that all citizens deserve such protection regardless of their standing in the public eye. The focus on the rights of the accused is not an affront to the victim; rather it is a protective measure for all parties affected by the case. This is especially important because of the stakes involved in capital cases with potential legal issues such as claims of innocence, mental retardation,349 and procedural error.350 Whereas the national platform for victims’ rights could have promoted a legal process that reduced the contentious behaviour toward the victim and expanded it to include the possibility of redress, instead the national penal reform campaign focused on reducing the rights of the accused and on harsher sentencing of the convicted in the name of crime victims.351 Victims’ rights culminated with the victims’ right to speak at the sentencing of the accused. This narrow advocacy obscured broader possibilities for the victim in the adversarial process. By focussing on victim input in the sentencing proceedings, victims’ rights proponents ignored other needs of victims that were created by the crime. As such, the victim continues to be a witness for the government, if and when the prosecutors choose. This tactic successfully developed a ‘forced marriage’

347 The Declaration of Independence, (para. 1), U.S., 1776. (para. 1)
348 In cases of possible innocence, a grave injustice to the victim, who has already suffered horrific losses, is the possibility of denying the victim safety and justice after years believing that the person convicted of the crime was the person who committed the crime. To realise that someone else, who has not been convicted or in prison, has committed the crime is an affront to the victims. As James Liebman said, “No one cared enough about the defendant or the victim to make sure they caught the right guy.” See: James S. Liebman, Columbia Law School Investigation Uncovers New Evidence Suggesting Texas Executed Innocent Man. (May 15, 2012), available at http://www.law.columbia.edu/media_inquiries/news_events/2012/may2012/the-wrong-carlos.
351 GARLAND, Culture of Control at 159. See also: Mosteller, Victims’ Rights and the Constitution 1059; Robert Elias, Community Control, Criminal Justice and Victim Services, in REORIENTING THE JUSTICE SYSTEM: FROM CRIME POLICY TO VICTIM POLICY 290, 295 (Ezzat A. Fattah ed. 1986).
between the prosecutor and the crime victim. Despite the purported directives for officials to improve the treatment of victims, previous empirical research shows that prosecutors continued to view victims as witnesses under their control. This perspective persists today and, as demonstrated in Chapters Six and Seven, in capital cases federal prosecutors view their dealings with the crime victim as a marriage of convenience despite federal victims’ rights legislation.

The institutional response to victims’ judicial interests is largely correlated with public engagement in the debate. As analysed in the next section, despite the fact that federal laws protect all citizens, the voices heard in the national dialogue regarding victims’ rights were limited. Thus, the outcomes have simultaneously allowed for the politicisation of the role of the crime victim and the perpetuation of the notion that crime victims only want to participate in the adjudication of a case for retributive purposes. As a result, some crime control advocates highlight America’s history of the victim–prosecutor as grounds for a return to or a variation of private prosecution. Others do not call for the return of victims as prosecutors, but rather as sentencing advocates. These voices challenge the legal system’s preoccupation with the constitutional rights of the accused and argue that such concern has created a legal system that is not in step with the interests of society. On the other hand, due process proponents dismiss the idea of victims having a role in the legal proceedings.

352 Goldstein, *The Victim and Prosecutorial Discretion* 246.
353 Goldstein, *Defining the Role of the Victim* at 518-20; Kelly, *How Can We Help the Victim* at 15.
See generally: Hall, *Prosecution and Disposition*.
outright as inappropriate, antiquated, or misguided. Researchers have found that crime victims develop their expectations and needs of the criminal justice system based upon the institutional environment in which they are situated. As such, crime victims aligned with authorities that legitimated their concerns and established the national victims’ rights platform.

3.2 The President’s Task Force on Victims of Crime

During his presidential campaign, Ronald Reagan promised that if elected, his administration would take seriously the plight of crime victims at the federal level. Early into his presidency, the policy issue of the “neglected” rights of victims was contrasted with the “permissiveness” given to defendants, a tactic that remains in place today. A skilled politician, Reagan used the growing concern for victims’ rights to call for broader changes to the law than merely incorporating the needs of crime victims. He argued that, “[t]he American people have lost patience with liberal leniency and pseudo-intellectual apologies for crime.” With this, Reagan’s administration focused on “state reconstruction” that emphasised a shift from social and penal welfarism to prosecuting street and drug crimes as a means of social (and thus crime) control. Building upon his Attorney General’s Task Force on Violent

---


358 Barker, The Politics of Pain at 620 (writing that crime victims align with either retributive or restorative movements based on the political environments in which they were worked. In other words, in order to get support for their platform, crime victims would align with the political authorities that gave their concerns a legitimate platform).


360 Task Force Final Report at ii, vii. See also Task Force Final Report at 22, 26, 50 (in which the victim is referred to as “ignored”).


363 Beckett, Crime Pay, at 51

364 Beckett, Crime Pay at 27, 44-58; Elias, Politics at 123; Garland, Culture of Control at 113; Simon, Governing at 34-36, 276.
President Reagan ordered a Task Force on Victims of Crime to “conduct a review of national, state, and local policies and programs affecting victims of crime.”

The Task Force criticised the criminal justice system that had “relied on excluding the victim” for its inability to maintain support from victims and its ineffectiveness at controlling crime. The Task Force asserted that the rights of the defendant overshadowed those of the victim and gave the defendant the opportunity to victimise again. Therefore, a portion of the Task Force’s official recommendations have had a lasting influence on the pervasive and punitive zero-sum game policies of defendants’ rights under the pretext of improving victims’ involvement in criminal justice proceedings. Today, the Final Report is still considered by many politicians and advocates as the authoritative dictum regarding crime victims, and is referred to as a sign of success for such victims. Because this Task Force had a pivotal role in establishing standards for the better treatment of crime victims by both the criminal justice system and other organisations, it is important to examine whether the Final Report’s recommendations meaningfully accommodate the broader concerns of crime victims.

President Reagan appointed ten individuals to serve on the Task Force Executive Committee, each of whom were ideologically conservative and had a crime-control predisposition. The Task Force included four prosecutors, two victim advocates, one of whom was a former local and federal law enforcement officer who also served on the Attorney General’s Task Force on Violent Crime, one state Supreme Court assistant, a police chief, a criminal psychologist, and a member of the clergy.

---

367 ELIAS, POLITICS at13.
368 TASK FORCE FINAL REPORT at 23.
369 See generally Beloof, The Third Model of Criminal Process: The Victim Participation Model; Kyl, et al., On the Wings of Their Angels; Cassell, Balancing the Scales; Cassell, A Reply to the Critics.
370 TASK FORCE FINAL REPORT at ii.
371 For additional discussion, see: ROACH, Due Process and Victims’ Rights.
372 TASK FORCE FINAL REPORT at 142- 144. (Lois Haight Herrington, Kenneth O.Eikenberry, Robert J. Miller, Terry Russell).
374 See Id. Garfield Bobo.
The Executive Committee held hearings in six cities, at which nearly two hundred witnesses testified. The stated objective of the hearings was to listen to crime victims and to learn how the criminal justice system could provide better treatment to them when needed. Administrative staff for the Task Force interviewed potential witnesses ahead of time in order to “pick witness[es] that could really focus on the key issues…with a story to tell.” This selection of witnesses raises a concern that the staff may have selected individuals whose experiences or perspectives simply affirmed the Task Force’s predilection for greater crime control policies. Sixty crime victims testified, which was the largest and most important group represented at the hearings. Additionally, the Committee heard from professionals in the medical, mental health, and ministry fields about how to better respond to victims’ needs. From the legal system, the Task Force invited five judges, fourteen prosecutors, and attorneys from various backgrounds, but none with criminal defence experience. Two of the attorneys who testified had valuable experience to share with the Task Force regarding their successful representation of victim interests in individual civil proceedings. Because the opportunity to testify at the hearings was by invitation-only, it is fair to question why the Task Force chose not to include the testimony of criminal defence attorneys.

375 See Id. James P. Damos.
377 See Id. Marion “Pat” Robertson, founder of the Christian Coalition and the American Center for Law and Justice, which, “focuses on pro-family, pro-liberty and pro-life cases nationwide.” http://www.cbn.com/700club/showinfo/staff/patrobertson.aspx (last visited July 21, 2009)
379 Id. (quoting Terry Russell).
380 Id. (quoting Russell, Meese, Miller, and Samenow excerpts).
381 TASK FORCE FINAL REPORT at 126, 127, 130, 132, 133.
382 Id. at 126-133. These included the US Attorney General, attorneys from US Attorneys’ offices, Commonwealth Attorneys, State Attorney Generals, and State District Attorneys.
384 Id. at 130, Merrill J. Schwartz. See also, Thompson v. County of Alameda, 27 Cal.3d 741 (1980); Donald McGrath, II. See also, Martinez v. California 444 U.S. 227 (1980).
The exclusion of a criminal-defence perspective compromised the basis of the Task Force’s final recommendations. As an essential role in the criminal justice system, due diligence warranted the inclusion of the criminal defence perspective. Excluding the professional duties, obligations, and perspectives of defence counsel from the proceedings raises concern about the recommendations the Task Force. Because of this, the recommendations made by the Task Force are fundamentally unbalanced.

Paradoxically, the Task Force recommended\textsuperscript{385} that the Bar associations be better represented by victims’ interests to create a “balance between the opposing parties in criminal litigation.”\textsuperscript{386} Such a recommendation appears duplicitous, as the Task Force did not include input from the defence community throughout their investigation, yet it recommended that the Bar include victims’ perspectives. Had the Task Force worked to include the criminal-defence perspective along with the other criminal justice professionals’ input, the recommendations could have been a catalyst for significant meaningful change with limited risk to either the victim or the accused. Instead, exclusion from the entire process may have fostered an increased adversarial attitude and scepticism from defence counsel toward victim input given what is readily observable in the criminal proceedings over the following two decades.

The Final Report reveals a duality of what appears to be a concern for the victim whilst simultaneously focussing on the prosecution of the accused. The Task Force encouraged prosecutors to treat crime victims better and foster improved relationships with them.\textsuperscript{387} The Report then asserted, almost as an incentive the Task Force asserts, with improved relations, “the prosecution will profit from the better cooperation of a victim who feels he has been protected and assisted.”\textsuperscript{388} On the one hand, the Task Force addressed concerns regarding the treatment of victims and issued suggestions that led to meaningful changes within the criminal justice system and other organisations that treat victims of crime. Yet on the other hand, such effectiveness raises the question of necessity or purpose for the Task Force’s

\textsuperscript{385} TASK FORCE FINAL REPORT, Recommendations for the Bar at 97-100.  
\textsuperscript{386} TASK FORCE FINAL REPORT, Recommendation 3 at 97.  
\textsuperscript{387} Id. on 65  
\textsuperscript{388} Id on 69 (emphasis not original)
recommendation for a constitutional amendment for victims’ rights. Nevertheless, even if the Task Force believed that every crime victim has the right to provide input into the sentencing of the accused, this does not justify the Committee’s use of the victims’ rights platform to lead the charge for considerable changes to America’s criminal justice system that effectively limited the constitutional rights of the accused.

Notwithstanding its deficits, the Task Force made important strides in improving the general legal approach toward victims of crime. The majority of its recommendations made on behalf of crime victims focussed on substantive issues related to a victim’s right to respectful treatment by criminal justice officials, safety, privacy, and information about the case. The Task Force also went so far as to make recommendations to other organisations outside of the legal system whose members relate directly with victims in the aftermath of a crime. Such substantive issues were at the core of local victim groups’ concerns, which, as Kelly observed, focussed on the treatment and lack of support they received from criminal justice officials, and prosecutors in particular. It is evident that the Task Force was successful in addressing many of the original concerns raised by these groups because it led to greater legal professional sensitivity toward victims in addition to increased assistance from victims in the reporting and investigation of a crime.

In addition to victims’ substantive concerns, the Task Force also pursued participatory rights for victims. In one recommendation, the Task Force challenged the legal restrictions that prevented victims from being present in court before they were due to testify. The Task Force argued against the presumption that allowing

390 TASK FORCE FINAL REPORT. See Recommendations for Government Action 1, 2, 11, 12 at 17, 19-21, 35-6; Recommendations for Proposed Federal Action 1 at 37-9; Recommendations for Police 1, 2, 3, 4 at 57-62; Recommendations for Prosecutors 1, 3, 5, 6, 8 at 63-4, 66-71; Recommendations for the Judiciary 1, 3, 5, 9, 10 at 72-76, 78-82; Recommendations for the Parole Board 1 at 83-4.
391 TASK FORCE FINAL REPORT, Recommendations for Hospitals 1, 2, 3, 4, 5 at 89-94; Recommendations for the Ministry 1, 2 at 95-6; Recommendations for Schools 1 at 101-2.
392 Kelly, *Victims’ Perceptions* at 18.
393 TASK FORCE FINAL REPORT. See Recommendations for Federal and State Action 3, 10(a) and (c) at 17-8, 21-2, 33-4; Recommendations for Prosecutors 2, 4 at 63, 65-8; Recommendations for the Judiciary 2, 4, 6, 7, 8 at 72, 75-80; Recommendations for the Parole Board 2 at 83-4.
394 TASK FORCE FINAL REPORT. See Recommendations for the Judiciary 8 at 72, 80.
victims to observe the trial might bias their testimony, suggesting instead that “absent a compelling need to the contrary,” it is in the victims’ interest to understand that the legal case is fairly adjudicated. In most circumstances, the victim’s presence would not diminish the defendant’s right to a fair trial and thus the victim’s presence should be considered on a case-by-case basis. The Task Force also advocated for restitution from the offender to make the victim “economically whole.” This recommendation could have included broader reparations for victims, but the Task Force limited the definition to what was owed to a victim after a crime to financial compensation.

Rather than emphasise what can be done for the crime victim as part of the sentencing considerations, the Task Force used its authority to further ensure the consideration of the victim’s input regarding the detainment and sentencing of the accused. It is unclear whether the participatory rights the Task Force sought for crime victims emerged from the grassroots victim community or whether these recommendations were the impetus of another agenda. For instance, the Task Force determined that prosecutors “have the obligation” to inform the court of the victim’s views regarding bail, continuances, plea bargains, and sentencing. In a study of crime victims’ experiences with the criminal justice system conducted around the time of the Task Force hearings, victims’ priorities for participation focussed more on their perception of engagement with the prosecution rather than the disposition of a case. Kelly noted that whilst victims wanted to be involved in the case, this did not constitute ‘throwing the book’ at the defendant. The Task Force also proposed that judges consider victim input as part of their sentencing considerations.

395 Ibid.
396 TASK FORCE FINAL REPORT. See Recommendations for Federal Actions 10(c), at 18, 34; Recommendations for the Judiciary 7 at 79.
397 TASK FORCE FINAL REPORT. See Recommendations for Government Action 10 (a) at 17, 21-2; Recommendations for Prosecutors 2 at 63, 65-6; Recommendations for the Judiciary 6 at 72, 76-8, and Recommendations for the Parole Board 2 at 83-4.
398 TASK FORCE FINAL REPORT, Recommendations for Prosecutors 2 at 63, 65.
399 Kelly, Victims’ Perceptions at 18-9. See also: F. Cannavale, Witness Cooperation, INSTITUTE FOR LAW AND SOCIAL RESEARCH (1975).
400 Kelly, Victims’ Perceptions at 21. Kelly, Victims 21
401 TASK FORCE FINAL REPORT. See Recommendation for the Judiciary 6 at 76.
was “simply one-sided and inadequate.” But this proposal still does not take into consideration the victim’s needs that arose from the crime; rather, it urges the judge to consider “the danger posed by a defendant” in consideration of the defendant’s punishment. Yet, as was clear by both the grassroots movement and the studies done around the same time as the creation of the Task Force, crime victims wanted better treatment and acknowledgment from criminal justice officials throughout the proceedings—not just at the very end. Such needs do not justify the emphasis placed on the victim impact statement as only part of the defendant’s sentencing. The Task Force suggested that the greatest contribution that the legal system can give to the crime victim is the opportunity to address the “real and personal interest in seeing the imposition of a just penalty.” The Task Force went further in its argument, stating, “The goal of victim participation is not to pressure justice but to aid in its attainment.” Such comments appear even-handed, but the Task Force’s Final Report recommendations regarding victim involvement were to influence the punishment of the accused.

3.3 Victim Impact Statement Discord

For legal practitioners, a consistent concern about the inclusion of victim impact evidence at trial is its purpose. The primary opposition is the placement of victim impact statement in trial proceedings. Because this evidence is given during sentencing considerations, it is a valid inference this evidence is meant to influence the jury’s sentencing considerations. One concern is that with prosecutors’ control of over this evidence, they also control the information that is shared by the victim.

---

402 TASK FORCE FINAL REPORT at 77.
403 Ibid.
404 TASK FORCE FINAL REPORT at 78.
405 Ibid.
406 TASK FORCE FINAL REPORT. See Recommendations for Government Action 4, 5, 6, 7, 8, 9 at 7-8, 22-32; Recommendations for Proposed Federal Action 5, 6 at 37, 51-55; Recommendations for Prosecutors 7, 8 at 63-4, 69-71; Recommendations for the Judiciary 6, 10 at 72-3, 76-8, 81-2; Recommendations for the Parole Board 1, 2, 3, 4 at 83-5; Recommendations for the Bar 1, 2, 3 at 97-100; Recommendations for Schools 1, 2, 4 at 101-4.
407 Roger Douglas, et al., Victims of Efficiency: Tracking Victim Impact Information through the System in Victoria, Australia, 3 INT'L REV. OF VICTIMOL. 95 (1994). This research focuses on the legal system in Australia, which limits the comparison to the US and capital cases due to the different legal policies, practices and values. Yet, it is worthy to note that researchers observe the practice of editing a victim’s statement to fit the prosecutor’s interests.
An outcrop of the victim becoming more central in public policy is the role victims have in the government’s perception and treatment of defendants. Most citizens have little encounter with the criminal justice system before becoming a victim of crime. Such interactions may form perceptions of victimhood by legal professionals’ behaviour towards victims and by how the criminal justice system deals with defendants. Victims typically do not have preconceived ideas of what they want from the legal system. Rather, after a crime, victims take their cues from prosecutors, police officers and victim advocates. Victims look to professionals to normalise their experiences and to shape their expectations both in coming to terms with being victimised and how they can assist in the legal proceedings against the accused. Paradoxically, victims’ reliance on legal professionals perpetuates a power imbalance as victims try to regain a sense of control in the aftermath of a crime yet rely on the attorneys for this sense of self-possession.

Roberts and Erez propose that there are distinctions between the expressive and instrumental functions of victim impact testimony. They put forward that the expressive function – the victim’s ability to communicate to the court and to the defendant his or her feelings about the repercussions of the crime “more accurately reflects the original purpose” of victim impact testimony. The authors write of the importance for victims to be able to communicate what happened and how the crime affected them – especially in enhancing communication between the victim and defendant. They also discuss how misguided political efforts to make victim impact evidence ‘instrumental’ have discoloured the purpose for such testimony. Yet, the authors resist moving victim impact testimony outside of the sentencing proceedings. Rather, they argue that if the victim impact testimony was not a part of the

408 Paul Rock, On Becoming a Victim, in NEW VISIONS OF CRIME VICTIMS (Carolyn Hoyle & Richard Young eds., 2002); GARLAND, Culture of Control.
409 Mythen, Cultural Victimology: Are We All Victims Now? 467. See also:
412 Roberts & Erez, Expressive Communication in Sentencing 236.
sentencing proceedings, the defendant is less likely to listen to the victim’s views. The authors believe that the communicative aims of a victim’s testimony could encourage reciprocal dialogue between the defendant and the victim, which, in turn, could produce rehabilitative benefits by making the defendant more fully aware to the harm caused, as well as having a therapeutic value for the victim. In principle, I agree with Erez and Roberts that communication between the victim and defendant could produce more meaningful outcomes for both parties than the current design considers. Yet, Erez and Roberts’ belief that the victim impact statement “may prompt offenders to respond” in the current sentencing framework is either shortsighted or a sentencing ruse for retributive purposes. The notion that defence counsel would encourage a client to listen to the victim’s story of suffering, as real as it may be, and then to respond to it in an empathic manner with a sense of contrition as a part of the sentencing proceedings in an adversarial context is misguided. As Erez and Roberts note, having the victim questioned about their impact statement can compound a victim’s stress and trauma caused by the crime. Similarly, an extemporaneous conversation between the victim and defendant – in the midst of the defendant’s sentencing when fear, anxiety, and stress are likely elevated for both parties – is not conducive to meeting a victim’s expectations or producing meaningful outcomes for either party. This is especially true in capital cases. Although the authors state that they do not consider capital cases as part of the expressive communication at sentencing, this disclaimer is in an endnote and does not explain why they would consider expressive communication inappropriate for such cases.

Advocate proclaim that victim impact statements are about participation in the proceedings and provide victims benefits “without unfairly prejudicing defendants in any tangible way.” Yet, Cassell maintains that Congress’ unwillingness to pass the Victims’ Rights Amendment denies the victim protection to be heard, “in particular,

---

413 Id. at 251 n.21.
414 Id. at 236.
415 Id. at 244.
416 In their endnotes, not in the body of the work. See p. 249-50 n.3
417 Cassell, In Defense at 611.
‘the right to be heard at any proceeding involving sentencing.’” 418 If Cassell’s advocacy is not about influencing the sentence of the accused, than his assertion about the ‘benefits’ of a victim impact statement are ambiguous when he challenges the sceptic to, “Read an actual victim impact statement from a homicide case all the way through and see if you truly learn nothing new about the enormity of the loss caused by a homicide.” 419 Advocates like Cassell, whose intentions may be to provide a more meaningful role for crime victims in the legal proceedings, have obfuscated the objective of victims’ rights. With near-single mindedness to ensure the victim’s voice specifically be included in what happens to the defendant, it can be argued that these concerns are more about the victim having a retributive influence on the defendant than about addressing a victim’s loss.

3.3.1 Empirical Research

The characteristics of crime victims have been the subject of extensive research in analysing both capital case indictments and sentencing determinations. Such work has been critical to determine whether discriminatory patterns exist against defendants because of the individual victim characteristics in capital cases. Primary among these was the landmark, “Baldus study,” which found that a disparity existed in the imposition of the death penalty “based upon the race of the murder victim, and to a lesser extent, the race of the defendant.” 420 Despite this empirical research that analysed over 2,000 cases from the state in which the defendant was sentenced to death, the Court ruled that the data was “insufficient to support an inference that any of the decisionmakers in this case acted with discriminatory purpose.” 421 The McCleskey Court argued that the Baldus study “did not prove” that the race of the deceased victim was a factor in the defendant’s case or in any capital sentencing decisions. 422 The Court refused to allow statistics of institutional discrimination stand

418 Id. at 615 (note: no citation was given by Mr. Cassell for the quoted text, but it may be attributed to S. Rep. No. 108-191, at 1-2 (2003)).
419 Cassell, Barbarians at 488. See also: Cassell In Defense at 629. (in which the author uses the same language with the exception of “a homicide case,” which is replaced with “a serious crime.”)
421 McCleskey 481 U.S. at 280
422 McCleskey 481 U.S. at 281 (emphasis original)
in court as the circumstances in capital cases needed to be “fact-specific to each defendant.” McCleskey established a legal paradox concerning crime victims that continued with Payne. McCleskey argued that in order to establish that a defendant was sentenced to death based on the victim’s characteristics, defence counsel had to prove intentional prosecutorial prejudice against the defendant. The Payne Court ruled that in order to understand the blameworthiness of a defendant in capital cases, prosecutors had the right to introduce evidence about a victim’s uniqueness to juries. Strikingly, however, neither the McCleskey nor the Payne Courts were unwilling to identify what degree of randomness constituted arbitrariness. To prove that a defendant was sentenced to death due to arbitrary factors related to the victim, defence counsel must be able to do so without statistical proof or a defined legal threshold as to what constitutes unduly prejudicial victim impact evidence in an individual case. The rulings beg the question of what evidence must be used to prove that prosecutorial discriminatory sentencing practices in capital cases are not random and therefore violate a defendant's Eighth Amendment rights?

As victim impact statements are now common in capital cases, researchers examine the role that such evidence plays in these cases to understand jurors’ experiences of the evidence and whether such evidence influences the sentence outcomes. From the beginning, a central concern of defence advocates has been the role of victims’ emotions during their testimony and its lasting impression on jurors. Early research attempted to examine whether mock jurors were more likely to sentence a defendant to death if victim impact evidence was introduced in capital cases. Researchers in several studies provided participants with a criminal factual basis that varied in severity, but only some participants were exposed to the victim impact evidence. The results of these studies were similar: participants who were given the most severe case details and victim impact evidence were more likely to sentence a defendant to

423 Sundby, The Loss of Constitutional Faith 13. (citing Justice Powell’s Memorandum to the Conference (June 27, 1986)).
424 Payne 501 U.S. at 867 (J. Stevens, dissenting).
426 Luginbuhl & Burkhead, Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death; Myers & Arbuthnot, Effects of VIE.
death than participants who were given the identical set of facts absent the victim impact evidence. Researchers also analysed how jurors respond to the perceived harm family members experience, as the Payne Court considered this an essential factor in a defendant’s blameworthiness. Through various permutations of studies with mock jurors, or post-trial interviews with real jurors, researchers examined the degree to which jurors are influenced by victims’ suffering based on the victim impact testimony given at trial. This research indicates that although jurors were emotional in the face of powerful testimony, jurors were able to separate their emotions from the testimony and focus on the harm caused by the crime for sentencing purposes.427 Such analysis is pertinent to the larger dialogue regarding victim impact testimony in capital cases, yet has its limitations due to the reliance on mock juries and the lack of input from actual capital case jurors. Such studies have mostly further entrenched legal positions amongst the defence community and victim advocates.428

Despite the Payne Court’s dismissal of the argument that jurors may compare victims to others, victim worth has been consistently predicated by legal experts and advocates as a critical element of victim participation in legal proceedings.429

427 Myers, et al., Effects of Harm; Myers & Greene, Prejudicial Nature; Nadler & Rose, Victim Impact Testimony and the Psychology of Punishment. See also: Myers & Arbuthnot, Effects of VIE. (citing mixed results on whether it was the harm or emotionality of the mock VIE in which the victim cried throughout the testimony that led to the harsher sentence.) For an analysis linking jurors perceptions of the seriousness of the crime to both worth and harm see: Greene, The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgment.

428 For scholars who agree with the inclusion of harm see: Douglas E. Beloof, Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure, 56 CATH. U. L. REV. 1135 1149 (2006), (writing that federal law legitimise the inclusion of victim harm for sentencing purpose); EREZ, Big Bad at 553-4 (writing that victims feel “gratified when their sense of harm is validated by judges” remarks.”); CASSELL, In Defense at 629 (arguing if VIS helps the jury understand the harm, it assists with the punishment). For scholars who disagree with harm as a sentencing consideration see: Bandes, Empathy and Narrative at 396-8. (arguing that a death sentence should be carefully based upon the harm caused and their moral culpability for that harm, not the ‘irrelevant fortuities’ a victim’s family represents in their victim impact testimony); Jeffrey Abramson, Death-is-Different Jurisprudence and the Role of the Capital Jury, 2 OHIO ST. J. CRIM. L. 117 121, 133, 164 (2004-2005). (arguing that Payne brought back the irrationalities and emotional arbitrariness Furman set out to stop); HARRIS, Jurisprudence at 83, 86, 87 (writing that Payne’s argument for the assessment of harm “reduces the penalty trial to a contest between the innocent and the guilty.”) See generally: Jeremy A. Blumenthal, Affecting Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements, 46 AM. CRIM. L. REV. 107 (2009). (addressing the assessment of harm without confronting the victim witnesses presented by the prosecution on a specific case).

to victim worth, civil law scholars have examined the power of the ‘identifiable victim’ and how direct knowledge of the circumstances or details of a person’s death invokes certain “anxiety and sentiment, guilt and awe, [and] responsibility.”

Additional research shows that sympathetic characteristics of a person in crisis determine the level of public support and engagement. In death penalty fieldwork, researchers affirmed that higher victim admirability correlates with an increased perception of harm amongst jurors. However, whilst these studies had participants rate both the severity of the crime and the respectability and likeability of the victim, participants were not asked to sentence the defendant. As such, with this data, it is difficult to determine the effect victim admirability has on jurors’ sentencing decisions in either capital or non-capital cases.

Not surprisingly, the influence that victim impact statements have on sentencing severity differs amongst researchers claims. Early research on the inclusion of victim impact statements at trial claimed that this evidence did not delay or extend the trial proceedings. Myers and Arbuthnot linked mocked jurors’ imposition of the death penalty with the inclusion of victim impact evidence. Yet, Myers further studied the influence of the victim impact statement on jurors and assessed that it was the level of harm expressed by the surviving victims’ family, not the families’ demeanour. A complication with these studies is that the researchers used mock jurors, which cannot replicate the intense circumstances or emotional conditions of a capital juror experiences at trial. One review of different empirical studies states that the studies have shown there has not been an increase in sentencing severity with the

---


430 Schelling, The Life You Save 128.

431 Jenni & Loewenstein, Identifiable Victim Effect; Deborah A. Small & George Loewenstein, Helping a Victim or Helping the Victim: Altruism and Identifiability, 26 J. Risk & Uncert. 5 (2003).


434 Myers & Arbuthnot, Effects of VIE.

435 Myers, et al., Effects of Harm.
inclusion of victim impact statements. This review examines victim impact statement schemes throughout the world, yet a distinction often lacking, overlooked, or downplayed in scholars’ research is that capital cases are different, given the finality of the sentence.

3.4 Conclusion

With Payne, the present legal standard, defence practitioners and researchers are obliged to examine what may constitute unduly prejudicial victim impact testimony, and its influence on sentencing outcomes in capital cases. As victim impact testimony was new to capital cases, researchers developed hypotheses and methods to examine its influence on the outcome of a case. On the other hand, scholars and victim advocates who support the Payne ruling do not need to prove that victim impact evidence meets the legal standard. Yet there is a certain degree of irresponsibility when—three years after Payne—a key researcher for victims’ participatory rights stated:

> It [victim impact testimony] is a benign way of providing victims with a right to input and of satisfying their need to be part of the process, without any documented adverse effects on the adversarial system or thorough compromising the rights of the accused.

Such a statement is a central point of contention between defence and victim advocates. Victims’ rights proponents reject the notion that death penalty trials are different from other types of criminal cases. For instance, whilst Cassell advocates for the inclusion of victim input in all cases, he is a vocal proponent to ensure this participatory right in death penalty cases. Cassell most often cites Erez’s empirical research on victim impact testimony to justify such participatory rights in capital

---

437 Erez, Victim Participation in Sentencing: And the Debate Goes on at 28.
438 Infra ft. 425
439 See Furman v. Georgia, 408 U.S. 238, 285-91 (1972) (Brennan, J., concurring) (explaining the distinctions between death and lesser punishments in other ruling and how death sentences require different standards of care)
cases. There are significant limitations to Erez’s research, however. Her empirical research was conducted was prior to the Payne ruling and either the research does not include data from capital cases or was conducted in a country that does not have the death penalty. Despite these limitations, Cassell references the research to corroborate his arguments that victim impact testimony (often referring to capital cases) does not produce more punitive sentences or deny the accused a fair trial. Likewise, Erez uses her same research to support the use of victim impact statements in both capital and non-capital cases. This reliance on data collated from non-capital cases to support their justifications for victim impact evidence in capital cases augments the position that these proponents are primarily concerned with victim-influenced sentencing.

Given the irreversible nature of the punishment in capital cases, any attempt by the prosecution to include victim harm or loss is attacked as undifferentiated vengeance or inflammatory. With the charge that victim testimony “authorizes juries to use unreflective emotional responses rather than develop a critical perspective on facts presented,” scholars have resisted such participatory rights based on scepticism about the politicisation of victims’ rights and its consequences to the adversarial system. Others have argued that victims’ rights are ‘political

441 CASSELL, A Reply to the Critics at 490-1, 533-4 (describing Erez as, “One careful scholar in the field of victim impact statements); CASSELL, In Defense at 636-7 (citing Erez and Tontodonato at 469, writing that by allowing capital juries to know fully about the deceased victim and the victim’s family “meshes with the empirical studies in non-capital cases suggesting that, if a victim impact statement makes a difference in punishment, the description of the harm sustained by the victims is the crucial factor.”).  
446 Minow, Surviving Victim Talk. at 1435 (citing Angela P. Harris, The Jurisprudence of Victimhood 1991 SUP. CT. REV. 77, 92 (1991)).  
447 Ashworth VIS&S; Ashworth Punishment 118-9; Sarat; Dubber; Also include others who have written about research done on participatory rights in UK but not relevant due to death penalty; But cf Erez and Cassell
potential”448 used to facilitate crime control reform and therefore operate as an impediment to justice.449 Many nevertheless acknowledge that victim involvement in judicial proceedings is here to stay.450

As Walklate observes, tensions between the victim and the defendant are inevitable because the politick that introduces such participatory rights like the victim impact statement “presumes a very different mode of victim participation within the criminal justice system.”451 To establish normative rather than political standards, crime control policies must be examined for the use of victims’ rights as justification for changes to and the denial of defendants’ rights. Victims should be able to participate in legal proceedings. Their suffering should be recognised and, where possible, their needs addressed within the criminal justice system. Yet it is imperative that the retributive justifications made by politicians, prosecutors, and penal reform advocates that sanction victim impact testimony be challenged and exposed for the ways in which they harm rather than help those whose rights they purport to promote.

448 Miers 51 See also Elias, Roach
449 Scheingold, Garland 111-3, Simon
4 Law on the Books & Law in Action: An Assessment of Federal Law

Over the past thirty years a series of federal laws related to the criminal justice system have been enacted that serve as a confirmation of lawmakers’ intent to develop harsher penal policies. Central to the rationale for such legislation has been a ‘commitment’ to crime victims. Yet, victims’ rights proponents’ continued calls for greater legislative enforcement suggest that politicians appear more concerned about being known to their constituents as ‘tough on crime’ than promoting actual victim engagement with the criminal justice system. Often, victims’ rights legislation seems significant in its rhetoric, but hardly influences victim engagement. Criminal justice policies such as victim’s rights legislation were traditionally symbolic in nature. Analysis of federal legislation indicates that although many politicians promote penal control, they may be more opportunists than ideologues regarding victims’ rights. There are points at which crime control goals and victim participation connect in criminal proceedings. Such intersections prompt the defendants’ versus victims’ rights debate between scholars and practitioners. The contention focuses on questions such as: What does the law mean? Whose interpretation is accurate? Which law is more relevant? Who is responsible for ensuring the laws are enforced? This chapter is devoted to developing a frame of reference for federal laws—both legislative and judicial—that are directly associated with victim participation in criminal proceedings. The first section discusses the ‘laws on the books’ and the second section examines how these laws are applied in federal capital cases. By providing an understanding the progression of federal crime control and victims’ rights legislation, this chapter explains victims’ rights proponents’ justifications to ensure a victim’s participatory rights in the case against the accused. The incorporation of this new voice disrupts criminal proceedings that traditionally have been between the state and the accused. Additionally, victims’ rights proponents’ use of federal legislation to argue procedural law clashes with the courts and legal teams’ preference for constitutional and case law. By focusing on the participatory rights, attention is drawn to the legal arguments for and against victim impact testimony rather than how it is applied.

4.1 Law on the Books: Federal Law and its Subsequent Debates

Legal approaches to criminal cases are not typically based on one court ruling or a single legislative act. Rather, a prosecutor’s case often braids together various aspects of law as the rationale for victim involvement in a case. Therefore, this section begins with an examination of the United States Supreme Court’s decision in *Payne v. Tennessee*, in which it overruled its previous holdings and effectively sanctioned the victim’s voice in death penalty cases. In order to understand *Payne*, further context must be given regarding other cases whose legal arguments centred on the significance of the victim. In turn, this section examines several Acts of Congress that relate to victims’ rights and America’s turn toward penal populism. With an understanding of the laws on the books in relation to victims of crime and their potential engagement in criminal proceedings, the chapter then examines how these laws affect criminal justice professionals’ practice.

4.1.1 The Death Penalty and Victim Impact Evidence: Rulings by the United States Supreme Court

In the relatively recent history of the American death penalty, the U.S. Supreme Court has ruled upon three cases involving lawfulness of the victim impact testimony. The most recent case, *Payne v. Tennessee*, created the present standard for the use of victim impact statements in capital cases. Since the Court’s ruling, prosecutors’ use of this testimony as part of their evidence to justify sentencing the defendant to death is common practice. Prior to the 1991 ruling, and as expressed in its decisions in *Booth v. Maryland* and *South Carolina v. Gathers*, the United States Supreme Court had held that victims were not allowed to participate in capital proceedings. This changed with the Court’s holding in *Payne v. Tennessee*, which

---

453 *Payne* 501 U.S. at. [herein referred to as *Payne*]
454 *Booth* 482 U.S. at. [herein referred to as *Booth*]
455 *Gathers* 490 U.S. at. [herein referred to as *Gathers*] (extending the *Booth* ruling so that prosecutors could not refer to personal qualities of the victim in the sentencing phase of a capital trial. The case held that a defendant’s “punishment must be tailored to his personal responsibility and moral guilt,” not the victim’s personal qualities. *Gathers*, citing Enmund v. Florida, 458 U.S. 782 801 (1982).
overruled both earlier cases and permitted prosecutors to introduce victim impact statements into evidence in capital cases.

The 1987 judicial review of *Booth* pertained to a petitioner’s argument that the victim impact evidence presented to the jury was unduly prejudicial. John Booth murdered an older couple, Mr and Mrs Bronstein, and the jury heard evidence in which the surviving family members described their emotional anguish as well as their opinions about Mr Booth, the crime, and the sentence. The majority of the Court ruled that the “introduction of a victim impact statement at the sentencing phase of a capital murder trial violates the Eighth Amendment” and “may impose the death penalty in an arbitrary and capricious manner.”

The Court expressed concern that such testimony could lead to different outcomes from case to case due to the subjective and persuasive nature of the deceased’s family testimony. Further, *Booth* argued, that a “threshold problem is that victim impact information is not easily susceptible to rebuttal,” therefore limiting a defendant’s defence. As such, prosecutors were not allowed to include victim impact evidence in death penalty cases.

Four years later, the Court heard the case of Pervis Payne who was sentenced to death for the murder of Charisse Christopher and her young daughter. Payne argued that a surviving family member’s testimony during the sentencing phase of his trial and the State’s closing arguments, which referenced that testimony, violated *Booth* and his Eighth Amendment rights against cruel and unusual punishment. Both the Tennessee and United States Supreme Courts affirmed that the state was allowed to introduce victim impact statements in capital cases to provide relevance to a defendant’s blameworthiness and moral culpability. The *Payne* Court held that surviving family members could provide recollections of their loved one’s character and describe the emotional harm the murder has caused. The Court reasoned that this was an opportunity to show “each victim’s uniqueness as an individual human

---

456 *Booth* 482 U.S. at 496, 503-09.
457 Id. at 506.
458 Id. at 507.
459 *Payne* 501 U.S. at 809; 111 St. Ct. 2597, 2603; 115 L.Ed.2d 720, 730.
being,” not as a provocation for the jury’s sentencing considerations. The Court argued that if the defendant was allowed to present to the court evidence about his life circumstances, than the State had the right to present evidence about the victim’s character as well. The Court justified that such evidence is not for comparative purposes between the defendant and the victim, but offered no concrete explanation of how this would prove out in court. Such an argument is a clear contradiction to the concern raised in Booth about a potential “mini-trial,” which could produce moral judgments of a victim’s character and life.

The issue with victim impact statements is whether such evidence could produce arbitrary sentences in capital cases, which could violate a defendant’s Eighth Amendment rights. The two earlier decisions, Booth and Gathers, had held that arguments of comparative worth between the victim and the defendant could lead to such violations and should be disallowed. The Booth Court echoed a concern raised in Furman v. Georgia that sentences could be arbitrary if jurors viewed certain victims as more worthy than others. In Furman, the United States Supreme Court decision affirmed a capital defendant’s Eighth Amendment right to be protected from cruel and unusual punishment by requiring a degree of consistency in the State’s pursuit of the death penalty. Booth argued that the assessment of harm—a victim impact statement—could produce a constitutionally unacceptable risk that a death sentence would be rendered upon arbitrary reasons. Further, Booth reasoned that capital jurors needed to determine sentences by rationally assessing the defendant’s blameworthiness. After Booth, capital defence attorneys argued that prosecutorial inclusion and jury consideration of arbitrary factors such as the race, gender, or worth of the victim in capital sentences violated their clients’ rights. In its reversal, the Payne Court argued that the jury’s assessment of harm to the victim’s family and community was not arbitrary, but rather a standard used by courts to determine the

---

460 Id. at 809 (emphasis original).
461 Booth 482 U.S. at 508.
463 Booth 482 U.S. at 506 ft. 8.
464 Furman 408 U.S. at.
465 Booth 482 U.S. at 503
466 Booth 482 U.S. at 504
appropriate punishment. Further, the Payne Court ruled that victim impact evidence was not about comparative judgments between victims, but that there was historical relevance for the assessment of harm in determining a defendant’s blameworthiness and that victim impact evidence held a legitimate role for this purpose. The Court in Payne ruled that victim impact evidence could be presented to counteract the defence’s mitigating evidence and to provide jurors with an understanding of the harm caused to the victim. Chief Justice William Rehnquist, writing for the majority, asserted that judges historically considered “[t]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment.”

Referring to the exclusion of harm caused to a crime victim, Justice Antonin Scalia wrote that Booth “conflicts with a public sense of justice keen enough that it has found a voice in a nationwide ‘victims’ rights movement.”

By overturning Booth and Gathers, the Payne Court signalled its willingness to examine the law from both a constitutional context and one of political activism. With Payne, the Court indicated its willingness to decrease regulatory control over the established procedural rights of the accused and more efficiently accommodate the emerging procedural rights of the victim. In his scathing dissension, Justice Thurgood Marshall argued that the majority’s assertion that criminal law is based on harm was an “unremarkable observation.” Rather, Justice Marshall wrote that the

---

467 Booth 482 U.S. at 819, 825.
468 Payne 501 U.S. at 808-09, 819, 825.
469 Id. at 825.
470 Id. at 819.
471 Id. at 834 (Scalia, J., concurring).
“inherently prejudicial quality of victim-impact evidence” now allowed in capital cases dismisses the difficulty for the defendant to rebut such testimony. And in his dissenting opinion, Justice John Paul Stevens wrote that the decision was “a dramatic departure” from the Court’s jurisprudence because capital law required that evidence focus on the offence and the defendant, and not the emotional appeal that victim impact evidence may produce.

Although there was neither a change in the law nor a change in facts that could justify the Court’s—uncommon—decision to overturn its previous holdings, two of the Booth justices retired. According to the remaining Booth and Gathers justices, the reversals were a culmination of the retirement of two liberal-minded Supreme Court justices and the momentum of a conservative crime control agenda. As Justice Marshall stated, “It takes little real detective work to discern just what has changed … this Court’s own personnel.” The Court’s decision to recognise the ‘voice’ of victims signified that the Court sanctioned that jurors could base their sentencing decision on “their emotions, rather than their reason.” The Payne majority justified its ruling by saying that there was no requirement for prosecutors to submit victim impact evidence, but rather, that “the Eighth Amendment erects no per se bar” for the prosecution to do so.

Payne provides prosecutors with enormous discretionary power to remedy what the Court considered “virtually no limits” to the mitigation evidence that the defence can introduce to explain a defendant’s life circumstances to a jury. Despite Justice Scalia’s reference to the victims’ rights movement in his concurring opinion, the Court did not speak directly of the victim’s right to participate in judicial proceedings. Instead, the Payne Court’s ruling concentrated on “counteracting” the

---

474 Ibid.
475 Payne 501 U.S. at 856 (Stevens, J., dissenting). See also: PACKER, The Limits of the Criminal Sanction 154.(discussing the values of the competing criminal process models)
476 Justice Stevens retired in 1987 after the Supreme Court’s rulings were issued, one of which was Booth; Justice Brennan retired in 1990.
477 Payne 501 U.S. at 850 (Marshall, J., dissenting; Blackmun, J. joining).
478 Id. at 856 (Stevens, J., dissenting; Blackmun, J. joining).
479 Id. at 827.
480 Id. at 831 (O’Connor, J., concurring).
481 Id. at 809, 822.
perceived imbalance between the evidence that prosecutors and defence attorneys can present during the penalty phase of a capital trial.\textsuperscript{482} The Court suggested that it was out of “fairness to the prosecution,”\textsuperscript{483} that prosecutors should be permitted to introduce evidence to inform “the sentencing authority about the specific harm caused by the crime in question,”\textsuperscript{484} and to offset the defence’s introduction of compelling evidence that, presented alone, could influence the jury’s sentencing determination. Despite the Court’s explanation that \textit{Payne} was a prosecutorial matter, victims’ rights proponents praised the decision as an acknowledgment of the vital role that victims can have in the sentencing of an accused.\textsuperscript{485} Yet the Court did not decide whether the victim had the right to provide impact evidence, only that the prosecution was not prohibited from using it. This belief has created an on-going debate between due process and crime control scholars about the procedural rights of the accused versus the propriety of victims’ procedural rights. Defence advocates do not view \textit{Payne} as an endorsement of victims’ rights, but rather as an attack on the defendant’s right to a fair trial. Shortly after \textit{Payne}, Attorney General William Barr denounced the “permissiveness”\textsuperscript{486} of defendants’ rights and called for dramatic legal reform. One of Barr’s recommendations called for the development of federal victim testimony policies\textsuperscript{487} reflecting the newly embraced “value commitment”\textsuperscript{488} of victim narratives in capital proceedings.

Despite the Supreme Court’s argument that \textit{Payne} was about the prosecutorial right to include victim impact statements in capital cases, the Justices’ acknowledgment of the victims’ rights movement substantiated the wider dispute between victims’ rights proponents and due process advocates who traditionally supported defendants’

\textsuperscript{482} Id. at 809, 825.
\textsuperscript{483} Id. at 809; Cf. \textit{Payne} at 859-60 (Stevens, J., dissenting).
\textsuperscript{484} Id. at 825. See also 820-21.
\textsuperscript{485} In fact, victims’ rights proponents filed briefs of amici curiae in support of the State of Tennessee. Frank Carrington, who served on President Reagan’s Task Force on Victims of Crime, was joined by Michael Lockerby on one brief. Also, two prominent crime control and conservative legal advocates who have represented crime victims in court, Daniel Popeo, founder of the Washington Legal Fund and Kent S. Scheidegger, the Legal Director of the Criminal Justice Legal Foundation, filed similar briefs.
\textsuperscript{487} Id. at 50 ft. 61.
rights. Defence proponents argued that a defendant’s sentence must be based on the traditional rules of evidence, which require a jury to examine the facts of the crime and the individuality of the defendant. Others centred on how Payne provided no procedural safeguards regarding the admission of victim impact evidence. Still others expressed concern that Payne could allow for similar comparative and selective violations as presented in McCleskey v. Kemp, which held that permitting the introduction of victim impact evidence would violate the defendant’s rights to equal protection under the Fourteenth Amendment and protection from arbitrariness in the legal proceedings and sentencing as guaranteed by the Eighth Amendment. Likewise, some pointed out that victim impact testimony might lead to arbitrary sentencing based on emotion and revenge instead of reason. Finally, some argued that the inclusion of victim impact evidence in capital cases would oblige defence counsel to scrutinise the life and characteristics of the victim “whose death represents a unique loss to society.” Despite the concern the Booth Court raised regarding the “prospect of a ‘mini-trial’ on the victim’s character,” the Payne Court recognised that it would be imprudent for defence counsel to question or challenge the victim’s surviving family member testimony in front of the jury for “tactical reasons.” With the Court’s ruling in Payne, prosecutors present an untenable situation to defence counsel with the inclusion of victim impact evidence, as a client’s life is at stake and

489 Payne 501 U.S. at 834 (Scalia, J., concurring); 859, 867 (Stevens, J., dissenting). See also: Booth 482 U.S. at 520 (Scalia, J., dissenting) (“Recent years have seen an outpouring of popular concern for what have come to be know as ‘victims’ rights’.”).
491 Mosteller, Victims’ Rights and the Constitution; Levy, Notes Limiting Victim Impact Evidence and Argument After Payne v. Tennessee; Blume, Ten Years of Payne: Victim Impact Evidence in Capital Cases.
492 McCleskey 481 U.S. at.
494 Minow, Surviving Victim Talk; Logan, Through the Past Darkly; Markus Dirk Dubber, Regulating the Tender Heart When the Axe Is Ready to Strike, 41 BUFF. L. REV. 85 (1993); Susan Bandes, Victims, "Closure," and the Sociology of Emotion, 72 LAW & CONTEMP. PROBS. 1 (2008); Bandes, Empathy and Narrative.
496 Booth 482 U.S. at 507.
497 Payne 501 U.S. at 823.
defence counsel has the duty to challenge all evidence presented against the defendant.

4.1.2 Victim and Witness Protection Act of 1982

As previously stated in Chapter Three, many of the Task Force’s recommendations improved victims’ experiences with criminal justice professionals in the aftermath of a crime. Yet in the rush to capitalise on the political influence of victims’ rights, lawmakers diluted any opportunity to provide meaningful outcomes for victims. Instead, like the Task Force, lawmakers concentrated their efforts on the inclusion of the victim impact statement with the belief that this would ‘balance justice.’ The House of Representative’s debate regarding the first federal legislative act created with the Task Force’s recommendations illustrated the pressure to enact such legislation. Vested interests appeared to force the Victim and Witness Protection Act of 1982 (VWPA) to a vote as revealed in this statement made by Representative Thomas Kindness on the House floor:

I shall not object…except to point out what a lousy way this is to legislate…This bill could have been more carefully crafted if it had gone through hearings and the usual markup procedures. The Justice Department wanted [this bill] in a hurry at the end of this session…I hope we can straighten it out in the future.

In the rush to pass the legislation, Congress made decisions with little explanation, which could have better engaged and informed the criminal justice system actors. One example is that the VWPA placed the responsibility of the victim impact statement with the federal Probation and Pre-trial Services Department. Congress may have done by replicating the probation office in Fresno, California, which conceived of the idea to include victims’ statements as part of the pre-sentencing

498 Frank Carrington & George Nicholson, Victim's Rights: An Idea Whose Time Has Come - Five Years Later: The Maturing of an Idea Victim's Rights, 17 PEPP. L. REV. 1 (1989). (detailing how a significant number of the issues raised in The Task Force on Victims of Crime’s Final Report had been addressed in the five years since the report was published.)
502 Maureen McLeod, Victim Participation at Sentencing, 22 CRIM. L. BULL. 501 512 (1986). ("Without elaborating on the reasons for their choices, legislators have placed primary responsibility for victim impact statement preparation on victims and probation staff.")
reports.\textsuperscript{503} As probation officers’ primary responsibility was to assist judges regarding a defendant’s sentence, this arrangement had the potential to involve all invested parties. This legislation put the Probation and Pre-trial Services Department in a distinctive role in that the officers would actively engage with both the accused and the victim. Additionally, the Probation Department’s duty was to the judiciary, not to either legal team. This position could have helped incorporate the “victim’s interest in restitution, restoration, and retribution,”\textsuperscript{504} which could have directly addressed the “financial, social, psychological, or physical”\textsuperscript{505} needs identified in the VWPA. But this did not occur. The emphasis of victims’ rights quickly centred on receiving monetary restitution and giving a victim impact statement during the defendant’s sentencing.

Representative Kindness’s observation was accurate; Congress has continued to pass additional legislation in an effort to strengthen previous victims’ rights legislation. President Reagan’s campaign promise to take the victim seriously was achieved on paper, but it did not modify legal practice as victims’ rights proponents expected. After the VWPA, the apparent concern for the victim seemed to diverge: federal politicians used the victim as political fodder and penal populists expected the politicians’ ‘commitment’ to the crime victim to mean significant changes to criminal justice policies.

\section*{4.1.3 The Violent Crime Control and Law Enforcement Act of 1994 & the Federal Death Penalty Act of 1994}

Although federal legislation regarding victim impact statements had been in effect since 1982, the U.S. Attorney’s Offices did not systematically use such testimony before 1995. As part of U.S. Attorney General Barr’s 1992 missive to combat violent crime, Barr commissioned a committee to develop federal victim testimony policies.\textsuperscript{506} While individual states quickly determined the role of the victim impact

\textsuperscript{504} McLeod, \textit{Victim Participation at Sentencing} 513.
\textsuperscript{505} Pub. L. No. 97-291, 96 Stat. 1248
\textsuperscript{506} Although the committee was not comprised of politically appointed individuals like the President’s Task Force for Victims of Crime, it did include three criminal justice advocacy organisations (National Victim Center, Mothers Against Drunk Driving, and the American Prosecutor’s Research
statement in state legal proceedings, it took the federal government ten years to endorse its own policy. The committee commissioned by AG Barr recommended that Congress enact legislation delegating responsibility to U.S. Attorneys’ Offices for the “collection and dissemination of victim impact statements.”

The release of this publication coincided with the passage of the largest federal crime bill in US history, the Violent Crime Control and Law Enforcement Act of 1994.

The VCCLEA was the culmination of years of ‘tough on crime’ political rhetoric, coming after state and local governments had implemented crime control policies with severe punishments?, and the federal government making good on its promise to do the same. This legislation was broad in its reach, with legislation addressing violence against women, better protection for minorities in impoverished urban settings, senior citizens, as well as the aberrant concern for violence against trucker drivers and out-of-wedlock births. The VCCLEA signified the government’s delineation between the previous norms for defendant’s rights and what Congress then considered ‘America’s rights.’ Despite the political trope that harkened back to President Reagan’s ‘Let’s Make America Great Again’ spiel regarding crime control, Congress in the VCCLEA gave little attention to Reagan’s campaign pitch about victims’ rights. Rather, Congress’ omnibus legislation simply ensured that victims—especially victims of violent crime, as they noted—could speak at the defendant’s sentencing and that an allocated federal crime victims’ fund was secured. Despite their vocal campaign to promote greater awareness and rights to victims in the decade prior to VCCLEA’s passage, victims’ rights proponents said

Institute) that have maintained a strong crime control, anti-defendant, pro-victim position in their mission statements and work. The committee was given an eighteen-month grant by the Department of Justice to produce proposals regarding national protocol for the inclusion of victim impact testimony in criminal cases


H.R. 3355 Title IV Sec. 40001-40113 (“Safe Streets for Women”)
H.R. 3355 Title III Sec. 31501-05, 31901-04
H.R. 3355 Title XXIV Sec. 24001-02 (“Protections for the Elderly”)
H.R. 3355 Title XXXII Sec. 320906
H.R. 3355 Title XXXII Sec. 320907
H.R. 3355 Title XXIII Sec. 230101-02 (“Victims of Crime”)
little about the legislation.\textsuperscript{515} It is unclear whether these proponents considered the sparse inclusion of victims’ rights in the VCCLEA an oversight or a dismissal of such rights.

This thesis argues that the VCCLEA was the USA’s institutional acquisition of the role as the victim, not a validation of the individual victim. Similar to the State’s decision to take over as prosecutor in the eighteenth and nineteenth centuries, the VCCLEA was Congress’s declaration that ‘America’ is the victim of violent crime. The legislation was an explicit acknowledgement of how penal populism defined crime, criminals, and ‘America’s rights’ as the victim of these crimes. The individual crime victim may personally experience the crime but society is the body that is less safe, more at risk, and in need of assurance that the criminal justice system will keep us safe. The VCCLEA pronounced the government’s intention to combat crime on multiple levels to assure society that politicians and law enforcement officials intended to control crime.\textsuperscript{516} Yet the VCCLEA’s language is clear as to who is the victim: we are. The generic, yet personal, description of Americans as the crime victim both draws us into this membership and replaces our responses to personal experiences of crime and safety with a monolithic voice as the crime victim.\textsuperscript{517} Victims’ rights proponents’ campaign to recognise the individual rights of the crime victim is effective advertisement for US criminal justice policies. The ‘personal’ voice keeps the collective consciousness engaged and mindful that we are all victims. Without the fanfare that accompanied victims’ rights with the passage of the VWPA, Congress quietly placed the victims in the hands of federal prosecutors.

As part of the omnibus VCCLEA, Congress included the Federal Death Penalty Act (FDPA), which broadened the number of federal crimes for which US Attorneys

\textsuperscript{515} For instance, Paul Cassell, a leading victims’ rights proponent discusses federal victims’ rights legislation at length in his writings. Yet, Cassell lists the VCCLEA as a legislative act that addressed victims’ rights without any mention of what gains were achieved for victims. See: Cassell, Protecting Crime Victims 615; Paul G. Cassell, Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure, 2007 UTAH L. REV. 861 866 (2007); Cassell, Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act 843.\textsuperscript{516} SIMON, Governing Through Crime 102-05. See also: GARLAND, Culture of Control 200-01; DUBBER, Victims in the War on Crime 190-202.\textsuperscript{517} DUBBER, Victims in the War on Crime 19, 27.
could seek the death penalty.\textsuperscript{518} As part of this Act, Congress gave US Attorney’s Offices the responsibility for overseeing victim impact statements. Rather than have the Probation and Pre-trial Services Departments incorporate emerging victims’ rights into their established practice within the judiciary, Congress opted to give the U.S. Attorney’s Offices the administrative control of the victim impact statement.

Federal prosecutors understand that politicians are an “external force” on the legal system with an agenda of courting the public vote and media rather than a concern for the longevity of the law.\textsuperscript{519} With this, prosecutors hold a certain view of the political drive for criminal legislation, believing it merely provides legitimacy for the politician’s ‘tough on crime’ position. Thus, some federal prosecutors consider legislation such as the VCCLEA, the CVRA, or the Violence Against Women Act of 1994,\textsuperscript{520} more as political than substantial.\textsuperscript{521} Paradoxically, the power given to prosecutors through various legislative acts aimed at penal reform is the same power that gives federal prosecutors the discretion and ability to dismiss federal legislation if it does not fit the U.S. Attorneys’ criminal justice goals or the particular issues their offices face. As prosecutors handle the day-to-day work on criminal cases, they have a greater understanding of the impact a law has on defendants, caseloads, court dockets, and federal prisons than politicians. Thus, U.S. Attorneys’ public assertions often give the appearance that they adhere to federal legislation, yet they will pursue their own agenda.\textsuperscript{522}

Although the 1976 ruling in \textit{Gregg v. Georgia}\textsuperscript{523} re-established the death penalty in America, the federal government did not pursue capital charges against any defendants until the enactment of the Anti-Drug Abuse Act of 1988.\textsuperscript{524} For six years this crime, also known as the drug kingpin statute, was the only crime eligible for the

\textsuperscript{518} 18 U.S.C. 3592(a)(1)-(7)
\textsuperscript{519} GARLAND, Culture of Control 111.
\textsuperscript{521} Stuntz, \textit{Disappearing Shadow} 2557-8. (discussing how in the first three years of the VAWA, there had been no federal criminal prosecutions, despite the likelihood that there had been violent acts committed against women).
\textsuperscript{522} GARLAND, Culture of Control 111.
\textsuperscript{523} Gregg v. Georgia 428 U.S. 153 (1976)
\textsuperscript{524} Pub. L. 100-690, 102 Stat. 4181, enacted November 18, 1988, H.R. 5210

109
federal death penalty. The FDPA gave federal prosecutors broad jurisdiction to prosecute cases ‘of federal interest.’ With the legislative directive toward greater crime control, “virtually every homicide occurring within federal jurisdiction” became death-eligible. As federal authorities previously had limited jurisdiction in capital cases, state officials have contested the federal government’s new attention to criminal justice policies and authority over specific cases. At times, local district attorneys have challenged federal prosecutors’ claims of jurisdiction when local prosecutors had a clearer invested interest due to the locality and the constituents involved in the crime. Yet Congress’ legislative authority gave US Attorneys increased control over such cases, which, over time, has solidified U.S. Attorneys’ reputations as tough and successful litigators in cases of national importance.

Marshalling in the modern federal death penalty, the Federal Death Penalty Act specified procedures Congress believed would assure fair and consistent procedural rights to the accused. The legislation imposes standards on federal prosecutors as well as provides guarantees to protect the legal rights of the accused. In Gregg v.
Georgia, the Court ruled that the evidence introduced by the prosecution for sentencing consideration must meet “clear and objective standards.” Therefore, the Federal Death Penalty Act requires prosecutors to present evidence of aggravating factors to pursue the death penalty. Congress divided the aggravating factors into two categories – statutory and non-statutory. For the government to seek the death penalty, the jury must find a defendant guilty of at least one statutory aggravating factor that is proportional to justify a death sentence. The statutory aggravating factors include circumstances such as previous convictions; evidence the murder was especially heinous, cruel, or depraved; evidence the defendant committed the act for pecuniary gain; or evidence the defendant committed the offence after substantial planning. The FDPA also allows federal prosecutors to include non-statutory aggravating factors for juries to consider. Examples include future dangerousness, gang membership, lack of remorse, and victim impact.

In addition to the government’s arguments regarding aggravating factors, the FDPA allows defence attorneys to present mitigating factors as reasons why the death penalty should not be pursued against the defendant. Such characteristics may include evidence as to the defendant’s background or character, the defendant’s lack of significant criminal history – suggesting the defendant does not pose a risk to others, or evidence the defendant committed the offence under emotional or mental disturbance. To address concerns raised by the Gregg ruling, the FDPA requires that indigent defendants facing capital charges are given two court-appointed two attorneys; at least one of whom is “learned in the law applicable to capital cases.” To be qualified as defence counsel on a capital case, a lawyer must have previous trial, appeal, or post-conviction work on either federal or state capital cases.

530 Gregg 428 U.S. at 196.
531 18 U.S.C. § 3591(a)(2)
532 18 U.S.C. § 3592(b) through (d)
533 18 U.S.C. § 3593(a)(2)
534 18 U.S.C. § 3592(a)
As part of the Department of Justice’s (DOJ) endeavour to have the U.S. Attorney’s Offices behave as a disinterested party in the assessment of whether a specific case warrants the federal government seeking the death penalty against the accused, the DOJ instituted a ‘death authorisation’ process or “protocol.” The Attorney General’s Review Committee on Capital Cases (Review Committee) is comprised of Department of Justice attorneys who make an independent recommendation of whether to authorise the local US Attorney to seek the death penalty in a given case. The Review Committee meets with the legal teams for the government and the defense, and both sides present evidence related to aggravating and mitigating factors, arguing for and against a capital prosecution.

To seek a death sentence, the prosecution must file with the court a ‘notice of intent to seek the death penalty.’ Additionally, to present statutory and non-statutory aggravators at trial, prosecutors must notify defence counsel of this information (and provide it in a timely manner?) or that it will be forthcoming in a timely manner. This list of evidence is what the government will present against the defendant as substantiation for why they will seek the death penalty should the accused be found guilty of capital charges. If the prosecution fails to include information about a specific aggravator, such as the victim impact statement, in the notice of intent, the government cannot present that evidence at trial. If prosecutors can show that the defendant and the crime meet the threshold of aggravating factors, they argue that the death penalty should be a sentencing option for the jury’s considerations. On the other hand, the defence attorneys present mitigating factors related to the defendant’s life and actions to demonstrate why the government should not be allowed to pursue or the jury should not be allowed to consider the death penalty as a sentencing option. The defence provides this information to the ‘death authorisation’ committee in a timely manner.

539 18 U.S.C. § 3593(a). This is commonly referred to as the ‘Notice of Intent’ or the ‘NOI’.
540 But see: United States v. Stitt, 250 F.3d 878, 898-99 (4th Cir. 2001). (Despite not having filed notice of the victim impact statement, the prosecution included such testimony at trial. The defense raised this issue on appeal but the court ruled that the prosecution’s inclusion of this testimony was harmless error.) See also: United States v. Waldon, M.D. FL 3:00-CR-436-J25-TJC. (in which the prosecution filed an amendment requesting to be allowed to introduce victim impact evidence after the deadline for such notification had passed. The court granted the prosecution’s request.)
not to justify why the accused may have committed the crime, but to more fully inform the committee about the defendant’s circumstances and actions.

Although federal prosecutors maintain that the authorisation process removes the personal bias or investment of the local U.S. Attorney in seeking the death penalty, it does not eliminate all bias. Once a case has been authorised as a capital case by the Department of Justice, the local U.S. Attorney’s Office resumes discretionary power and control of the case. One U.S. Attorney cautioned, “There are few types of power greater than having a role in seeking to take someone’s life.”541 As discussed in Chapter Two, not all prosecutors consider this authority an onerous responsibility; rather prosecutors’ sense of righteousness to ‘seek justice’ can become “self-righteousness” and that they are the only ones who know what justice is.542

We can only speculate about whether Congress’s decision to have the US Attorney’s Offices administer the victim impact statement was influenced by the recommendations made to Attorney General Barr. Yet, with prosecutors gaining control of such powerful testimony, it is fair to call attention to how this administrative authorisation assisted federal prosecutors’ sentencing pursuits. Despite the VWPA ordinance to have the Probation and Pre-trial Services Department assist victims in pre-trial proceedings, the U.S. Attorney’s Offices established victim advocate positions to assist victims of crime throughout the legal proceedings as directed by supplemental 1984 federal victims’ rights legislation.543 From a bureaucratic perspective, the VCCLEA’s decree to consolidate victim assistance responsibilities into one office (and position) makes sense. Yet, how victims were engaged and for what purpose shifted with the enactment of the Federal Death Penalty Act. Whereas the Probation and Pre-trial Services Department worked with both legal teams, the defendant, and the victim, to determine sentencing recommendations that could benefit all impacted parties, the U.S. Attorney’s victim

541 Fitzgerald, Ethical Culture
advocate notified “only those select victims the prosecutor needed to prove the case, say.” In my experience within the federal courts, the victim advocate’s function has changed little in the nearly thirty years since Kelly’s research. Because the criminal justice system is so dichotomous and the U.S. Attorney’s victim advocate works at the behest of the prosecution, it is assumed that the prosecutor, not the victim, directs the victim advocate’s objectives.

Congress’ intention to include victim input into sentencing considerations for defendants convicted of violent crimes, as well as to give the US Attorneys authority to administer the victim impact statement, makes clear that Congress regards this testimony as a crime control tool more than as a victim’s right. The Federal Death Penalty Act does not address victims’ rights or interests. The legislation is specific to the federal government’s right to pursue the death penalty against defendants whose crimes meet specific conditions. Further, the legislation depicts the necessary justifications, parameters, and considerations that must be met for federal prosecutors to seek the death penalty against a defendant. The US criminal code clearly details that prosecutors “may include” such testimony; nowhere does it or the VCCLEA refer to the testimony as the victim’s right. In fact, by giving U.S. Attorneys the authority to use victim impact statements, Congress arguably gave victims less of a voice in the legal proceedings, and restricted the sentencing body from hearing about the impact of the crime and their needs that stem from the crime. The surviving family members’ voice is thus only heard when the prosecution considers their voice to be a part of the collective.

4.1.4 The Crime Victims’ Rights Act

As victims sought greater participation in criminal proceedings, criminal justice professionals were confronted with the challenges and limitations of victims’ rights legislation in federal criminal cases. Congress has attempted to address issues as they have arisen with several acts in addition to the Victim Witness Protection Act and Victims Of Crime Act. These include the Victims’ Rights and Restitution Act of

544 Kelly, How Can We Help the Victim 15.
545 18 U.S.C. §§3591-3598
546 18 U.S.C. § §3593(a)(2)
1990,547 the Antiterrorism and Effective Death Penalty Act of 1996,548 and the Victims Rights Clarification Act of 1997.549 The piecemeal approach to victim participation in criminal proceedings has left open the question of what specific rights victims actually have in federal criminal proceedings.

Victims’ rights proponents argue that despite each federal act passed on behalf of victims’ rights, there is little enforceable power that enables crime victims to demand that the judicial system administer their rights. Committed to the notion that crime victims deserve rights equal to those of the accused, victims’ rights proponents sought to “significantly expand”550 federal legislation, most notably through the constitutional amendment originally recommended by the President’s Task Force on Victims of Crime.551 Victims’ rights proponents believed that crime victims’ participatory rights would never be recognised until victims had the same standing as defendants.552 Thus, for nearly a decade, Senators Jon Kyl and Dianne Feinstein pursued changes to the Sixth Amendment to the U.S. Constitution to incorporate equal standing rights for the crime victim.553

Despite apparent public support from high-level politicians, however, penal populism apparently has its limits. Senators were reluctant to make such sweeping constitutional changes to enhance crime victims’ rights and standing. Senators Kyl and Feinstein were ardent in their belief that the courts would only take crime victims seriously if confronted with violating a person’s constitutional rights. Yet the idea of altering the U.S. Constitution transcends politics, or even ideology, and the Kyl-Feinstein bill did not have enough legislative support to pass a constitutional amendment. Senators Feinstein and Kyl discontinued their pursuit to amend the Sixth Amendment and pursued another legislative amendment on behalf of crime victims.

550 Cassell, Treating Victims Fairly 939. (italics original). See also: Kyl, et al., On the Wings of Their Angels.
552 Kyl, et al., On the Wings of Their Angels 588. See also: Garvin, NCVLI NEWSLETTER OF CRIME VICTIM LAW. May 2011.
553 Kyl, et al., On the Wings of Their Angels 589.
The result was the Crime Victims’ Rights Act of 2004 (CVRA), is the most comprehensive federal legislative act for victims to date.\(^{554}\) The statute provides crime victims with eight rights in federal proceedings, many identical to those in the Kyl-Feinstein proposed constitutional amendment. Many of the rights reaffirm previous legislation favouring crime victims such as the right to be reasonably protected from the accused; the right to reasonable, accurate, and timely notice of any public court proceeding; and the right to be reasonably heard at any related public proceeding in the district court.\(^{555}\)

Perhaps most significantly, CVRA permits victims to petition a court, through a Motion for Relief and Writ of Mandamus, as a party independent from prosecutors if they believe that the prosecutors or trial judge have violated their rights.\(^{556}\) Defence proponents express concern that the CVRA would violate the defendant’s constitutional rights under the Due Process Clause.\(^{557}\) First, if victims were permitted to testify independent of the state and the defence, this testimony would “circumvent the notice and adversarial testing provided by rule and statute.”\(^{558}\) Such testimony would bypass procedural safeguards that must be complied with before any other witness testifies before the court. Another concern centres on the enforcement clause providing the victim has the right to be heard at any legal proceeding related to the case. Defence proponents argue that Congress explicitly denied a victims’ rights constitutional amendment, preferring to grant victims statutory rights through the CVRA. Implicit in this argument is that the courts give precedence to constitutional and case law over statutory law, and if Congress meant to give victims greater rights and protections, Congress would have passed the CVRA as a constitutional amendment.\(^{559}\) Victims’ rights proponents assert that the writ of mandamus allows victims to appeal any action or decision by the government, defence, or judge that denies the victim’s right to participate in the proceedings.\(^{560}\) Further, the proponents

---


\(^{556}\) 18 U.S.C. 3771 (d) (3).


\(^{559}\) Id. at 6-10. See also: BELOOF, Victims’ Rights Guide 268-9.

\(^{560}\) Cassell, Treating Victims Fairly 870.
argue that the motion for relief and the writ of mandamus are meant to allow victims to be “an independent participant in the proceedings.”

As with prior legislative acts, crime control and victims’ rights proponents continue to concentrate on victim input in a defendant’s sentence and detention. The persistent narrow emphasis on ensuring that victims are allowed to participate in the defendant’s sentencing considerations shows the political construct of the victim impact statement rather than the intentions of the early crime victims’ rights movement. By continuing to single out and advocate for victim impact statements in criminal proceedings, legislators attempt to legitimise their authority both on knowing what crime victims want from the criminal justice system and what is best for all victims. Without greater understanding of the history of the politicised development of victims’ rights, legal professionals are not able to effectively address both defendants and victims’ legal and judicial interests. As a result, crime control proponents maintain the message of what victims need and how the legal system should attend to those matters.

Over time, defence counsel have discovered that victims’ rights proponents are not simply vying to be a voice of support for the direction the prosecution takes a case. Rather, victims’ rights proponents have made clear that they intend to act on behalf of the victim and independent of the prosecution to affect the direction and outcome of the case. Victims and their advocates seek to ensure that the victim is able to give testimony. Their reasons for this testimony are explained in Chapter Three. Yet, what continues to be elusory is why victims’ rights proponents insist that victim impact statements be given as part of the sentencing considerations. If the interest is in having the defendant hear about the victim’s harm, either with the expectation of informing or educating the defendant or the hope of receiving information or remorse from the defendant, the sentencing proceeding is too late in the process to

---


allow for a meaningful connection between the victim and defendant. Because the victim impact statement is part of the evidence being considered by a capital jury, defence attorneys are not likely to be receptive to a victim’s questions or righteous anger directed at the defendant, or encourage empathy in their client in that moment of the proceedings.

4.2 Law in Practice: Realities and Shortcomings

The advent of legislative and judicial actions directed at victim participation in criminal proceedings has produced wide-ranging rulings in federal courts. The analysis indicates that defence counsel and proponents rely heavily on case and constitutional law to raise objections to both prosecutorial use of impact testimony and victims’ rights proponents’ advocacy for victim impact testimony. Criminal justice officials’ predilections for case law has a certain conservatism in that there is a measured practice of considering the present case and applying the law impartially rather than being influenced by political or penal populist views. Case law develops over decades, if not generations, through legal arguments considered by many attorneys and judges who analyse the merits of the law and its challenges. Because of this, case law is considered more reasoned whereas legislation is politically evolutionary. Yet, victims’ rights proponents emphasise federal victims’ rights legislation, the President’s Task Force on Victims of Crime Final Report, and each other’s work. These proponents give little emphasis to Payne in their arguments, possibly because they agree with the Court’s ruling. It could also be that victims’ rights proponents do not use Payne to make their point because the ruling does not address the victim’s right to allocution, rather the prosecutor’s right to include it should they choose. Because victims’ participatory rights are relatively new in modern American law, legislative law is where victims’ rights gain traction. Victims’ rights proponents may have populist appeal, but they struggle to convince judges of the legitimacy of their positions. Prosecutors do not tend to engage in the scholarly community and often file their pleadings ex-parte—with only the judge, or under seal—in which only the legal teams and court will see the content of the pleadings. This obscurity personifies prosecutors’ preference for discretion. As noted earlier,
prosecutors’ inaccessible decision-making patterns have victims’ rights proponents as likely to challenge prosecutors (and judges) as defence counsel.664

In federal capital cases, a common retort that prosecutors use against defence counsel’s attempts to limit or block victim impact evidence is that both Payne and the 1994 Federal Death Penalty Act give them the right to include victim testimony as part of their evidence against the defendant.665 Prosecutors do not commonly call attention to their intention to include victim impact evidence in criminal proceedings unless it benefits their case to appear concerned about victims’ rights. This is especially true in federal capital cases that have atypical media attention.666 Payne v. Tennessee and the 1994 Federal Death Penalty Act are only two of the possible influences in federal capital case outcomes. The Crime Victims’ Rights Act creates a trifecta for penal control regarding victim impact evidence. Whilst defence counsel typically do not concern themselves with victims’ rights legislation, the CVRA has made them take notice due to concerns that victims’ rights would violate the defendant’s due process rights. All three challenges exponentially raise the legal stakes for the accused. Defence counsel now have to be vigilant towards prosecutors’ use of victim impact evidence, judges who increasingly approve of prosecutors’ arguments regarding the acceptable level of impact evidence and what is unduly prejudicial, and victims’ rights proponents whose motives also appear to have more to do with seeking retribution against the defendant than with addressing victims’ needs.

665 18 U.S.C. § 3593(a)(2). In filing the Notice of Intent to Seek the Death Penalty Motion, prosecutors notify defence counsel that the government will provide a list of the non-statutory aggravating factors. If this list includes the victim impact statement, prosecutors must list the legal rulings and/or legislation that supports the inclusion of this evidence.
666 Milton J. Valencia, US Attorney Says Sentiments of All Marathon Victims Important, THE BOSTON GLOBE, 2015, at https://www.bostonglobe.com/metro/2015/04/16/attorney-responds-richard-family-statement-tsarnaev-punishment/YKYhU1mYBdEbTOeblSeNK/story.html. (accessed 4/17/2015) (citing US Attorney Carmen Ortiz that the views of all the victims and survivors are continue to play a role in her decision to seek the death penalty, overriding the opinion of the Richard family, who was considered the most grievously affected by the bombings and spoke publicly against the government seeking the death penalty against the defendant, Dzhokhar Tsarnaev.)
4.2.1 Penal Reform on Sentencing

In the push for penal reform, politicians have begun to alter the federal criminal codes as a strategy for ensuring federal prosecutors’ compliance. The federal crimes and criminal procedure are a part of the United States Code (U.S.C.), which includes the “general and permanent laws” of the United States. As Congress frequently passes legislative acts each year, only permanent laws, not every provision of those acts, goes into the Code. By directly affecting the Crimes and Criminal Procedures Code, the reasoning might be that federal prosecutors would be required to adhere to Congressional acts. Yet the intended outcomes that legislators might have expected with additional criminal law do not always materialise. By imposing politically motivated or excessive reform, Congress may have frustrated their effort to control the outcomes. As Stuntz writes, the more federal criminal codes expand, “the less it matters.” Politicians overlook the fact that creating new federal criminal statutes does not restrict federal prosecutors’ options. Federal prosecutors may simply accuse a person of a different crime to avoid what they perceive as legislative overreach. For example, in a homicide case, prosecutors could choose between first degree and second-degree murder, or even manslaughter. Additionally, prosecutors have different offences they can allege occurred in the commission of the homicide to ensure further discretionary charging and sentencing options. As a result of Congress’ criminal legislation aims, federal prosecutors are able to use the ever-expanding federal criminal codes as discretionary options rather than obligations.

How federal prosecutors engage crime victims throughout legal proceedings remains unclear. Despite mandated efforts from Congress and the Department of Justice to create better communication between the U.S. Attorney’s Office and crime victims, crime victims remain disenfranchised from the legal proceedings, at least from the

568 Federal Crimes and Criminal Procedure is part of the United States Code (U.S.C.). All federal crimes and parameters are located under Title 18 of The Code, its short name for the U.S.C..
571 Stuntz, Disappearing Shadow 2549-50.
572 Id. at 2566-7.
standpoint of certain victims’ rights proponents. Yet, this may have less to do with prosecutors’ lack of concern for the victims and more to do with Congress’ crime control agenda. There is precedent that laws impacting federal criminal guidelines are often passed with the implicit expectation that other actions—either on behalf of the government or other entities—will counterbalance the legislation to produce a workable middle ground. Not surprisingly, the same crime control advocates who used the crime victim as the argument to ‘rebalance’ the legal system also sought to annul the Warren Court decisions that granted defendants’ greater legal protection and judges more discretion. Crime control proponents broadly attacked judicial discretion with passage of the federal Sentencing Reform Act of 1984.

This Act, presented as increasing sentencing consistency in federal courts, abolished judges’ ability to make sentencing determinations based on their interpretations of the individual facts of the case and their impressions of the defendant. The standard requires judges to apply established sentencing guidelines to the aggravating and mitigating factors of an offence as well as the criminal history of the defendant to determine the defendant’s sentence. Such guidelines restrict a judge’s ability to provide an impartial perspective and sentence upon a defendant based on the circumstances that are unique to that case. Rather, with the Sentencing Reform Act, Congress yielded great discretionary power to the prosecution to determine the charges, and therefore the sentencing range for the accused. Despite the attack on perceived excess of judicial power, crime control proponents did not question or challenge prosecutorial discretion. Rather, the passage of this Act gave greater authority to the federal prosecutor, whom many believed to already have tremendous


574 Barry Lynn Creech, And Justice for All: Wayte v. United States and the Defense of Selective Prosecution, 64 N.C. L. REV. 385, 386 (1985-1986).(describing how although President Carter signed a Presidential Proclamation requiring all males born in or after 1960 to register with the Selective Service, the Selective Service took a passive enforcement policy and allowed the Department of Justice to decide whether to prosecute noncompliant males); Stuntz, Disappearing Shadow 2557-8.


577 Stuntz, The Political Constitution 840; Stanley A Weigel, The Sentencing Reform Act of 1984: A Practical Appraisal, 36 UCLA L. REV. 83, 93-4 (1988-1989).(writing that “the parties,” in which he includes the defence, have discretionary power. This may have been the legal framework at that time, but most defence practitioners would argue that they have little power brokerage today.)
discretionary power. The Sentencing Reform Act created a “judicial vacuum” of power, displacing the court’s authority which prosecutorial discretion usurped.

Part of crime control advocates’ justification for reducing judicial discretion was that it would limit the Court’s ability to consider different penal options for the individual defendant. In their attempt to seem ‘tough on crime,’ politicians passed legislation such as mandatory minimum sentences, truth in sentencing, and the ‘three strike’ policy for felons, to limit judicial and prosecutorial power. Criminal law reform may have appeared to limit prosecutorial discretion, but it really just forced prosecutors to conceal their decision-making even more. Whilst crime control advocates declared victory with each subsequent ‘zero tolerance’ policy, federal prosecutors used such statutes as they saw fit: “as threats to extract pleas, not as punishments to be imposed on defendants who deserve them.” Crime control proponents might have assumed that prosecutors would hold a similar perspective on such reforms as often their interests are “fundamentally aligned most of the time.” Yet, this presumption causes tension between legislators and federal prosecutors because, as previously noted, Assistant U.S. Attorneys are not politicians as are state prosecutors. Federal prosecutors may consider the certainty of a conviction as the best resolution to the case, whereas politicians may see the political benefit to having the case play a case out in the media, public opinion, and court.

4.2.2 Judicial Rulings and the Victim Impact Evidence Debate

Defence attorneys must challenge or question any evidence presented against their clients. Yet doing so in the context of victim impact testimony, defence counsel risk appearing unsympathetic or callous toward the victim and the family’s loss. Victim rights’ proponents acknowledge this fact and use it as a justification to put

---

578 Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1419 (2010).(writing that Congress gives, rather than limits, more power to prosecutors); Hall, *Prosecution and Disposition*, 946.(expressing “…the prosecuting attorney has great discretion in determining whether to prosecute, what precise offense to charge, and whether to negotiate the charge.”)


580 SIMON, Governing Through Crime 101, 164-8, 241; GARLAND, Culture of Control 55-63, 103-38; BECKETT, Making Crime Pay Chapter Three "Creating the Crime Issue".


583 Association, Guidelines for Criminal Justice Standards. (citing defence attorneys are to “mak[e] extraordinary efforts on behalf of the accused.”)
victims on the stand. As discussed earlier, the Booth Court expressed concern about a potential “mini-trial,” which could encourage a moral judgment about a victim’s character and life. Payne creates a new legal standard that permits prosecutorial inclusion (and selectivity) of victims’ characteristics, which had previously been forbidden with Booth. No longer is the legal standard the protection of the defendant against comparative worth between the victim and the defendant, but what is considered an excess of prejudicial information about the victim.

McCleskey established a legal paradox concerning crime victims that continues with Payne. The current legal argument stands that McCleskey rejected the notion that prosecutorial patterns of bias exist. In McCleskey the Court held that in order to establish a defendant was unfairly sentenced to death based on the victim’s characteristics, defence counsel had to prove intentional prosecutorial prejudice specific to the defendant. The Court in Payne ruled that to convince the jury of the blameworthiness of a defendant in capital cases, prosecutors had the right to introduce evidence about a victim’s uniqueness to juries. Both rulings determined that the defendant would have to prove deliberate prejudice by the prosecution regarding the inclusion of the individual victim in a capital case. Strikingly, however, neither the McCleskey nor the Payne Courts were willing to identify what degree of randomness constituted arbitrariness. Defence counsel must prove that a defendant was sentenced to death because of arbitrary factors related to the victim without statistical proof, a standard determination of intentional bias, or a defined legal threshold as to what constitutes unduly prejudicial victim impact evidence in an individual case. The rulings beg the question of what evidence defence counsel can

584 Booth 482 U.S. at 518. (White, J., dissenting), (“No doubt a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement, but Maryland has in no way limited the right of defendants in this regard. Petitioner introduced no such rebuttal evidence, probably because he considered, wisely, that it was not in his best interest to do so.”) See also: Cassell, A Reply to the Critics 469 ft. 91. (“In neither the McVeigh trial nor the Nichols trial, for example, did aggressive defense attorneys cross-examine the victims at any length about the impact of the crime.”); Erez & Rogers, Victim Impact Statements and Sentencing Outcomes and Processes 233. (“The professionals explained avoiding challenges of mental harm as ‘not a good move for reasons’: challenging a statement requires that the victim be called to testify and be cross examined about his or her input. This is a risk that defence attorneys are generally not willing to take, because of its likely effect on the sentence.” Also, “[I]n the words of one defence attorney: ‘Once the conviction is in, it is impossible to put the victim on the stand again for a sentencing hearing without much harm to the defendant.”)

585 Booth 482 U.S. at 508.

586 Payne 501 U.S. at 819, 821, 822.
use to prove that prosecutorial discriminatory sentencing practices in capital cases are not random and therefore violate a defendant’s Eighth Amendment rights?

The indeterminate parameters of Payne’s ruling of unduly prejudicial harm remains unproved.\textsuperscript{587} As such, defence counsel routinely argues victim impact evidence is prejudicial when the government attempts to use it to prove the defendant’s blameworthiness. This leaves little room to consider surviving victim family members as people grievously harmed by the crime or the family members’ impact statement who should have an opportunity to participate in the trial. Rather, defence counsel often perceives surviving family members as antagonists in the case. At trial, defence attorneys fight to minimise the relevance of the loss and harm the victim’s death has caused because this testimony can have emotional significance to jurors. Despite the U.S. Supreme Court’s assurance that the lower courts would maintain a high standard regarding the admission of victim impact evidence, in the two decades following Payne, thousands of state and federal capital cases have been tried using such evidence, but courts have repeatedly denied appellants’ appeals.\textsuperscript{588} Federal appellate review has rendered four decisions in which courts have agreed that such evidence violated defendants’ rights.\textsuperscript{589}

---


\textsuperscript{588} See: Kelly v. California, 129 S.Ct. 564 (2008).(allowing a twenty minute video compilation of the victim's life played to soft music); Tuilaepa v. California, 512 U.S. 967 (1994).(holding that the state did not have to eliminate all risk of prejudice, only that it needed to minimise it); People v. Zamudio 181 P.3d 105, 134.(permitting a fourteen minute video that showed over one hundred photos of the victims as victim impact evidence). See also: Noel v. State 960 S.W.2d 439, 446-47 (allowing the mother of three young victims to read a poem about her children during her impact testimony); State v. Gray 887 S.W.2d 369, 389.(en banc) (showing a videotape of a family Christmas gathering); State v. Ard 505 S.E.2d 328, 331.(allowing prosecutors to introduce into evidence a photograph of an unborn child, who did not survive when his mother was killed, wearing the outfit chosen by his mother that was to be worn home from the hospital); State v. Roberts 948 S.W.2d 577, 604.(en banc) (arguing that showing jurors handmade items made by the victim was not unduly prejudicial). Cf: Humphries v. Ozment 397 F.3d 206 (en banc) (holding that a comparative worth argument between the defendant and victim did not violate Payne)

\textsuperscript{589} Salazar v. State, 90 S.W.3d 330 333-338 (Tex. Crim. App. 2002). (finding error in a seventeen-minute video that included over one hundred photos of the deceased victim, with an underlay of emotional background music) Id. at 335-36 (“...the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in criminal trials.”); Hall v. Catoc, 601 S.E.2d 335, 339 (S.C. 2004); Cargle v. Mullin, 317 F.3d 1196 (10th Cir. 2003).(ruling the state relied on improper VIE to support a death sentence); United States v. John Johnson, E.D. LA CR No. 04-17 (2010).(the prosecutor asking the jury whether the victims’ lives were worth that of the killer); But cf: United States v. Stitt 250 F.3d 878, 898-99 (the Court ruling that victim impact
More commonly, the courts acknowledge that at times victim evidence had a “purely emotional impact that may call due process protections into play” and that in some cases such evidence had exceeded the ‘quick glimpse’ permitted by Payne. Essentially, judges have accepted that in certain cases, the government’s victim impact evidence has violated what the U.S. Supreme Court considered permissible but they have not exercised their power to change the result. Yet, the Payne Court left it to the lower courts to decide when victim impact evidence is unconstitutional without a meaningful definition of a ‘quick glimpse.’ The U.S. Supreme Court’s lack of legal parameters has both increased the number of challenges to the use of victim impact evidence at trial and limited the lower courts’ “duty to search for constitutional error with painstaking care” regarding these challenges. Despite lower courts’ admissions of prejudicial evidence, the limited number of rulings in the appellant’s favour exposes the difficulty of quantifying emotional harm. Barnette, Kelly, and Tuilaepa stand as examples of how judges have allowed victim testimony to have a more expansive role despite the fact that sentencing considerations should concentrate on the crime for which the defendant is convicted. Thus, when confronted with ‘over the line’ victim impact evidence, judges have made justifications and concessions to allow the testimony into the proceedings.

As such, victim impact evidence appears essentially incontrovertible. Judges most often rule against defence challenges to victim impact testimony, perhaps because they are concerned about appearing insensitive to the family’s loss, because they believe that the emotional testimony is relevant, or because they are genuinely uncertain of how to limit a person’s testimony. The case law therefore continues to reinforce prosecutors’ discretionary use of victim impact evidence. Thus, what constitutes unduly prejudicial impact evidence is an ever-shifting standard that defence counsel have not been able to stop. The United States Sentencing Commission mandates federal sentencing practices to ensure certainty and fairness to “avoid unwarranted disparity among defendants with similar characteristics.

evidence was not prejudicial despite the fact that prosecutors included this testimony but had not filed the statutory notice requirement or notified defence counsel.)

590 Kelly 129 S.Ct. at 568. (Breyer J. dissenting from denial of certiorari) (italics original)
591 Logan, VIE in Capital Trials 6. (citing United States v. Barnette, 211 F.3d at 818 (4th Cir. 2000))
593 Blume, Ten Years of Payne: Victim Impact Evidence in Capital Cases 277.
convicted of similar criminal conduct.” The omission of a delineated standard for determining when the emotional appeal of victim testimony is unduly prejudicial renders such evidence arbitrary and capricious in violation of due process.

In addition to legal challenges from defence counsel, federal prosecutors also may be at legal odds with crime victims. For the first time since 1982, crime victims have legal recourse if they believe their CVRA-mandated rights have been denied. With the Motion for Relief and Writ of Mandamus providing victims the enforcement previous legislation lacked, victims’ rights proponents achieved a major victory for victims’ rights. As prosecutors have controlled the direction of criminal cases for generations, the possibility of being confronted by the victim as a litigant rather than as a witness could mean that prosecutors would lose some of their discretionary power over a criminal case. This concern has been voiced by criminal justice professionals who consider the call for greater victim rights and party status in criminal proceedings a threat to due process. One reason for the concern is that the CVRA allotted funding to law clinics and advocates throughout the country to provide pro bono counsel to assist victims seeking greater participation in their cases. Several of these clinics continue to maintain an active legal practice, providing counsel to victims of crime. Advocates have monitored and maintained documentation about case outcomes nationwide to assess whether crime victims continue to meet resistance from courts and U.S. Attorneys Offices. The clinics and advocates therefore continue working to ensure victims know and make use of their rights in the criminal justice system and to advocate that Congress make good on the “intent” of this legislation.


395 Kyl, Senate Floor Statement in Support of the Crime Victims' Rights Act 70-2.(detailing 'the intent' of certain portions of the legislation). See also: Cassell, In Defense 615.

396 BELOOF, Victim's Rights Guide 207-259.(documenting victims' rights cases since the passage of the CVRA). See also: Cassell, Senate.(detailing several cases and subsequent court rulings).
Preliminary research indicated that the Department of Justice and US Attorneys’ Offices gave support for and compliance with the CVRA. For instance, the Department of Justice contends that since the passage of the CVRA, US Attorneys’ Offices have a “more energetic approach” toward providing victims with their rights.\textsuperscript{597} As an indication of how CVRA changed their general practice, US Attorneys’ Offices specify that in the year after the act was passed, their victim notification effort “doubled to 5.7 million notices” and totalled nearly 8 million by 2010.\textsuperscript{598} In federal capital cases, in 2004 every prosecutor officially notified defence counsel of their intention to include victim impact evidence at trial. This total compliance to allow victims to “be reasonably heard”\textsuperscript{599} at the capital sentencing proceedings suggests that prosecutors finally accepted the call for greater victims’ participatory rights. Yet, as Garland indicated, there is divergence between the political acts of Congress and the will of government officials to adhere to such policies, as such actions were only temporary.\textsuperscript{600} Of the eleven cases that were authorised death-eligible in 2008, prosecutors listed victim impact evidence as a non-statutory aggravator against the accused in only six cases. In four years, prosecutors went from 100% notification of intent to use this type of evidence to 45%. This thesis examines whether or not there was a pattern to this practice.

In 2008, independent of both victims’ rights proponents and the Department of Justice, the General Accounting Office (GAO) conducted a study of the U.S. Attorney’s Offices implementation of the CVRA.\textsuperscript{601} In the first four years after the CVRA was enacted, the GAO found that victims, or their legal counsel, filed 43 motions in district courts and 20 writs of mandamus in appellate courts.\textsuperscript{602} Although there were some rulings in favour of victims, the majority of the motions were

\textsuperscript{597} Crime Victims’ Rights Act, Office of the United States Attorneys, “Priority Areas”
\textsuperscript{598} Id.
\textsuperscript{599} 18 U.S.C. § 3771 (a) (2004)
\textsuperscript{600} GARLAND, Culture of Control 111.
\textsuperscript{602} Id. at 47.
denied. Additionally, the Department of Justice received 144 complaints against a prosecutor, of which eleven warranted further investigation. The Department of Justice identified approximately 750,000 victims of crime between the enactment of the CVRA in 2004 and June 2008, thus the number of actions taken by or on behalf of the crime victim is comparatively small. Although the GAO suggested that victims needed greater awareness of their rights, it was unclear with whom that responsibility rested. U.S. Attorney’s Offices, court personnel, and defence counsel must do better at informing victims of their rights—and supporting those rights. Yet it appears inevitable that criminal justice officials will continue to be reluctant to be proactive with this information as their interests lie in the disposition of individual cases.

Separate from the GAO study, Beloof also analysed the court filings on behalf of victims and found that the Department of Justice often backed US Attorneys Offices’ actions when victims’ rights “conflict[ed] with the defense of a conviction.” A common complaint brought by or on behalf of victims is that the prosecution, and ultimately the court, denied their right to give input into pleas or sentences. Yet, based on court rulings, judges disagree with victims’ rights proponents as to what constitutes being “reasonably heard.” In Rubin, the court bluntly critiqued the victims’ rights proponent’s assertion that the CVRA intended to confer party status on the victim. The ruling directed that victims are not accorded formal party status, nor are they even accorded intervenor status as in a civil action. Rather, the CVRA appears to simply accord them standing to vindicate their rights as victims under the CVRA and to do so in the judicial context

603 Id. at 48 (Judges’ rulings of motions filed in court granted 11, granted in part 1, and denied 26 in district court and granted 1, granted in part 1, and denied 17 in the court of appeals. Six decisions were not based upon the CVRA).
604 Id. at 36.
605 Id. at 49–50.
607 Rubin 588 F. Supp. 2d 411 (ruling the victim does not have the right to veto any prosecutorial decision regarding the case); In re Dean, 527 F.3d 391 (5th Cir. 2008) (victims seeking relief from the courts to stop a plea agreement between BP and the Department of Justice, who did not notify the victims of the agreement); In re Antrobus, 563 F.3d 1092 (10th Cir. 2009) (victims seeking the ability to give an impact statement at the sentencing of the person who illegally sold guns to the man who killed their daughter); Hunter No. 08-0410 Ct. of Ap. at (the criminal case from which In re Antrobus originated and was denied by the trial judge).
of the pending criminal prosecution of the accused that allegedly victimized them.609

The *Rubin* ruling went further, as if settling a schoolyard dispute, admonishing the victim for asking the court to compromise its impartiality in the case between the government and the defendant, “the only true parties.”610

Because the CVRA has “proven inadequate”611 to aid victims in asserting their rights both in criminal proceedings and in seeking relief, victims’ rights proponents have renewed their campaign for the Victims’ Rights Amendment (VRA).612 Representatives Franks and Costa, with the support of the National Victims’ Constitutional Amendment Passage, proposed a new amendment to the U.S. Constitution to protect crime victims’ rights.613 The language in the 2012 VRA resolution and in victims’ rights proponents’ speeches and articles has subtly changed. In promoting the CVRA as a constitutional amendment and in the subsequent discussions about the legislative rights afforded to victims, a common word used by proponents was ‘equal.’ In their zeal, proponents discussed the importance of “equal justice under the law,”614 “equal consideration”615 in the courts, the need for “equal opportunity”616 for crime victims. In the latest campaign, proponents seem to have replaced ‘equal’ with ‘same’617. Whilst the shift is slight, it is an important nuance. If the resistance to passing the CVRA constitutional amendment in 2004 was due to Congress’ concern about altering the Constitution’s edict to protect an accused’s due process rights, it could be that the notion of ‘equal’ rights for the victim was too radical. If the presentation of the idea is less threatening, Congress seemingly conferring the ‘same basic rights.’

609 Rubin 588 F. Supp. 2d 411, 417.
610 Id. at, 428.
612 Cassell, *Senate*, at 15.
614 Kyl, et al., *On the Wings of Their Angels* 584.
615 Id. at 598.
617 In his testimony in front of the House Judiciary Committee Subcommittee on the Constitution in April 2012, Professor Cassell described the importance for victims to have the “same rights,” p. 17; in the “same fashion” p. 26; the “same basic right” p. 29; so that “crime victims can do the same” p. 42 as defendants in criminal proceedings. In his testimony, Professor Cassell did not use the word ‘equal’. See: Cassell, *Senate*. 
There are two shortcomings with victims’ rights proponents’ justifications for a Victims’ Rights Amendment. First, ensuring better treatment of crime victims by the criminal justice system does not necessitate a constitutional amendment. Second, when proponents nearly exclusively emphasise victims’ right to be heard during sentencing proceedings, the campaign is less about addressing victims’ needs and more about influencing retributive penal policies. Although the CVRA did not provide the legal sanctions proponents had expected, the legislation has provided relief to victims. Yet, because proponents identified victim input at sentencing as the standard bearer of victims’ rights early in the movement, the determination of that movement’s success became a narrow path.

In capital cases, herein lies the tension regarding victims’ participatory rights: federal prosecutors utilise victim impact evidence where they see strategic benefits for their sentencing goals. Victims’ rights proponents declare that the CVRA makes clear that Congress meant to give victims the right to make sentencing recommendations irrespective of the prosecution’s case. Therefore, despite, or independent of, a relationship with the prosecution, victims’ rights proponents actively petition the courts to allow such input, either on behalf of the victim or as amicus curiae. Defence counsel considers the CVRA an attack on their clients’ rights, arguing that proponents’ demands for victim-sentencing recommendations are thinly veiled arguments for revenge. Given victim rights’ proponents’ continual emphasis on and federal prosecutors’ selective use of victim-influenced sentencing, it remains clear that victim participatory rights have focussed on the offender rather than the victim.

---

618 Kenna 435 F.3d 1011 435 F.3d 1011 at.(writing that the court was wrong to deny victims opportunity to speak at the sentencing of the son, who was a co-defendant simply because the court had heard victim testimony in the father’s case); In re Stewart, 552 F.3d 1285 (11th Cir. 2008).(ruling that the US Attorney’s Office be more mindful of its obligations to victims under the CVRA); In re Amy, 636 F. 3d. 190 (5th Cir. 2011).(regarding restitution in a child pornography case).


620 Garvin, NCVLI NEWSLETTER OF CRIME VICTIM LAW. May 2011. For example, in Utah v. Ott, Case No. 10-490, an amicus curiae brief was filed with the U.S. Supreme Court by victims’ rights proponents as a petition to the court to grant victims the right to give a sentencing recommendation in capital cases.
4.3 Conclusion

Given the overwhelming support for victim rights within the judiciary and Congress, victim impact statements should be *pro forma* in capital case proceedings. Yet the research for this thesis supports the arguments of victims’ rights proponents that federal prosecutors do not consistently implement the federally legislated right to provide a victim impact statement. The reason may lie in the incongruence between legal professionals’ regard for tradition and politicians’ opportunistic acts. The VCCLEA adorned ‘America’ as the victim. Congress’s focus is on penal policies, not victims’ rights. Therefore, when Congress discusses giving victims of violent crimes the right to speak at a defendant’s sentencing, the intent is to have the crime victim assist the government with crime control, not act with independent purpose. Federal prosecutors take *Payne*’s ruling to mean that they may include victim impact evidence as one of their discretionary actions. In the enormity of a capital case, defence counsel have focused on the assessment of harm and the possibility that such evidence may prove to be unduly prejudicial. The initial positioning of victims’ rights as a matter of ‘balancing justice’ by providing sentencing input has not panned out in practice, as judges have ruled in favour of preserving the prosecution’s discretionary right to present such evidence in capital cases. Yet, because the assessment of harm is individual to each case, it is difficult to compare or quantify what violates the threshold of a defendant’s rights.

The enormity of defending a capital case requires defence counsel to focus specifically on their client’s individual circumstances and case, which very often limits counsel’s ability to examine potentially larger discriminatory patterns or legal issues that may affect an individual client. Whilst *McCleskey* produced statistical evidence regarding arbitrary sentences based upon victim characteristics, and defence attorneys may intuitively recognise these problems in their work, the immediate demands of a client’s case typically prevents defence counsel from investigating the relevance of prosecutorial selectivity further. *McCleskey* is still relevant in capital cases, but is overlooked due to the shift caused by *Payne*. As such, this thesis examines federal capital cases to determine whether the patterns of federal prosecutors’ discretionary use/non-use of victim impact evidence constitute an arbitrary and capricious method of securing a death sentence.
5 Methodology

The U.S. Supreme Court’s ruling in *Payne v. Tennessee* forced defence counsel and legal scholars to examine prosecutors’ decisions to include victim impact statements in capital cases. As discussed in Chapters One and Three, the primary focus has been on the parameters of the *Payne* ruling and defendants’ perceived due process violations precipitated by victims’ statements during the sentencing phase of the trial. Although the inclusion of victim impact evidence increased as US Attorneys pursued more capital cases, evidentiary control remained between the two legal teams; prosecutors controlled victim participation and evidence, the defence had the right to that evidence before trial. In theory, both legal teams could limit the influence of the victim testimony - the prosecution could decide not to include it and the defence could challenge its inclusion. The passage of the 2004 Crime Victims’ Rights Act added to defence counsels’ concerns, since that act mandated that prosecutors include victim input at trial and granted victims legal recourse if prosecutors denied their rights. Focusing primarily on the individual cases before them, defence attorneys’ attention have been diverted from critically analysing prosecutorial patterns of inclusion or exclusion of victim impact evidence.

In the wake of CVRA’s passage, I was asked how defence teams should prepare for ‘changes’ to prosecutors’ inclusion of victim impact testimony in my role as national coordinator of defence-initiated victim outreach (DVO) for the Federal Death Penalty Resource Counsel Project. As DVO helps address surviving family members’ judicial needs stemming from the crime, the work requires interacting with the victims, defence counsel, and the prosecution. My experiences with victims’ family members taught me that prosecutors treated victims differently from case to case. As discussed in Chapter One, because capital cases that involved victims with desirable social status nearly universally included surviving family member

---


132
testimony, many defence practitioners and legal scholars assume that individual victims’ characteristics have a role in prosecutors’ decisions throughout criminal proceedings. Indeed, despite courts’ resistance to legal arguments that include social science data, there is a preponderance of evidence that charging and sentencing disparities are influenced by victim and defendant characteristics. I saw these assumptions play out in practice in my experience as a DVO liaison in federal capital cases for the seven years prior to CVRA’s passage. Yet, over time, my case experience prompted me to develop a different perspective of the same prism.

In 2000, I was a DVO liaison on behalf of Juan Garza’s defence attorneys. Mr Garza was convicted and sentenced to death for three murders as a drug kingpin. His case was in the final stages of appeals and his attorney was preparing a clemency request. Because the case had been pending for seven years, I assumed that the families of the three deceased victims were weary of the appellate litigation and likely upcoming execution. I was nevertheless both surprised and prepared for the responses I received from the victims’ families. Not one family member attended the original trial, two families did not know that they even could attend the trial, most did not know that Mr Garza was still alive (“Wasn’t he sentenced to death,” one asked), and none of the families had had any contact with the US Attorneys. Whilst two of the victims had racial and socioeconomic backgrounds that researchers might contend would be less likely to result in death sentences, because they were Hispanic and poor, one victim was a white, middle-class male from a respected local family. From the skewed perspective of ‘valued’ victim characteristics, this family would have made compelling victim impact witnesses. “Maybe the lawyers thought that because my son was a drug mule, we were too,” the victim’s mother reflected in one of our conversations. Her comment connected with anomalies from previous cases that had both similar victim characteristics and experiences of being overlooked by prosecutors. The question borne out of that experience and which guided the research for this thesis is whether prosecutors’ interactions with surviving family members depends on the victim’s actions – or the type of crime the victim was involved in -

622 Fulero & Wrightsman, Forensic Psychology.
623 Supra 62-66.
625 Supra 62
that resulted in the victim’s death, not necessarily the victim’s individual characteristics.

Both prosecutors and defence attorneys doubtless understand the value of social science in examining the behaviour of individuals and their relationships with others and society. Similarly, both sides know that to achieve their preferred outcome, they must anticipate a jury’s response to the defendant, the victim, and the crime. Schelling, an economist, examined jurors’ decision-making in civil lawsuits based on wrongful death claims observing that when confronted face to face with someone’s loss, jurors connect with that person’s grief.\(^626\) Society often does not interact with the tragedy of murder outside of the media, but when individuals serve on a jury, they see a family’s private grief not as an abstraction, but as something for which they share responsibility in their public role as jurors.\(^627\) As capital cases typically involve a small number of victims, that victim becomes “familiar,”\(^628\) which may prompt a stronger response from jurors to assist the surviving family members’ loss in ways that prosecutors deem meaningful.\(^629\) When a victim’s surviving family member provides impact testimony on behalf of the prosecution, jurors can respond to the victim’s murder through the sentence imposed on the defendant.

An obvious key to prosecutors obtaining a death sentence is juror identification with the victim. Empathy is possible when a person can imagine facing almost identical circumstances.\(^630\) And as researchers have previously shown, the particular victim matters. Whilst there is a longstanding agreement a victim’s individual characteristics affect a defendant’s sentence in an arbitrary manner, this thesis argues there is something more instinctive than a person’s race or socioeconomic background that influences a sentencing outcome: a victim’s behaviour. Researchers have analysed the altruistic nature of society’s willingness to help ‘identifiable

\(^{626}\) Schelling, The Life You Save 129-30.
\(^{627}\) Id. at 133.
\(^{628}\) Jenni & Loewenstein, Identifiable Victim Effect 236.
\(^{629}\) Id. at 253. (writing that when people believe that they are able to make a difference in a specific victim’s life there is a stronger impulse to protect that victim.)
victims, where a person is familiar with the victim’s story. Yet, when a victim’s behaviour itself is considered a factor of the circumstances, jurors may hold that person responsible and are less likely to help by handing down a harsh sentence. An instinctive—though maybe irrational—form of relating to others is whether we recognise ourselves in that person’s situation. People also identify and empathise with victims considered ‘worthy,’ especially if the victim’s death is particularly shocking and there has been a public call for justice. If a juror cannot relate to a victim’s behaviour or actions as those things relate to the victim’s murder, jurors may be less likely to agree that the defendant deserves a death sentence. Taken further, this thesis argues that when the general public cannot relate to a particular capital crime, the inclusion of victim impact testimony may produce the opposite sentencing outcome sought by prosecutors. By not including victim impact testimony, prosecutors reduce the jurors’ opportunities to compare themselves to the victim’s plight or the victim’s family’s suffering. Thus, prosecutors can maintain the trial’s focus on the severity of the crime and emphasise that ‘anyone’ can be the victim of a crime. For example, in the Garza case, prosecutors were able to obtain a death sentence based on the heinousness and seriousness of the crime without including victim impact evidence.

As discussed in Chapter One, Sundby made a similar correlation between juror identification with victims and sentencing outcomes based on his post-trial research interviews with capital jurors as those I observed between prosecutors and surviving family members. Sundby found that when jurors discussed the factors that led to the victim’s death in the capital case, they made distinctions based on the victim’s actions that led to his or her death. Importantly, jurors had sympathy toward victims who were killed randomly and not involved in risk-taking activities. On the
other hand, jurors considered victims involved in risk-taking, non-random acts less favourably. The jurors’ impressions correlate with Nils Christie’s hypothesis that society considers someone a victim when something bad happens to a law-abiding, honest and respectable person simply living his life. Although jurors believed that their judgment in the case was impartial, their responses to whether they could see themselves in the victim’s situation revealed an essential link to the ‘type’ of victim and the case outcome. In Sundby’s research, sixty-five per cent of jurors acknowledged they had imagined themselves in the victim’s situation during a trial in which a victim was killed in a random crime. The responses from jurors of non-random crimes (such as a targeted murder of a rival drug dealer) were directly inverse: sixty-two per cent of jurors said that they had not pictured themselves in the victim’s place. Based on his research, Sundby emphasised the link between juror-victim identification and the sentence in capital cases. This finding is significant because Sundby’s study was conducted on state capital cases that were tried before the Payne ruling, and therefore no victim impact statements were presented during the sentencing phase of the trials. This thesis submits that if Sundby’s research had been conducted with capital case jurors post-Payne, his findings likely would have shown a stronger correlation between jurors’ sentencing determinations and their perceptions of the worthiness or unworthiness of the victim.

Although Sundby did not categorise the crimes that denote worthy and non-worthy victims, his premise was clear regarding the victim’s actions. In fact, Sundby indicates that in cases involving non-random victims, jurors had a detached view of the victim. In one case, a juror referred to the murderous actions of the accused drug

638 Christie, The Ideal Victim 19.
640 Id. at 360.
641 Id. at 375. (making a same argument). But see: Mona Lynch & Craig Haney, Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination, 33 LAW & HUM. BEHAV. 481 489-90 (2009); Eisenberg, et al., Victim Characteristics and Impact Evidence 308, 335. Whilst some research has shown that victim impact evidence has mostly a neutral effect on the sentencing outcomes in capital cases, there are important distinctions that such research overlooks. Haney and Lynch’s work focuses on the role that race plays in jurors’ perceptions of aggravating evidence at the sentencing phase of a trial at which victim impact evidence is only one consideration. Eisenberg et al. studied capital case outcomes in pre- and post-Payne cases in South Carolina to analyse whether the use of victim impact evidence influenced the sentencing decisions. The group found no discernible differences, but did not base the research specifically upon the use of victim impact evidence and sentencing outcomes; rather the assessment was made looking at general sentencing patterns over time. Neither study examined the victim’s social status, behaviour, or the type of crime committed that resulted in the victim’s death.
dealer as “just business.” 642 This reductionist view presumes that honourable people would not have been in such questionable circumstances: a person’s behaviour makes it simple to judge whether they were a victim of a crime or a victim of their own lifestyle. To a certain degree, the law allows defence counsel to make a similar argument. One of the mitigating factors jurors can be asked to consider during sentencing deliberations is whether the victim’s conduct resulted in their death. 643 Although this rationale may be valid, it does not take away the suffering the victim’s family experiences. The victim impact statement is an opportunity and a right for all families to address the court in order to share information about who their loved one was and how the loved one’s murder has affected their lives. Any prosecutorial disregard for or denial of this opportunity calls into question prosecutors’ motives and intent for excluding this evidence during the sentencing phase of a capital trial.

A more recent study verified the vital role that victim social status held in both prosecuting attorneys’ decision to seek the death penalty and juries’ determination to impose it. 644 This study examined cases post-conviction and used a quantitative set of predictors—marital status, education, race, and past criminal record—to determine victim social status. Phillips examined 504 capital cases from Harris County, Texas during 1992 to 1999 and found that a death verdict was six times greater when jurors considered victims to be integrated, sophisticated, conventional, and respectable. 645 Phillips’ study provides a body of evidence that the courts have argued is missing: it shows a preponderance of how the victim’s worth is used both to determine prosecutorial pursuit of capital charges and juror patterns of sentencing. Phillips argues that the present legal arguments of arbitrariness cannot fully justify capital sentencing outcomes, that a victim’s social status influences jurors’ decision-making as well. 646 Whilst Phillips’ research did not take into consideration victim impact evidence, he questioned what sort of data could further be used to advance an

642 Sundby, Problem of Unworthy Victims 365.
643 18 U.S.C. § 3592(a)(7)
644 Phillips, Status Disparities. See also: Baldus, et al., Racial Discrimination in the Post-Furman Era; David Baldus, et al., Arbitrariness and Discrimination in the Administration of the Death Penalty, 81 NEBRASKA L. REV. 486 (2002). (examining the social status of the victims and found that the death penalty was less likely to be imposed on cases in which the victim was low-skilled or unemployed, lived in public housing, and had a criminal record or gang affiliation.) Both studies looked at the social status of the victim, but neither considered the inclusion of victim impact evidence.
645 Phillips, Status Disparities 809.
646 Id. at 833.
understanding of the relationship between victim social status and capital punishment. Phillips suggests analysing court transcripts for language predictors regarding victims’ social status. Rather than look for key words, this thesis tries to establish a similar argument of juror sympathy for and identification with victim social status through prosecutors’ inclusion or exclusion of victim impact evidence and the sentence outcomes. Analysing patterns of prosecutorial use of victim impact statements may be a predictor of prosecutors’ perceptions of victims’ social status that Phillips, Baldus, Woodworth, Zuckerman, and Grosso seek to establish patterns of whether capital cases are arbitrarily administered.

The research question is to determine if federal prosecutors selectively use victim impact evidence based on the type of crime committed, which in turn can be linked to a victim’s behaviour. This thesis seeks to establish whether there are patterns related to specific criminal charges and a prosecutors’ inclusion of victim impact evidence, thereby raising the possibility that such evidence contributes to arbitrariness in how the death penalty is imposed in federal capital cases. These questions are measured in two parts:

1. In the authorisation process, did federal prosecutors indicate an intention to use victim impact evidence during the sentencing phase of the trial?
2. If a jury convicted a defendant of a capital crime, did the prosecution include victim impact evidence as stated in the Notice of Intent?

5.1 Research Overview

Courts have been both resistant to consider quantitative data regarding victim characteristics and how such data might reveal patterns of unconstitutional arbitrariness and capriciousness, and reluctant to define what constitutes a reasonable versus an unduly prejudicial victim impact statement. Taking into consideration both challenges, this research carries out a quantitative analysis that focuses on prosecutors and the decisions they make, rather than victims’ characteristics and how they influence sentencing. In his article, Sundby recommended that new research

647 Id.
focus on the influence of victim impact evidence on sentencing outcomes. In particular, Sundby argued that in “certain types of cases,” victim impact evidence might be the deciding factor between life and death. Building on Sundby’s observations and my experiences with victims’ family members who were ignored by federal prosecutors, my research examines whether the specific facts about how the murder was committed determines whether prosecutors use victim impact evidence to obtain a death sentence.

The research for this thesis is a combination of file-based analysis and personal recall from defence counsel. To examine patterns of prosecutorial incorporation of victim impact statements in federal capital cases, this research analysed every Notice of Intent in the 476 federal capital cases from 1988 to 2007. The personal recall was collected through online quantitative-based questionnaire given to defence attorneys to assess whether impact evidence was included in cases in which prosecutors indicated its use. The research focussed exclusively on federal capital cases for multiple reasons. As criminal cases are tried in both in federal and state courts, and each state has its own jurisdiction over the crimes committed in its state, there is no national database for all capital cases. The differences between state laws and norms, as well as regulations for victim impact statements, makes it untenable to compare state prosecutors’ use of victim impact evidence in capital cases. The uniformity of federal law, on the other hand, requires US Attorneys to comply with the same regulations regardless of the state or district in which the crime occurs. It is therefore possible to conduct a national comparison of capital cases tried throughout the United States whilst having consistent legal practices and oversight. Finally, my DVO work was nearly exclusively focused on federal capital cases. My understanding of federal practices, familiarity with the defence community, and access to federal resource counsel who administer a database of federal capital defence attorneys made it possible to examine a contentious subject within a profession that is not typically forthcoming with discretionary information.

---

649 Id. at 372.
Each crime eligible for the federal death penalty was first categorised with a similar worthy or unworthy designation, as described in Sundby’s article. First, I reviewed the statute for each federal capital crime. I then considered whether it was more likely that the jurors would recognise themselves in or empathise with the circumstances of the crime, or blame the victim. With that, I made a reflexive decision for each of the statutes about whether prosecutors would include victim impact evidence during the sentencing phase because such testimony would support or detract from obtaining a death verdict from a jury.\(^{650}\) This process was not complete conjecture as the categorisation of the crimes was determined by my decade-long capital case experience and observations.\(^{651}\)

As discussed in Chapter Four, for federal prosecutors to present victim impact evidence at trial, they must indicate their intention to do so in the pre-authorisation Notice of Intent (NOI).\(^{652}\) This thesis suggests that prosecutors are more likely to include victim impact evidence as a non-statutory aggravator in sympathetic—worthy victim—crimes (such as carjackings or bank robbery-related murder, or kidnapping cases) than in unsympathetic—unworthy victim—crimes (such as prison inmate murders). A third category, putatively worthy victim, is for offences that, as the crimes are statutorily defined, could not be generalised either way. My hypothesis is that putatively worthy victim crimes require additional consideration of the specific circumstances of the crime and the victim by prosecutors. As this thesis examines only the type of crime and not the individual characteristics or circumstances of the victim as an indicator of whether federal prosecutors will present victim impact evidence, putatively worthy victim cases are less of a focus in this research.

---

\(^{650}\) Henry Jackman, *Intuitions and Semantic Theory*, 36 METAPHILOSOPHY 363 (2005). (writing that while conceptual intuitions can be fallible, they also have a prima facie claim to correctness); Kent Bach, *Seemingly Semantic Intuitions, in Meaning and Truth - Investigations in Philosophical Semantics* (Joseph K. Campbell, et al. eds., 2002). (theorising that the use of key ideas and language plays an important role in the development of ideas in others.)

\(^{651}\) Christie, *The Ideal Victim* 17. (stating that in social sciences, it is good to use our personal experiences as a starting point for research).

Federal capital charges, with the exception of treason (§238) and espionage (§794), are crimes that result in a victim’s death. Capital cases often involve multiple charges related to the crime that resulted in a victim’s death. As discussed in Chapter Two, prosecutors often ‘overcharge’ in order to strengthen the most serious charge against the defendant. For this research, all charges against each defendant are listed in the database. If a defendant was charged with more than one capital charge (for example: terrorism, destruction of federal property, and first degree murder), I consulted the government’s NOI for the leading charge, which is considered the most severe charge against the defendant. As this research suggests, not all criminal activities have clearly defined worthy and unworthy victims. One advantage of examining every NOI is that I learned about the crime and how the government listed the charges against the accused. When pertinent, in the summary of charges prosecutors identified their theory of why the victim was killed. Also, the leading charge is an indicator of victims being involved in criminal activity. For instance, if a rival drug dealer was kidnapped and murdered, it is less likely prosecutors would charge a defendant with §1201. Rather, it is more likely that prosecutors would charge the defendant with §1512, §1513, or §848.

TABLE 5.1 U.S. FEDERAL CRIMINAL STATUTES

<table>
<thead>
<tr>
<th>“Victim Worthy”</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 U.S.C § 32, 33, 34</td>
<td>Destruction of aircraft, motor vehicles, or related facilities resulting in death</td>
</tr>
<tr>
<td>18 U.S.C. § 37</td>
<td>Murder committed at an airport serving international civil aviation</td>
</tr>
<tr>
<td>18 U.S.C § 241</td>
<td>Conspiracy against rights</td>
</tr>
<tr>
<td>18 U.S.C § 242</td>
<td>Deprivation of rights under color of law</td>
</tr>
<tr>
<td>18 U.S.C § 245</td>
<td>Federally protected activities</td>
</tr>
<tr>
<td>18 U.S.C § 247</td>
<td>Damage to religious property; obstruction of persons in the free exercise of religious beliefs</td>
</tr>
<tr>
<td>18 U.S.C. § 351 by reference to 18 U.S.C. § 1111</td>
<td>Murder of a member of Congress, an important executive official, or a Supreme Court Justice</td>
</tr>
<tr>
<td>18 U.S.C. § 844 (d), (f), (i)</td>
<td>Death resulting from offences involving transportation of explosives, destruction of government property, or destruction or property related to foreign or interstate commerce</td>
</tr>
<tr>
<td>18 U.S.C. § 1091</td>
<td>Genocide</td>
</tr>
<tr>
<td>18 U.S.C. § 1114</td>
<td>Murder of a Federal judge or a law enforcement official</td>
</tr>
<tr>
<td>18 U.S.C. § 1119</td>
<td>Murder of a U.S. national in a foreign country</td>
</tr>
<tr>
<td>18 U.S.C. § 1120</td>
<td>Murder by an escaped Federal prisoner already sentenced to life imprisonment</td>
</tr>
<tr>
<td>Code</td>
<td>Description</td>
</tr>
<tr>
<td>------</td>
<td>-------------</td>
</tr>
<tr>
<td>18 U.S.C. § 1121</td>
<td>Murder of a State or local law enforcement official or other person aiding in a Federal investigation; murder of a State correctional officer</td>
</tr>
<tr>
<td>18 U.S.C. § 1201</td>
<td>Murder during a kidnapping</td>
</tr>
<tr>
<td>18 U.S.C. § 1203</td>
<td>Murder during a hostage taking</td>
</tr>
<tr>
<td>18 U.S.C. § 1503</td>
<td>Murder of a court officer or juror</td>
</tr>
<tr>
<td>18 U.S.C. § 1716</td>
<td>Mailing of injurious articles with intent to kill or resulting in death</td>
</tr>
<tr>
<td>18 U.S.C. § 1751</td>
<td>Assassination or kidnapping resulting in the death of the President or Vice President</td>
</tr>
<tr>
<td>18 U.S.C. § 2113</td>
<td>Bank-robbery-related murder or kidnapping</td>
</tr>
<tr>
<td>18 U.S.C. § 2119</td>
<td>Murder related to carjacking</td>
</tr>
<tr>
<td>18 U.S.C. § 2241, 2242, 2243, 2244, 2245</td>
<td>Death resulting from aggravated sexual abuse, sexual abuse of a minor or ward, or abusive sexual contact</td>
</tr>
<tr>
<td>18 U.S.C. § 2251</td>
<td>Murder related to sexual exploitation of children</td>
</tr>
<tr>
<td>18 U.S.C. § 2332</td>
<td>Terrorist murder of a U.S. national in another country</td>
</tr>
<tr>
<td>18 U.S.C. § 2332a</td>
<td>Use of a weapon of mass destruction resulting in death</td>
</tr>
<tr>
<td>18 U.S.C. § 2340, 2340a</td>
<td>Murder involving torture</td>
</tr>
<tr>
<td>18 U.S.C. § 3261</td>
<td>Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States</td>
</tr>
<tr>
<td>49 U.S.C. § 46502</td>
<td>Death resulting from aircraft piracy</td>
</tr>
</tbody>
</table>

**Putatively “Victim Worthy” in Comparison to the Accused**

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 U.S.C. § 1111</td>
<td>First degree murder</td>
</tr>
<tr>
<td>18 U.S.C. § 1116</td>
<td>Murder of a foreign official</td>
</tr>
<tr>
<td>18 U.S.C. § 1512</td>
<td>Murder with the intent of preventing testimony by a witness, victim, or informant</td>
</tr>
<tr>
<td>18 U.S.C. § 1513</td>
<td>Retaliatory murder of a witness, victim, or informant</td>
</tr>
<tr>
<td>18 U.S.C. § 2114</td>
<td>Mail, money, or other property of United States</td>
</tr>
</tbody>
</table>

**“Unworthy Victim”**

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 U.S.C. § 924 (j)</td>
<td>Murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime; murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime</td>
</tr>
<tr>
<td>18 U.S.C. § 24</td>
<td>Related to Federal health care offence</td>
</tr>
<tr>
<td>18 U.S.C. § 36</td>
<td>Murder committed during a drug-related drive-by shooting</td>
</tr>
<tr>
<td>18 U.S.C. § 794</td>
<td>Espionage</td>
</tr>
<tr>
<td>18 U.S.C. § 1118</td>
<td>Murder by a Federal prisoner</td>
</tr>
<tr>
<td>18 U.S.C. § 1959</td>
<td>Murder involved in a racketeering offence</td>
</tr>
<tr>
<td>18 U.S.C. § 1962</td>
<td>Use of Unlawful Flight to Avoid Prosecution warrants (UFAPS)</td>
</tr>
<tr>
<td>18 U.S.C. § 2280</td>
<td>Murder committed during an offence against maritime navigation</td>
</tr>
<tr>
<td>18 U.S.C. § 2281</td>
<td>Murder committed during an offence against a maritime fixed platform</td>
</tr>
<tr>
<td>18 U.S.C. § 2381</td>
<td>Treason</td>
</tr>
<tr>
<td>21 U.S.C. § 841</td>
<td>Prohibited acts related to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance</td>
</tr>
</tbody>
</table>
Within each type of crime, this research question examines the following concepts: did federal prosecutors include victim impact as a non-statutory aggravator in the Notice of Intent? If so, and the defendant was convicted of the crime, did the prosecutors use this evidence during the sentencing phase of the trial? After answering these questions, the goal was to determine whether there is a deviation in federal prosecutors’ inclusion of victim impact evidence between the two given categories. If there is a difference, is it in the notification process or in the use of impact evidence at trial? In addition, what is the percentage of cases within each category of crime that utilise victim impact evidence? Finally, what is the breakdown of case outcomes regarding the defendant’s sentence within each of these crimes?

5.2 Research Development

To determine whether victim impact evidence was used at trial, the US Attorneys’ Notice of Intent for each capital case was studied. Since listing the inclusion of a victim impact statement is of no cost to prosecutors and they can later decide not to use the victim evidence without penalty, it was assumed that prosecutors would include this impact evidence in every NOI. The initial examination of the federal capital cases was done sequentially in order to understand prosecutors’ inclusion of victim impact evidence from the beginning.

As discussed in Chapter Four, although the 1976 ruling Gregg v. Georgia⁶⁵³ re-established the death penalty in America, the federal government did not pursue capital charges against any defendants until the enactment of the Anti-Drug Abuse Act of 1988.⁶⁵⁴ At that time, federal prosecutors were legally prohibited from using

---

⁶⁵³ 428 U.S. 153 (1976)
⁶⁵⁴ Pub. L. 100-690, 102 Stat. 4181, enacted November 18, 1988, H.R. 5210)
victim impact evidence because of Booth’s prohibition of its use in capital crimes. Therefore, for the first four years of the federal death penalty, there was no lawful inclusion of victim impact statements. These cases are identified as “Pre-Payne” in the overall case catalogue and are not included in this analysis. After the Payne ruling, prosecutors were allowed to include the victim impact statement during the sentencing phase of the trial. As the ‘drug kingpin’ statute was still the only federal capital crime, all cases between 1992 and 1994 are referred to as the “Post-Payne and Pre-FDPA” category. The Federal Death Penalty Act of 1994 (FDPA) “Post-FDPA” created the modern federal death penalty in which federal prosecutors managed the administration of capital cases with little legislative or lobbyist pressure. The “Pre-CVRA build-up” category includes the year in which there was significant political attention to victims’ rights in anticipation of a congressional act granting greater participatory rights for crime victims. Finally, the “Post-CVRA” period covers 2005 to 2007, with the passage of the Crime Victims’ Rights Act to the year covered by this research. The data concluded with cases through 2007 because at the time that the empirical research was conducted, all of the cases for defendants who were charged with death eligible crimes through that year had either resulted in a plea agreement or had gone to trial. Most cases after 2007 had not been fully adjudicated.

Table 5.2 Analysed Time Periods for the US Federal Death Penalty

<table>
<thead>
<tr>
<th>NAME OF TIME PERIOD</th>
<th>YEARS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Payne</td>
<td>1988-1991</td>
</tr>
<tr>
<td>Post-Payne &amp; Pre-FDPA</td>
<td>1992-1994</td>
</tr>
<tr>
<td>Post-FDPA</td>
<td>1995-2003</td>
</tr>
<tr>
<td>Pre-CVRA build-up</td>
<td>2004</td>
</tr>
<tr>
<td>Post-CVRA</td>
<td>2005-2008 (to present)</td>
</tr>
</tbody>
</table>
The Federal Death Penalty Resource Counsel (FDPRC)\textsuperscript{655} provided access to the catalogue for every Notice of Intent filed since 1988. My initial intention was to inventory what capital crime each defendant was charged with and whether or not the prosecution indicated that a victim impact statement would be included at trial. I soon learned that more work would be required. Although the NOIs were online in portable document files (pdf), some of the NOIs were too old to be formatted with a search function. I also discovered that although the US Attorneys follow the same death penalty authorisation process, offices use different templates or motions and different language and arguments for similar points. For instance, teams may use \textit{Payne v. Tennessee} or 18 U.S.C. § 3593(a)(2) in the NOI to justify the inclusion of a victim impact statement. Some give no further explanation or even mention the phrase ‘victim impact statement,’ whereas others include the U.S. Code, the \textit{Payne} ruling, and a summary of what they plan to introduce at the sentencing phase of the trial if the defendant is convicted of the capital charges. Another complication was discovered with the FDPRC website database. Although the FDPRC had compiled a list of cases thought to include the victim impact statement as a non-statutory aggravator, I discovered multiple case NOIs inaccurately placed in this category. Thus, I decided to examine every NOI since 1988 to ensure the most accurate information given by the prosecution.

### TABLE 5.3 US ATTORNEYS’ NOTICE OF INTENT TO INCLUDE VICTIM IMPACT EVIDENCE (NOIVIE) IN FEDERAL CAPITAL CASES

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NO</th>
<th>YES</th>
<th>GRAND TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>19</td>
<td>5</td>
<td>24</td>
</tr>
<tr>
<td>1993</td>
<td>2</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>1994</td>
<td>2</td>
<td>8</td>
<td>10</td>
</tr>
<tr>
<td>1995</td>
<td>5</td>
<td>22</td>
<td>27</td>
</tr>
<tr>
<td>1996</td>
<td>6</td>
<td>20</td>
<td>26</td>
</tr>
<tr>
<td>1997</td>
<td>6</td>
<td>26</td>
<td>32</td>
</tr>
<tr>
<td>1998</td>
<td>12</td>
<td>31</td>
<td>43</td>
</tr>
<tr>
<td>1999</td>
<td>3</td>
<td>30</td>
<td>33</td>
</tr>
<tr>
<td>2000</td>
<td>5</td>
<td>26</td>
<td>31</td>
</tr>
<tr>
<td>2001</td>
<td>1</td>
<td>37</td>
<td>38</td>
</tr>
</tbody>
</table>

\textsuperscript{655} The FDPRC is a federally funded project of the Administrative Office of US Courts that acts as a national clearinghouse for information as well as case consultations to assist defence counsel in federal capital cases. \url{http://www.capdefnet.org/FDPRC/links.aspx?menu_id=78&id=2280} (accessed 07/28/2013).
<table>
<thead>
<tr>
<th>Year</th>
<th>17</th>
<th>27</th>
<th>44</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>2</td>
<td>20</td>
<td>22</td>
</tr>
<tr>
<td>2003</td>
<td>0</td>
<td>31</td>
<td>31</td>
</tr>
<tr>
<td>2004</td>
<td>4</td>
<td>8</td>
<td>12</td>
</tr>
<tr>
<td>2005</td>
<td>5</td>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>2006</td>
<td>5</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>2007</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>2008</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>2009</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>92</strong></td>
<td><strong>365</strong></td>
<td><strong>457</strong></td>
</tr>
</tbody>
</table>

With the initial analysis, I observed that after the 1994 Federal Death Penalty Act, federal prosecutors commonly incorporated victim impact as a non-statutory aggravator in the Notice of Intent to seek the death penalty. This may suggest that prosecutors generally became more aware of victims and their right to make a statement during the defendant’s sentencing. It could also signify that prosecutors discovered that impact statements made by the surviving family members assisted in their efforts to secure death sentences against defendants.

Given that the legal interests of federal prosecutors are not synonymous with those of crime control or victims’ rights proponents, I did not assume that prosecutors’ notification of intent to use victim impact evidence at trial necessarily meant that such evidence was in fact later presented. As the authorisation process for a federal death penalty case occurs relatively early in the case development, it is plausible that prosecutors referenced a broad scope of statutory and non-statutory aggravators both as a justification for the death penalty and to secure the opportunity to use such evidence at trial.

Additional research had to be conducted to know whether prosecutors used victim impact statements on the cases that included this evidence in the NOI. I could either read the court transcripts (which would have been the most accurate, but also the most time-consuming and cost prohibitive), contact the prosecutor who tried the case, or the defence counsel. Because of the FDPRC’s knowledge of whom all served as defence counsel and the relative ease of access to these teams, I opted to contact the defence attorneys. I decided against contacting the prosecutors considering the amount of time it would have taken to learn who the prosecutors
were on the 457 federal cases, get their contact information, introduce myself and the purpose of my research, which might have impeded getting a census for this research. Additionally, I was unsure of whether prosecutors would provide this information, as prosecutors have shown to be wary of engagement regarding case strategy.656 Lastly, as I knew that this research might be a contentious topic, I was unsure of whether I wanted to inform prosecutors about the work or the results before it was completed.657

5.3 Development of the Research Questionnaire

The intention for contacting defence counsel was straightforward – I wanted a ‘yes’ or ‘no’ answer as to whether prosecutors used of victim impact evidence at trial. I created an online questionnaire to collect the data. In order to both reduce the possibility of error and to obtain a higher response rate, I attempted to keep the questions to relevant issues as well as the response options consistent.658 Most of the questions required a ‘yes’ or a ‘no’ answer to reduce qualifying answers.659 Yet designing a questionnaire was more difficult than expected and required several revisions. The first draft asked for too much information, such as the victim’s ethnicity, level of education, and social status. Because the hypothesis is based on the correlation of prosecutorial use of victim impact evidence and specific types of crimes resulting in the victim’s death, individual victim characteristics were not necessary to this research. Similarly, this research does not analyse the content of victim impact statements. Researchers have measured the effects of victim impact statements on (mock) jurors with mixed results.660 One reason I believe that such research is met with scepticism is that qualitative studies are refuted as biased – either in the hypothesis, questions, or body of participants. Whilst I tend to agree with the value of listening to people’s stories for insight, qualitative research projects with mock jurors are not likely to convince courts. Therefore, I focussed on

656 See Chapter Two.
657 Conrad V. Fernandez, et al., Informing Study Participants of Research Results: An Ethical Imperative, 25 IRB: ETHICS & HUMAN RES. 12 (May - June 2003).(arguing that researchers are obligated to offer to provide research results to study participants)
660 Supra ft. 420–436
quantitative data that examines victim impact evidence without questioning a victim’s suffering, challenging the victim’s right to participate in the proceedings, or evaluating the victim’s individual characteristics. Rather, my research attempts to discover patterns of prosecutorial use of victim impact evidence irrespective of victims’ participatory rights, characteristics, or compelling testimony.

As the research was to examine the quantitative use of victim impact evidence, questions that asked for a defence attorney’s interpretation of events (such as, “Did the victim impact affect the sentence?”) were eliminated. As such, the questionnaire was redrafted several times to ask questions specific to the government’s use of victim impact evidence. Despite revisions, leading statements or questions can still be found in the questionnaire. For instance, the introduction to the questionnaire indicated the concept of victim worthiness despite the fact that respondents were to answer the questions based on the government’s actions, not their interpretations of such actions. Additionally, some questions were included because this research had an engaged audience responding to the questionnaire. In discussions with Ms Aldridge, she raised the question of legitimation of one question based on my attempt to steer away from defence counsel’s opinions. Bryman discusses how researchers attempt to construct validity with questions that would support their hypothesis. Recognising this problem, results to questions considered leading have been discarded. In retrospect, I would have limited the questionnaire to fewer questions.

662 Cassell, In Defense. (writing that victims have the right to give impact statements and that such statements provide valuable information to sentencing considerations).
663 Supra 63-66.
664 WALKLATE, Imagining 118. (observing that outside of Canada, little systematic research has been conducted on the implementation of victim impact statements).
665 See Appendix A,“Online Questionnaire Produced for Defence Counsel Regarding Federal Prosecutor’s Use of Victim Impact Evidence”
666 Senior Lecturer; Deputy Director of Research; and Director of Postgraduate Research for the University of Manchester School of Law. She is an experienced researcher and was authorized by the university to give ethical clearance for postgraduate research projects such as this thesis.
667 NEWMAN & BENZ, Qualitative-Quantitative Research Methodology 29.
668 BRYMAN, SOCIAL RESEARCH METHODS at 73.
Soon after the questionnaire was released, I observed that in cases for which the legal teams reached a plea agreement, which nullified the need for a trial, the respondents could not answer the questions as written. An additional questionnaire was created for cases that resulted in plea agreements that asked specific questions regarding victim participation at the plea-sentencing proceedings. This additional questionnaire was relatively similar to the trial questionnaire, but several questions were adapted to ask whether the prosecutors engaged the victim’s family after the plea agreement was reached and in the official sentencing proceedings. This questionnaire was sent to the respondents whose cases alerted me to the questionnaire oversight and to attorneys known to have had cases that resulted in a plea agreement with a request to complete this portion of the questionnaire. Thereafter, questionnaires submitted online were carefully inspected to ensure that the information for cases that resulted in a plea agreement were only entered once into the system.

5.4 Collection of Data

As the Notice of Intent for each case had been previously analysed for the type of crime charged and whether the prosecutors had indicated it would use victim impact evidence as a non-statutory aggravator, it was unnecessary to contact the defence attorneys on cases in which the government did not include victim impact as part of their planned evidence. The NOI information had been entered into a database and cases that did not include victim impact evidence were coded and processed into the final analysis without contact with the defence teams. Otherwise, defence counsel from each case was contacted by email with a short introduction and request to follow an embedded link to answer a short questionnaire. As part of the email request, all teams were told that no identifying information would be used in the research without their permission. Out of professional courtesy and because of their role on the case, lead counsel on each team was contacted first and given approximately two weeks before a second request was made. If correspondence failed because of out-dated information (which was common) or because defence

669 See Appendix B, “Online Questionnaire Produced for Defence Counsel Regarding Federal Prosecutor’s Use of Victim Impact Evidence in Cases that Resulted in Plea Agreements”
counsel did not respond to either email request, another attorney on the team was contacted with the same request. If defence counsel did not respond, I followed up with a phone call to take the information over the phone, thus increasing the likelihood of getting the questionnaire completed. I only did phone interviews as a matter of ensuring greater completion of the data. Otherwise, I did not have direct interaction with defence counsel beyond the email requests.

Because the goal was to obtain a high response rate, field research took six months. Ultimately, data was collected for 426 out of 467 cases—93 per cent of the cases. The strong response from defence counsel indicated that there was an interest in or at least a reaction to federal prosecutors’ use of victim impact evidence. I also speculated that my professional work relationships with the capital defence community encouraged a higher response, but in fact, the respondents with no professional connection were most often the quickest to respond and complete the questionnaire.

5.5 Composition of Data Analysis

Once the questionnaires were closed online, the data were carefully reviewed to ensure that case information was not duplicated either by co-counsel for all cases that they had worked on, rather than the cases that were specifically requested of them, or by attorneys accidentally answering the questionnaire twice. The data was transferred from Survey Monkey to Microsoft Excel. In discussion with Ms. Aldridge, it was decided that SPSS would be used to analyse the responses. To do so, I learned basic SPSS and the mechanics of how to properly code the raw data from the original questionnaire to create a uniform system maintaining the integrity of the questions and the answers. A consistent coding system was developed so that where applicable, the categories would have the same responses (1 = yes; 3 = no). This effort also required manually entering into SPSS the data from all 426 responses. The data input was tested and verified on three separate occasions to ensure accurate results for the analysis produced in this thesis. Despite these efforts, I discovered that Excel

670 This does not include the ten Pre-Payne cases.
671 See Appendix C, “Thesis SPSS Codebook”
provided greater clarity in organising the data and was easier to use in developing the various spreadsheets and tables (as well as the graphs included in this thesis). Despite the time-consuming setback of working with SPSS and then returning to Excel, the change offered the opportunity and ability to work with the data with greater ease and confidence.

5.5.1 Processing the Data

With data for the 467 federal death penalty cases inputted into both SPSS and Excel, the next step was to examine the cases to determine whether any, like the ten pre-
Payne cases, should be excluded from the analysis.

Upon further investigation of the post-Payne cases, it was discovered that 94 cases were ultimately not adjudicated as federal capital offences. Either a judge dismissed the capital charges or the authorisation to seek the death penalty was removed by the US Attorney. In 24 cases, a federal judge dismissed the capital charges. The most commonly noted reason for dismissal was that the US Attorney filed the Notice of Intent too late. Other reasons include the following: the judge discovered the co-defendants of the accused were more culpable of the crime and had received life sentences for the same charges; three defendants were found to have been tortured to obtain a confession; and after authorisation, the defendant was found to be mentally retarded, thus prohibiting the prosecutors from seeking the death penalty. In 70 cases, the federal prosecutors withdrew the capital charges. The prosecutors’ decisions to withdraw the authorisation to seek the death penalty are less clear, as it is the prerogative of the government to seek or retract death penalty charges in sanctioned crimes. Due to the pre-trial actions by the federal judges or prosecutors, these 94 cases are not included in the analysis for this research.

After the authorisation process, three men were found innocent of the charges that were levelled against them and all proceedings for these capital charges were

672 See Appendix Table D, “All Cases, Important Fields”
vacated. Additionally, two defendants were found incompetent to stand trial and two others died during the pre-trial process. These seven cases were also excluded in the analysis for this research.

When this research was conducted, 22 cases were pending trial. In two of the cases, the defendants had been previously sentenced to death but were waiting resentencing or a retrial based on the defendants’ appeals. The other 20 defendants had yet to be tried in federal court. These cases were included in the initial stage of analysis regarding the prosecutors’ Notice of Intent to assist this research in determining whether patterns of inclusion or exclusion of victim impact evidence based upon the type of crime continues. As the cases had not gone to trial, they are separated out from the final prosecutorial use of victim impact evidence analysis.

The combination of the ten Pre-Payne cases in which prosecutors were legally prohibited from including victim impact evidence, the changes to cases after they were authorised death eligible, and cases that were not adjudicated, totalled 133 cases not included in the final body of research. As such, the analysis concentrates on the remaining 334 federal capital cases. This group of cases is called, “Adjudicated Cases.”

---

673 Id.
674 Id.
675 Id.
676 One case, United States v. Stitt, E.D. VA No. 2:98CR47, has since had authorisation withdrawn. Stitt’s appellate attorneys argued ineffective assistance of trial counsel for a number of reasons. One reason was that defence counsel did not object to federal prosecutors including victim impact evidence at trial, despite the fact that prosecutors had not included this evidence as a non-statutory aggravator in the Notice of Intent. Although the Fourth Circuit Court of Appeals ruled that such evidence was not prejudicial, the Court ordered a re-sentencing on other factors of ineffective assistance. Federal prosecutors ultimately agreed to a plea agreement in 2010.
<table>
<thead>
<tr>
<th>Reason for Exclusion</th>
<th>Case Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Payne Capital Case</td>
<td>10</td>
</tr>
<tr>
<td>Authorisation Withdrawn/ Case Dismissed</td>
<td>94</td>
</tr>
<tr>
<td>Innocent</td>
<td>3</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>4</td>
</tr>
<tr>
<td>Pending Trial</td>
<td>22</td>
</tr>
<tr>
<td>Total</td>
<td>133</td>
</tr>
</tbody>
</table>

5.5.2 Cases with Incomplete Data

With results for the Adjudicated Cases, we must consider that the questionnaire produced for this research was not answered for 28 cases. Additionally, defence counsel responded that they could not remember the case or its details on 13 cases. Despite multiple efforts to get information from the defence counsel who had not responded, the attempts were not successful. Nonetheless, the cases are included in the analysis, as federal prosecutors indicated that they would use victim impact evidence in the penalty phase of a trial, but the data remains incomplete. Contained in the final analysis for these specific cases is the crime, the federal prosecutor’s indication to include victim impact testimony, and the case outcome. Yet, ‘Did Not Respond’ or ‘Did Not Remember’ is entered respectively for the question of whether prosecutors used this evidence at trial. Of the 28 cases that did not respond to the request to complete the questionnaire, ten resulted in guilty pleas, one was convicted of a lesser charge, twelve were given life sentences, and five were sentenced to death. Defence counsel for clients on death row were reluctant to respond to requests for information or to complete the questionnaire. Of the defence counsel who were willing to respond to the original email request, the reason given for the unwillingness to participate was out of concern for their clients’ appeals. When a second contact was made to clarify that the questionnaire did not ask questions that

---

677 Cases in which either the judge dismissed the case as death eligible or the prosecutors removed their notice to seek the death penalty are labelled “Authorisation Withdrawn” for the remainder of this thesis.

678 Cases in which the defendant died or was killed before trial or in which the defendant was ruled incompetent to stand trial are included in “Miscellaneous.”
would have any impact on the appeals, defence counsel still refused to participate. For the other cases, there was no pattern that would suggest a rationale for a lack of response. Of the specific types of offences, first-degree murder had the highest no response rate. Most likely the reason for the lack of response was similar to that of the attorneys who did respond but could not remember the details of the case: 20 of the 28 cases were over ten years old when the questionnaire was sent to defence counsel. Likewise, the cases in which defence counsel Did Not remember the details of the crime were all at least 15 years old. In total, of the 467 cases surveyed for this research, 41 cases have incomplete information regarding the prosecutorial inclusion of victim impact evidence.

5.5.3 Limitations to the Questionnaire and Data

A limitation of this research as with other types of victimological research, is that it narrowly focuses on federal capital cases and thus has a limited applicability to the question of broader prosecutorial decisions regarding the inclusion of victim impact evidence. As such, any conclusions made here are limited to American federal capital cases and not more broadly in the United States, other western cultures as no other western cultures have capital punishment. Another limitation is the interpretation of the results will not be considered objective, as I subjectively created the table of worthy and unworthy victim related-crimes for the research. As Sebba notes, this research is conducted to either support or refute the hypothesis posed in this thesis. As an attempt to keep this research as objective as possible, I decided not to include surveys or interviews in the research. I also chose not to do a sample population or select cases, as I did not want to be accused of weighing the results of specific crimes or cases to favour my hypothesis.

This project required defence counsel to recall previous capital cases at the time of trial. This has limitations for multiple reasons. Many of the attorneys worked on multiple cases and could have mixed up details between the cases. In addition, many cases are decades old and required attorney recall that could have been inaccurate.

680 Id. at 34.
Yet, research conducted in Britain on victim testimony used victim recall rather than a file-based analysis. Researchers based their results on the victims’ memory of whether they were offered the opportunity to give a victim personal statement (the UK equivalent to a victim impact statement) because they believed that victim recall was a valid approach because it seems less likely that a victim would give a statement and forget that they had done so. When defence counsel did not respond to my repeated requests for case information, I noticed that either the case was nearly two decades old or the client was sentenced to death.

Another possible limitation is that both the attorneys and I had to enter a large amount of data. At several junctures in the research, I had to enter the compiled data. Despite crosschecking for accuracy, human error likely occurred either in defence counsel misreading the question, inputting the wrong answer, or me inaccurately doing the same.

One personal development has been seeing the importance that quantitative analysis can have in law. As a long-time qualitative empirical researcher, I value the importance of context. Attorneys who knew of my previous work tried to anticipate or interpret the questions through ‘storytelling’ rather than assume the question at face value. On occasion, I would receive an email from an attorney asking what a certain question ‘meant’ as they wanted to make sure that they gave me the ‘right’ information. Having a degree of insider status could be a hindrance if attorneys answered the questionnaire in a way they assumed I wanted, rather than the way victim impact evidence materialised in the case. Only the facts are going to make this research stronger – inaccurate information weakens the thesis’ arguments. Previous cases have proven the courts’ reluctance to rule against victim impact evidence (Payne) and to rule in favour of data showing prosecutorial bias regarding victim characteristics (McCleskey). In order for this research to have power to challenge prosecutorial patterns, the data needs to be accurate.

681 Roberts & Manikis, at 16.
5.6 Post-CVRA Data

The data in this thesis includes all Post-Payne (1991) federal capital cases. It could be argued that the inclusion of cases before the Crime Victims’ Rights Act of 2004 misrepresents the relevant data of prosecutorial use of victim impact evidence. If the federal legislation mandates victims’ rights to be reasonably heard both regarding the plea and at the sentencing of the defendant, one would expect that after 2004 prosecutors would incorporate victim impact evidence in all cases unless a victim chose not to participate. Analysis of the Pre-CVRA build-up and Post-CVRA cases indicates that federal prosecutors complied with the federal legislation. In the year leading up to the 2004 legislative vote, federal prosecutors included victim impact evidence in every Notice of Intent for the first time since the commencement of the federal death penalty. In the following two years, prosecutors omitted this evidence only once each year. However, beginning in 2007, the pattern of inclusion began to change, as prosecutors omitted this evidence in the Notice of Intent 33% in 2007 and 2009 and 45% in 2008. In total, from 2004 to 2009, federal prosecutors excluded victim impact evidence 12 times from the Notice of Intent, thereby forfeiting their right (and the victims’) to include victim impact evidence in the capital legal proceedings against the accused. One possible reason for this reversal is that prosecutors became less committed to the federal legislation. Another argument is that the type of offences committed was the impetus for the exclusion of victim impact evidence in the Notice of Intent for cases from 2007 to 2009. As the earlier comparison of all adjudicated cases show, there was a disproportionate use of victim impact evidence between cases that resulted in a plea agreement and those that went to the penalty phase of a capital trial.

As the enactment of the CVRA clearly communicates the victim’s right to give input regarding the plea agreement and to make a statement at all sentencing proceedings, the next measure is to determine whether this legislation changed the prosecutorial patterns observed in the complete data set. Since 2004, 21 federal capital cases resulted in guilty pleas. Of those cases, only six incorporated victim impact

682 18 U.S.C. § 3771(a)(4)
However, cases that went to trial maintain a higher inclusion of victim impact evidence. In post-CVRA cases that went to trial, prosecutors incorporated impact testimony in 39 out of the 50 cases. Comparatively, of post-CVRA cases, 78% of victims’ families participated in the legal proceedings that went to trial compared to 28% of the families connected to the cases that resulted in a plea. Despite what the US Attorneys’ Office officially states, it is clear that in capital cases the priority for engaging crime victims is not about participatory rights for all victims, rather it is about ensuring victim participation for those that can assist in sentencing the defendant.

**TABLE 5.5 POST-CVRA PROSECUTORIAL USE OF VICTIM IMPACT EVIDENCE BETWEEN CASES THAT RESULTED IN A PLEA AND THOSE THAT WENT TO TRIAL (2004-2009)**

<table>
<thead>
<tr>
<th>Pre-Authorisation Notice of Intent (NOI)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No NOI</td>
<td>12</td>
</tr>
<tr>
<td>No NOI</td>
<td>12</td>
</tr>
<tr>
<td>Authorization withdrawn</td>
<td>2</td>
</tr>
<tr>
<td>Death Sentence</td>
<td>2</td>
</tr>
<tr>
<td>Guilty plea</td>
<td>1</td>
</tr>
<tr>
<td>Life sentence from jury</td>
<td>1</td>
</tr>
<tr>
<td>Pending trial</td>
<td>6</td>
</tr>
<tr>
<td><strong>VIE Use Indicated Pre-trial</strong></td>
<td><strong>106</strong></td>
</tr>
<tr>
<td>Yes Included</td>
<td>45</td>
</tr>
<tr>
<td>Death Sentence</td>
<td>14</td>
</tr>
<tr>
<td>Guilty plea</td>
<td>6</td>
</tr>
<tr>
<td>Life sentence from jury</td>
<td>25</td>
</tr>
<tr>
<td><strong>Not Used at Trial</strong></td>
<td><strong>20</strong></td>
</tr>
<tr>
<td>Acquittal</td>
<td>2</td>
</tr>
<tr>
<td>Death Sentence</td>
<td>2</td>
</tr>
<tr>
<td>Guilty plea</td>
<td>11</td>
</tr>
<tr>
<td>Life sentence from jury</td>
<td>5</td>
</tr>
<tr>
<td>Did Not Respond</td>
<td>2</td>
</tr>
<tr>
<td>Guilty plea</td>
<td>1</td>
</tr>
<tr>
<td>Life sentence from jury</td>
<td>1</td>
</tr>
<tr>
<td>Dismissed or Unauthorised</td>
<td>25</td>
</tr>
<tr>
<td>Authorization withdrawn</td>
<td>20</td>
</tr>
<tr>
<td>Dismissal after notice by judge</td>
<td>5</td>
</tr>
<tr>
<td>Pending Trial Not Contacted</td>
<td>14</td>
</tr>
<tr>
<td>Pending trial</td>
<td>14</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>118</strong></td>
</tr>
</tbody>
</table>

683 One additional case did not respond to the questionnaire, therefore it is not known whether the prosecutors included victim impact evidence.
5.7 Conclusion

All of the cases in this study are authorised federal capital cases, yet the prosecution’s public actions toward the surviving family members are strikingly different between the cases that proceeded to the penalty phase of a capital trial and those that did not. Although federal prosecutors overwhelmingly include victim impact evidence in the sentencing phase of capital cases, discriminatory patterns are beginning to emerge. As seen in both the data set for all adjudicated cases and in cases beginning in 2004, federal prosecutors incorporate victim impact evidence into cases that result in a plea agreement a significantly lower rate than those that go to trial, despite the fact that there is no legal reason that prohibits its inclusion at plea sentencing hearings.
6 Prosecutorial Inclusion of Victim Impact Evidence in Cases that Resulted in a Plea Agreement

Federal death penalty cases constitute a small number of the criminal cases tried by the US Attorneys. Each year, the US Attorneys prosecute approximately 84,360 criminal cases.684 Since the reintroduction of the federal death penalty in 1988 until 2007, for which the data is available, there were 2,545 cases that were eligible for the federal death penalty,685 of which the Department of Justice (DOJ) authorised capital charges in 454 cases.686 As this figure represents a minority of potential capital cases over nearly two decades, it could be argued that the DOJ has been moderate in its decision to seek the death penalty. On the other hand, given that the first crime eligible for the federal death penalty was the drug kingpin statute and that the largest numbers of federal capital cases were drug-related, it calls into question the influence that crime control has had on federal prosecutors’ policies. The inflated number of drug-related federal capital cases compared to other types of crimes corresponds with the political zero-tolerance approach toward drug-related offences.687 As discussed in Chapters Two and Four, federal prosecutors’ public statements often evoke national security, the public significance of a crime, or the federal government’s invested interest in the crime or case regarding why they—rather than state prosecutors—will pursue a case and capital charges. Yet, prosecutorial discretion obscures the reasons federal prosecutors seek the death penalty in certain cases or types of crime. Such actions support local prosecutors and defence counsel calling into question the purpose of US Attorneys’ involvement in capital cases without a clear claim to jurisdiction. As the death penalty is the ultimate punishment, federal prosecutors are likely to utilise the most compelling evidence both to ensure a conviction and to obtain the death sentence in each capital case. In this regard, victim impact evidence has the potential to substantiate the government’s position that the death sentence is the appropriate sentence for the accused.

686 This total reflects the number of authorised cases through 2007. This thesis includes the total number of authorised cases through 2009, which are 467.
With the argument that prosecutors elect to use victim impact testimony as evidence for sentencing purposes in specific crimes, not as recognition of a victim’s participatory right, this research analyses the use of this evidence on several fronts. First, for what types of crimes did federal prosecutors state that victim impact evidence would be introduced in the penalty phase of the capital trial? Second, for cases that resulted in a conviction, did the prosecutors include victim impact evidence during the penalty phase of the trial? Third, in cases in which a defendant was sentenced to death, this research examines whether there is a correlation between crimes that were labelled *worthy victim* (sympathetic) and the inclusion of victim impact evidence compared to the exclusion of victim testimony in *unworthy victim* (unsympathetic) crimes. The first two questions are examined in this chapter and the third question, regarding the connection between victim impact evidence and the death sentence, is explored in the following chapter.

### 6.1 Cases that Resulted in a Plea Agreement

Of the 334 federal capital cases analysed for this thesis, 121 resulted in plea agreements either before or at trial.688 As there was no trial in these cases, it cannot be determined whether prosecutors would have included victim impact evidence or if such statements would have influenced jurors’ sentencing decisions. Yet, as these cases still require a sentencing hearing for the defendant, the victim impact statement could be included in these proceedings but the plea means that there is no death penalty option. Defence attorneys whose cases resulted in plea agreements were asked whether prosecutors included victim impact statements at the sentencing hearing. With this information, this study tries to distinguish whether there was any difference in the prosecutorial utilisation of this evidence at plea-sentencing hearings and the sentencing phase of death penalty trials. In cases that resulted in plea agreements, it could be argued that victim impact statements are less contentious to a certain degree. In such circumstances, defence counsel should have fewer objections to such statements, as their client’s sentence has already been determined by the plea agreement and the defendant is not at risk of being sentenced to death. As others

688 Table 6.1
have argued, the sentencing hearing is an appropriate forum for victim impact statements, as the statements allow the families more freedom to discuss their loved one and their grief in a less adversarial environment. Yet, do prosecutors include victim impact statements at the sentencing hearing in capital cases that result in a plea agreement? It is reasonable to think that if prosecutors include victim impact evidence at a rate similar to their use of this evidence in the penalty phase of a capital trial, then prosecutors may arrange this as recognition of the families’ interests to participate in the trial. On the other hand, if the data shows that impact statements are not used equally, it supports the argument that federal prosecutors normally include these statements when it is part of their strategy to seek the death penalty for the defendant. As such, the data is analysed to determine if there is a pattern of victim impact evidence use in cases that results in a guilty plea. If so, is that pattern similar to the inclusion of victim testimony in cases that go to the penalty phase of a capital trial? If not, this study considers the possible differences between the cases that result in a plea and the cases that went to trial data.

### Table 6.1 General Comparison of Prosecutorial Use of Victim Impact Evidence Between Cases that Resulted in a Plea and Those that Went to Trial

<table>
<thead>
<tr>
<th>VIE Use Indicated Pre-Trial</th>
<th>No Notice of Intent Filed</th>
<th>Yes Notice of Intent Filed</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guilty Plea Inclusion of VIE</td>
<td>25</td>
<td>96</td>
<td>121</td>
</tr>
<tr>
<td>No NOI</td>
<td>25</td>
<td></td>
<td>25</td>
</tr>
<tr>
<td>No</td>
<td></td>
<td>51</td>
<td>51</td>
</tr>
<tr>
<td>Yes</td>
<td></td>
<td>27</td>
<td>27</td>
</tr>
<tr>
<td>Did Not Remember</td>
<td></td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Did Not Respond</td>
<td></td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Went to Trial Inclusion of VIE</td>
<td>29</td>
<td>184</td>
<td>213</td>
</tr>
<tr>
<td>No NOI</td>
<td>29</td>
<td></td>
<td>29</td>
</tr>
<tr>
<td>No</td>
<td></td>
<td>43</td>
<td>43</td>
</tr>
<tr>
<td>Yes</td>
<td></td>
<td>119</td>
<td>119</td>
</tr>
<tr>
<td>Did Not Remember</td>
<td></td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Did Not Respond</td>
<td></td>
<td>17</td>
<td>17</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>54</strong></td>
<td><strong>264</strong></td>
<td><strong>334</strong></td>
</tr>
</tbody>
</table>

Note: The column “No Notice of Intent” is for cases in which federal prosecutors gave no Notice of Intent during the authorisation process, thereby forfeiting their right to include victim impact evidence at in the legal proceedings. This is distinguished from cases in which

---

the government chose not use VIE during the legal proceedings despite having the authorisation.

The categorisation of guilty pleas and cases that went to trial shows a significant gap between the two case directions and the prosecutorial use of victim impact evidence. One aspect that needs to be considered first is the pre-authorisation decisions of whether to include victim impact evidence. It is important to note that this determination was made before each case was authorised as death eligible at no cost to the prosecution. During the authorisation process, prosecutors eliminated their right to include victim impact evidence at the sentencing phase of the trial by not including this non-statutory aggravator in the Notice of Intent in 54 cases. This figure may suggest a correlation between prosecutors’ overall inclusion of victim impact evidence, the case outcome, and the type of crime committed in the case. As for the cases in which prosecutors were authorised to include victim testimony, prosecutors only included it 26% of the time in cases that resulted in a plea. Comparatively, 64% of the cases that went to the penalty phase of a capital trial included victim impact evidence. Despite the fact that all of the victims’ families lost a loved one to murder, the statistics show that prosecutors disproportionately acknowledge the bereavement of families in cases that went to the penalty phase of a capital trial.

This brings into question surviving family members’ role in the legal proceedings that result in a plea agreement. Later in this chapter, the influence victims’ families had on plea agreements with a specific type of offence is discussed at length. Although this research did not interview victims’ family members, it is unrealistic to think that 74% of the families whose cases resulted in a plea agreement communicated to prosecutors their lack of interest in being involved with the legal proceedings whereas 64% of the families in cases that went to trial did. As prosecutors are the ones to decide whether to charge a defendant with capital crimes, it stands to reason that the evidence prosecutors present at the penalty phase is to procure the death penalty for the defendant. From this perspective, it is apparent why

---

690 The overall outcomes do not include the “Did Not Remember” or “Did Not Respond” cases, as it was not possible to obtain this information. Therefore, these responses are included with each table to indicate the possible different result.
the prosecution includes victim impact evidence significantly less at plea-sentencing hearings than in capital trials.

### 6.2 Examination of Federal Capital Offences that Resulted in a Guilty Plea

This section delineates each category of offence and examines the case outcomes separately. The purpose of this is to take into account the cases that resulted in a plea, since as the legal case against the defendant is concluded at the plea-sentencing hearing. As victim impact statements are not used as part of the sentencing determination but can be included in the official plea-sentencing proceedings, the research examines whether the prosecution included victim impact testimony at that time. Later in the thesis, this data will be compared to cases that went to trial to determine whether there is a correlation between the inclusion or such testimony and the type of offence committed.

#### 6.2.1 Continuing Criminal Enterprise

The Continuing Criminal Enterprise cases are related to drug trafficking offences that involve large-scale enterprises in which the defendant is accused of supervising or managing long-term and elaborate conspiracies to maintain a narcotics organisation. This statute is also referred to as the Drug Kingpin Statute, or in legal parlance, the CCE Statute.

As the first federal offence eligible for the death penalty, this category has the largest number of cases, constituting 37% of all adjudicated cases. The government’s ‘war on drugs’ led to an aggressive campaign in attempt to dismantle the drug trade. The CCE or drug kingpin offence was labelled as an *unworthy victim* crime in the initial categorisation of federal offences. Several reasons lead to this presumption. The fact

---

691 The full name of this statute is “Murder Related to a Continuing Criminal Enterprise or Related Murder of a Federal, State, or Local Law Enforcement Officer”

692 21 U.S.C. § 848

693 CCE cases comprised of 181 out of 467 of all federal capitals (38%)

694 See generally: BECKETT, Making Crime Pay; MAUER, Race to Incarcerate; SCHEINGOLD, The Politics of Law and Order.
that the federal government authorised the death penalty against drug enterprise-related crimes rather than give the same consideration to other murder crimes appeared to be a politicised effort to rid society of ‘violent criminals.’ The government’s anti-drug campaign raised concerns with other researchers who questioned why the legal enforcement resources focused so heavily on drug crimes and not other areas of crimes.\textsuperscript{695} Second, as the \textit{Payne} ruling did not come into effect until three years after federal prosecutors had been trying drug kingpin offences as capital cases, prosecutors’ initial response to include victim impact evidence was mixed. Third, as discussed in Chapter Five, the observations from my previous work noted that the families of the drug-related crime victims were treated qualitatively differently than victims of other crimes.\textsuperscript{696} Fourth, subtly different to Sundby’s speculation that jurors’ perceptions of drug dealers are less dangerous because jurors are not likely to come into contact with these individuals,\textsuperscript{697} this thesis posits that because of the disconnection between jurors and the drug-trade world, jurors would not relate to victim impact testimony about the loss of the drug-related deceased victim. As such, the research projected that defendants charged with CCE offences would less likely have victim impact evidence used against them at trial.

\begin{table}[h]
\centering
\caption{The Case Direction of CCE Capital Offences}
\begin{tabular}{|c|c|c|}
\hline
Cases & that & Total  \\
\multicolumn{1}{|c|}{Resulted} & in a & Adjudicated  \\
\multicolumn{1}{|c|}{Plea} & Cases & Cases  \\
\multicolumn{1}{|c|}{that} & that &  \\
\multicolumn{1}{|c|}{Went to Trial} & &  \\
\hline
57 & 65 & 122 \\
\hline
\end{tabular}
\end{table}

\begin{table}[h]
\centering
\caption{The Inclusion of Victim Impact Evidence in CCE Cases that Resulted in a Guilty Plea}
\begin{tabular}{|l|c|}
\hline
VIE Used & Life Sentence  \\
\hline
No Notice of Intent (NOI) & 12  \\
Yes NOI, VIE Included at Sentencing Hearing & 9  \\
\hline
\end{tabular}
\end{table}

\textsuperscript{695} Id.
\textsuperscript{696} Supra pp. 132-3.
\textsuperscript{697} Sundby, \textit{Problem of Unworthy Victims} 364.
As the data shows, 47% of the adjudicated CCE cases resulted in a plea agreement. Of those proceedings, prosecutors presented victim impact evidence in only 9 of the 57 of the plea-sentencing hearings.698 This figure is 8% less than the average of the combined capital cases that resulted in a plea agreement. A significant portion of the cases were eligible to include these statements but did not. From the outset, due to the lack of filing an NOI to include victim impact as a non-statutory aggravator, the prosecution forfeited this right in a quarter of the cases. The high percentage of omissions of victim impact evidence in CCE plea-sentencing hearings could be evidence of prosecutors’ perceptions of the victims’ families, or that the families chose not to participate in the hearing, or that prosecutors did not see the purpose of the victim statements at this point in the legal proceedings. The next chapter of analysis compares this data against cases that went to trial and discusses the differences and similarities between the two types of case outcomes and the prosecutors’ inclusion of victim impact evidence.

6.2.2 Murder Committed During a Crime of Violence or Drug-Trafficking

The federal government’s war on drugs not only targeted drug kingpins, but also individuals involved in the distribution and use of drugs on a smaller scale. Individuals charged with murder during a crime of violence or drug-trafficking offences are indicted under a ‘catch-all’ statute related to drug crimes or violent crimes that are somehow attributed to drug activities.699 Defendants charged under this statute can face the death penalty, although the accused may not have an

| Yes NOI, VIE Not Used at the Sentencing Hearing | 29 |
| Did Not Remember/Respond | 7 |
| Total | 57 |

698 NB: the stated figures keep the “Don’t Remember” or “Did Not Respond” separate and in the total outcome.
699 18 U.S.C. §924(j), See also: Lynn Marsella, Something about Carry: Supreme Court Broadens the Scope of 18 U.S.C. 924(C), 89 J. CRIM. L. & CRIMINOLOGY 973, 995 (Spring 1999). 995 (Due to the unwieldy statute name, this offence is often referred to as ‘§924.’ Hereinafter, this thesis will use this idiom.)
‘enterprise’ like that of drug kingpins. For the same reasons given with the CCE cases, this research designated the §924 offences as an *unworthy victim* offence.

**TABLE 6.4 THE CASE DIRECTION OF MURDER COMMITTED DURING A CRIME OF VIOLENCE OR DRUG-TRAFFICKING CAPITAL OFFENCES**

<table>
<thead>
<tr>
<th>Cases that Resulted in a Plea</th>
<th>Cases that Went to Trial</th>
<th>Total Adjudicated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>24</td>
<td>36</td>
</tr>
</tbody>
</table>

**TABLE 6.5 THE INCLUSION OF VICTIM IMPACT EVIDENCE IN MURDER COMMITTED DURING A CRIME OF VIOLENCE OR DRUG-TRAFFICKING CASES THAT RESULTED IN A GUILTY PLEA**

<table>
<thead>
<tr>
<th>VIE USED</th>
<th>Life Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>5</td>
</tr>
<tr>
<td>Yes NOI, VIE Included at Plea-Sentencing Hearing</td>
<td>1</td>
</tr>
<tr>
<td>Yes NOI, VIE Not Used at the Plea-Sentencing Hearing</td>
<td>4</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>12</strong></td>
</tr>
</tbody>
</table>

The §924 plea proceedings included only one victim impact statement. Although this exclusion supports this research’s theory that such cases are *unworthy victim* offences, the percentage of §924 cases that went to trial compared to CCE cases called for further consideration of the two categories of crime. With the government’s war on drugs focusing on drug kingpins from the earliest days, this research presumed that those individuals would remain the government’s target for the death penalty. If so, why would more CCE cases result in plea agreements than §924 cases? The reason may be that drug kingpin cases involve a convoluted mixture of charges related to running a large narcotics enterprise that is unseen by most citizens and therefore harder to prove; whereas §924 cases, on the other hand, involve street violence, which directly effects communities and require greater police involvement. Consequently, for this type of offence, this research speculates that

---

700 This number reflects the percentage of the cases that responded.
jurors are more likely to sympathise with victims whose stories convey a message of living in a neighbourhood riddled with violence than with victims whose loved one was murdered in a complicated drug-business scheme that does not directly affect their community. Strategically, if cases involving drug-related offences go to trial, jurors are more likely to connect with surviving victim family members in §924 cases to trial than CCE cases. If this is true, the assessment that the §924 is an \textit{unworthy victim} offence is wrong.

The next step for the §924 cases is to determine whether the prosecution used victim impact evidence. This data will be compared with CCE cases inclusion of victim impact evidence and the case outcomes for both categories. Did the prosecution include this testimony at a higher rate in §924 cases than in drug kingpin cases? From a time and cost analysis perspective, did the §924 cases that included victim impact evidence result in death sentences at a greater rate than with §924 cases that did not? Did victim impact evidence help prosecutors achieve a death sentence or as this research suspects, did jurors not relate to victims of §924 cases because it is still a crime that jurors do not experience in their daily lives?\footnote{701}

\subsection{6.2.3 Carjacking}

Carjacking is the intentional and forceful taking of a motor vehicle from an individual with the intention to cause death or serious bodily harm.\footnote{702} This offence was labelled in this research as a \textit{worthy victim} crime for the emotional response it elicits. Due to the randomness of a carjacking offence, the research projected that prosecutors expect jurors to imagine the possibility that they could have been the victim as the evidence and therefore victim impact evidence is presented.

\footnote{701}{These questions are considered in Sections 7.2.1 and 7.2.2.}
\footnote{702}{18 U.S.C. § 2119}
### Table 6.6 The Case Direction of Carjacking Capital Offences

<table>
<thead>
<tr>
<th>Cases that Resulted in a Plea</th>
<th>Cases that Went to Trial</th>
<th>Total Adjudicated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>19</td>
<td>31</td>
</tr>
</tbody>
</table>

### Table 6.7 The Inclusion of Victim Impact Evidence in Carjacking Cases That Resulted in a Guilty Plea

<table>
<thead>
<tr>
<th>VIE Used</th>
<th>Life Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>0</td>
</tr>
<tr>
<td>Yes NOI, VIE Included at Sentencing Hearing</td>
<td>6</td>
</tr>
<tr>
<td>Yes NOI, VIE Not Used at the Plea-Sentencing Hearing</td>
<td>6</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>12</strong></td>
</tr>
</tbody>
</table>

The fact that federal prosecutors included victim impact evidence in every Notice of Intent confirmed these cases as *worthy victim*. Also indicative of the emotional influence such cases have on society is that all questionnaires sent to defence counsel were responded to and all of the attorneys remembered the case details. Of all the categories of crimes, attorneys for carjacking cases most frequently wrote additional information in the comments box, giving details about the crime, the victim’s family, and the case outcome. Due to the emotional and visceral reaction people have to news of a carjacking, it came as a surprise to learn that over one-third (38%) of the carjacking cases resulted in a plea agreement rather than go to trial. This research assumed that once prosecutors decided to seek the death penalty in carjacking cases, they understood that they were almost assured of a conviction followed up by the emotional appeal of victim impact testimony. Yet, along with twelve plea agreements, only half included victim statements at the plea-sentencing hearing. I expected the inclusion of victim impact evidence to be much higher, even with cases the resulted in a plea agreement. This incongruence prompted a return to the raw data to verify that my input was correct. The individual comments from defence counsel,
which were not able to be inputted into SPSS, revealed more nuance to the plea agreements than could have been expected. In one example, the defence attorney wrote,

> Originally, victim impact was perhaps the single most significant reason for the case going to trial and not settling. During the second week of jury selection, the government reassessed its position after the victim's family expressed a desire for the case to settle. [The client] pled guilty and received a life sentence.\(^{703}\)

In another case, the victim’s family did not agree with the US Attorney’s decision to seek the death penalty and wanted the case to be settled. After the family hired their own legal representation to assist with their interests, the US Attorneys decided to accept a plea agreement in exchange for a life sentence. The victim’s parents chose not to speak at the sentencing proceedings.\(^{704}\) Defence counsel’s additional information provides significant detail for consideration. Foremost, it was discovered from information provided by the defence that the influence and interests of the victims’ families is what prompted many of the plea agreements. In the samples of carjacking offences for which comments were made, prosecutors appeared to consider the judicial interests of the families along with the state’s decision to seek the death penalty. In these instances, prosecutors appeared responsive to the families’ judicial interests. As prosecutors were not surveyed for this research, such answers are speculative. But, considering the fact that one family hired an attorney to assist their judicial interests of a plea agreement to *end* the legal proceedings, prosecutors could have realised that not having a supportive courtroom presence from the victim’s family might have produced the opposite outcomes expected for a death penalty case. Overall, prosecutors included victim impact evidence in half of cases that resulted in a plea. The knowledge that victims’ families had such an active role in the negotiations that led to the plea agreement—whether they opted to speak at the sentencing hearing or not—needs to be considered in the broader context. Could the family members of victims of *unworthy victim* cases have the same influence with

---

\(^{703}\) On file with the author. All additional attorney comments in the questionnaire were examined, but comments were not common. The second case referred to, in which the family hired a private attorney to represent their interests, was a case that was known to me through my work. Information about victims’ actions or interactions regarding the case could be helpful in understanding victims’ involvement in the case outcomes. This would require direct interviews with either the victims, defence counsel, or prosecutors and is considered in Chapter Eight.

\(^{704}\) On file with the author.
prosecutors while opting not to speak publicly during the legal proceedings? This is discussed in the final analysis chapter.

6.2.4 Murder by a Federal Prisoner

The media’s depiction that prisons are a cesspool of violence is often confirmed by the federal charges of murder against inmates. When a prisoner is charged with the murder of another inmate, prosecutors use a double standard in their justification for seeking the death penalty. First, federal prosecutors suggest the fact that inmates are in prison because they are dangerous. Federal prosecutors argue that despite the safety measures provided by federal prisons, the accused continue to be a danger to other prisoners and Department of Corrections staff. Consequently, federal prosecutors declare that there is no other legitimate course of action but to seek the death penalty against the accused. The double standard comes in during the authorisation process when federal prosecutors do not recognise the loss of the victim’s family in the Notice of Intent. It appears that the decision to seek the death penalty against a federal prisoner focuses on maintaining prison safety and not about the loss of person’s life. Because of this theory, this study labelled murders by a federal prisoner as an *unworthy victim* offence.

**Table 6.8 The Case Direction of Prison Inmate Murder Capital Offences**

<table>
<thead>
<tr>
<th>Cases Resulted in a Plea</th>
<th>Cases that Went to Trial</th>
<th>Total Adjudicated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>16</td>
<td>18</td>
</tr>
</tbody>
</table>

**Table 6.9 The Inclusion of Victim Impact Evidence in Prison Inmate Murder Cases that Resulted in a Guilty Plea**

<table>
<thead>
<tr>
<th>VIE Used</th>
<th>Life</th>
</tr>
</thead>
</table>

705 In the Notice of Intent for defendants facing the death penalty for killing another inmate, prosecutors state that the crime occurred while both the defendant and victim were incarcerated for various, often violent, crimes. Additionally, prosecutors discuss the levels of violence at the prison, the security issues Bureau of Prison officers face working in such institutions, and known protection problems faced by prisoners.
<table>
<thead>
<tr>
<th>Sentence</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>3</td>
</tr>
<tr>
<td>Yes NOI, VIE Included at Sentencing Hearing</td>
<td>0</td>
</tr>
<tr>
<td>Yes NOI, VIE Not Used at the Plea-Sentencing Hearing</td>
<td>0</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>3</td>
</tr>
</tbody>
</table>

Of the nineteen prison-inmate killings, three resulted in a plea agreement. This data further indicates that federal prosecutors do not see the value of defendants’ lives. A guilty plea would produce a status quo scenario: the prisoner remains in prison and is capable of committing the very acts that federal prosecutors argue why the death penalty is necessary. As none of the cases indicate an intention to include victim impact evidence, the emphasis remains of the dangerousness of the accused. This omission dismisses the possibility of the victim’s surviving family’s grief. Although the deceased victim in these cases was in prison, it does not mean that the person’s life was without value to family and friends. A violent death affects all families, regardless of the person’s circumstances. Yet, if prosecutors consider the victim impact statement only as a sentencing tool, not as a family member’s opportunity to describe to the court who their loved one was or the emotional impact their murder has had on them, strategically this exclusion makes sense. If the working assumption is that there is a link between jurors identifying with victims and the case outcome, few, in any, law-abiding jurors would imagine themselves in the place of the deceased victim or the victim’s family. Therefore, the prosecutors’ exclusion this type of evidence for jurors’ sentencing considerations, as though the deceased prisoner was as criminal as the defendant, confirms the position of prison inmate killings as being an *unworthy victim* offence.

### 6.2.5 Bank Robbery

Bank robbery was labelled *worthy victim* with the assumption that jurors could imagine themselves or their family members at their bank under similar
circumstances to the evidence introduced by the government. Because of this, jurors would more likely identify with the victim impact evidence presented during the sentencing phase of a capital trial.

**Table 6.10 The Case Direction of Bank Robbery Capital Offences**

<table>
<thead>
<tr>
<th>Cases that Resulted in a Plea</th>
<th>Cases that Went to Trial</th>
<th>Total Adjudicated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>12</td>
<td>18</td>
</tr>
</tbody>
</table>

**Table 6.11 The Inclusion of Victim Impact Evidence in Bank Robbery Cases that Resulted in a Plea**

<table>
<thead>
<tr>
<th>VIE Used</th>
<th>Life Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>0</td>
</tr>
<tr>
<td>Yes NOI, VIE Included at Sentencing Hearing</td>
<td>2</td>
</tr>
<tr>
<td>Yes NOI, VIE Not Used at the Plea-Sentencing Hearing</td>
<td>2</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>6</td>
</tr>
</tbody>
</table>

One-third of the bank robbery cases resulted in a plea agreement. Of the cases that responded, victim impact evidence was included half of the time. This is nearly double compared to the total data set average. There were no comments made by defence counsel to suggest that the victims’ family members were actively a part of the plea negotiations or intentionally chose not to participate in the sentencing hearing. For offences, like bank robberies, that have higher inclusion rates of victim impact evidence than the data set average, it will be important to compare such results to its counterparts that went to trial.
6.2.6 Kidnapping

The federal death penalty statute defines kidnapping as the unlawful seizure or abduction of a person against their will that results in murder.\textsuperscript{706} For this reason, this study labelled the crime as \textit{worthy victim}, with the expectation that prosecutors would utilise victim impact evidence as a sentencing tool to seek victim identification amongst the jurors in their deliberations for the defendant’s sentence.

\textbf{Table 6.12 The Case Direction of Kidnapping Capital Offences}

<table>
<thead>
<tr>
<th>Cases that Resulted in a Plea</th>
<th>Cases that Went to Trial</th>
<th>Total Adjudicated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>11</td>
<td>18</td>
</tr>
</tbody>
</table>

\textbf{Table 6.13 The Inclusion of Victim Impact Evidence in Kidnapping Cases that Resulted in a Plea}

<table>
<thead>
<tr>
<th>VIE Used</th>
<th>Life Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>1</td>
</tr>
<tr>
<td>Yes NOI, VIE Included at Sentencing Hearing</td>
<td>2</td>
</tr>
<tr>
<td>Yes NOI, VIE Not Used at the Plea-Sentencing Hearing</td>
<td>3</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>7</strong></td>
</tr>
</tbody>
</table>

Of the eighteen cases that proceeded to adjudication, prosecutors accepted plea agreements in seven cases. With attorneys who were able to recall the details of the cases, prosecutors included victim testimony in two of the cases. Although this is higher than the total data set average, the quantitative data does not provide a full understanding of the crimes in the categories. The cases that had indicated victim impact evidence but did not include it at the plea-sentencing hearings involved two co-defendants in a kidnapping scheme of Chinese nationals. They attorneys stated that the victims were from China and were held for ransom money from their families in China. Defence counsel said that victims’ families were likely not present\textsuperscript{706} 18 U.S.C. § 1201
due to the distance that would be required to travel for a hearing with a foregone conclusion.\footnote{707}

As the utilisation of victim impact evidence in this category of offences, was above the average of the total data set, this gives a preliminary indication that prosecutors were professionally engaged with the victims’ families through the conclusion of the case.

### 6.2.7 Murder for Hire

Murder for hire, a crime in which there is a financial transaction for the death of a specified person,\footnote{708} is a crime few people often consider as a real or personal threat. Consequently, this crime was labelled \textit{putatively worthy victim}; in essence, emotionally neutral until provoked otherwise.\footnote{709}

#### Table 6.14 The Case Direction of Murder for Hire Capital Offences

<table>
<thead>
<tr>
<th>Cases that Resulted in a Plea</th>
<th>Cases that Went to Trial</th>
<th>Total Adjudicated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>9</td>
<td>15</td>
</tr>
</tbody>
</table>

#### Table 6.15 The Inclusion of Victim Impact Evidence in Murder for Hire Cases that Resulted in a Plea

<table>
<thead>
<tr>
<th>VIE Used</th>
<th>Life Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>1</td>
</tr>
<tr>
<td>Yes NOI, VIE Included at Sentencing Hearing</td>
<td>3</td>
</tr>
<tr>
<td>Yes NOI, VIE Not Used at the Plea-Sentencing Hearing</td>
<td>1</td>
</tr>
</tbody>
</table>

\footnote{707}{On file with the author.}
\footnote{708}{18U.S.C. § 1958}
\footnote{709}{This is not to infer that murder of any type is neutral. Rather, the point is that in the abstract, people may not react to this sort of crime over others, as they cannot imagine it happening in their own lives.}
Sixty per cent of the adjudicated murder for hire cases that resulted in guilty pleas presented victim impact evidence at trial. As this thesis does not have the details as to how the defendants were connected to the victim (Was the defendant the hired assassin or the person who order the hit?), it is unclear why there was such a high rate of victim testimony in the plea-sentencing hearings. Given the circumstances of the crime, one could speculate that if the defendant was the person who hired the assassin, the victim’s family may have wanted to confront the defendant, as it is likely that this is the first time since that person was indicted that the victims had contact with the defendant. On the other hand, prosecutorial inclusion of victim impact evidence could be based on: whether both the assassin and the contractor charged with the death penalty; whether the contractor was indicted on non-capital charges; or whether one of the defendants was given a deal in order to testify against the other who was facing capital charges? Although these questions may seem unrelated to the inclusion of victim impact evidence, because this type of offence involves more than one offender, the prosecutors’ inclusion of victim impact evidence could be dependent upon who was facing the capital charges. It is speculative, but family members may consider the person who hired the murderer as more culpable. Even though the contractor did not commit the murder himself or herself, that person was the one who contemplated the murderous act and hired someone to complete it. In order to accurately assess this type of offence, more specific information is needed regarding the relationship between the contractor and the deceased victim, what charges, if any, both the contractor and murderer faced, and whether one of the defendants turned state’s witness against the other defendant. Yet, in the cases that resulted in a plea in this category, clearly prosecutors found it important to provide the victims’ family members the opportunity to address the court, and more likely in this circumstance, the defendant.
6.2.8 First-Degree Murder

First-degree murder, the premeditated killing of another human being,\textsuperscript{710} is the charge that people understand most easily. Yet, as federal prosecutors have to justify how a case are within the federal jurisdiction and not under the authority of the local government, first-degree murder is not a commonly used statute in federal capital cases. It appears that with first-degree murder indictments, it is more a matter of prosecutorial discretion regarding what charge to bring against the accused. For instance, although there is a specific statute for prison inmate murders,\textsuperscript{711} some defendants charged with first-degree murder would have also met the standards of that offence. It appears a common justification for indicting someone with first-degree murder rather than a more specified federal statute is that the crimes happened on federal property, therefore federal prosecutors had jurisdiction. Because of the lack of identification for the purpose of the charge, this category was labelled \textit{putatively worthy victim}, similar to the reasons given with murder for hire offences.

<table>
<thead>
<tr>
<th>Cases that Resulted in a Plea</th>
<th>Cases that Went to Trial</th>
<th>Total Adjudicated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>11</td>
<td>14</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VIE USED</th>
<th>Life Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>2</td>
</tr>
<tr>
<td>Yes NOI, VIE Included at Sentencing Hearing</td>
<td>0</td>
</tr>
<tr>
<td>Yes NOI, VIE Not Used at the Plea-Sentencing Hearing</td>
<td>0</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>3</td>
</tr>
</tbody>
</table>

\textsuperscript{710} 18 U.S.C. § 1111
\textsuperscript{711} 18 U.S.C. § 1118
For the category of first-degree murder, prosecutors accepted a plea agreement in only three of fourteen of the cases. As no Notice of Intent was submitted for two of the three cases and the third could not remember whether testimony was given during the plea-sentencing hearing, it is difficult to give consideration to these cases. Rather, the analysis of the cases that went to trial in the next chapter of analysis may give more clarity as to prosecutors’ attention to victim impact evidence within this category. As first-degree murder is a catchall for federal cases that don’t necessarily fall into other statutes, these crimes may be an example of prosecutors assessing the individual facts of the case or of the deceased victim before deciding whether to include victim impact evidence in the Notice of Intent and during the trial.

6.2.9 Death Resulting from Offences Involving Transportation of Explosives, Destruction of Government Property, or Destruction of Property Related to Foreign or Interstate Commerce

Whilst the statute name is unwieldy and unclear, the criminal use of remote explosives to murder individuals is explicit. Many of the defendants’ names or their crimes are a part of the American criminal folklore. In most situations, the defendants built explosives to be set off remotely in situations that no one would expect or was prepared for such acts of violence. Often, there were many injuries or deaths. Also, for some of the defendants, long periods of time passed before they were detected or captured, thus propelling these defendants onto the FBI’s Most Wanted List and in society’s mind. The crimes are highly sympathetic as people can imagine themselves as the unsuspecting victim in similar situations of work, play, or celebration. As such, the research labelled this crime worthy victim, assuming that the prosecution would use victim impact evidence as a central aspect of their argument for the death penalty.

712 18 U.S.C. §844
Surprisingly, two-thirds (67%) of the cases resulted in a plea agreement. With such violent acts that were so methodically planned and executed, this research would have predicted that more cases would have gone to trial in effort to seek the death penalty against the accused. Yet, among the cases that resulted in a plea agreement, there is compelling evidence that the prosecution knew that victims would have to be a central voice in the plea proceedings. In the two cases that indicated that victim impact evidence was included in the plea proceedings, the hearing was more about the victims’ allocation than it was about the defendants’ sentencing. One defendant had two days worth of plea proceedings in order to allow the victims to present an impact statement.713 In the case listed as not filing the Notice of Intent, the victim’s surviving family member became the central agent for the plea agreement. The deceased victim was a 17-year-old boy who was killed by a packaged pipe bomb that was sent to him by the defendant out of retaliation for a dishonest business deal. The

---

713 Notes on file with the author.
victim expressed a list of judicial concerns, one being the unnecessary need to go through a trial, and asked both legal teams to settle the case. Defence counsel reported that the statement given by the victim’s surviving family member overshadowed the defendant’s allocution. Although the prosecution did not have the right to present this testimony, the defence allowed for its inclusion as the circumstances of the case shifted the victim from the role of an adversary back to a grieving parent. With this case, the use of victim impact evidence was 50%, which is two times the average.

6.2.10 Murder with the Intent of Preventing Testimony by a Witness, Victim, or Informant

This offence and the one proceeding are similar in that both crimes involve the murder of a government witness. This category of offence concerns the murder of a witness before the person is able to provide testimony against another person. The assumption might be that if the government witness is not able to give evidence in court, then the government will either have a weaker case or no evidence in the case against that defendant. As the witness who was murdered is often a person involved in criminal activity and is testifying for the government in exchange for a reduction in charges, or for the charges to be dropped against them, I labelled this category of crime as putatively worthy victim. Unlike the other crimes given this designation, which involved random or unsuspecting victims, this type of crime involves victims who were potentially criminal offenders and have agreed to be a witness for the prosecution.

<table>
<thead>
<tr>
<th>Cases that Resulted in a Plea</th>
<th>Cases that Went to Trial</th>
<th>Total Adjudicated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>8</td>
<td>9</td>
</tr>
</tbody>
</table>

Notes on file with the author.

18 U.S.C. § 1512. For brevity, this crime will be referred to as Pre-Trial Witness.
Only one case resulted in a plea agreement for which victim impact testimony was not included. This is the lowest of all the federal offences in all three worthiness categories. There is no additional information on this case. As 87% of the cases went to trial, the analysis will have to come from that body of data.

### 6.2.11 Retaliating Against a Witness, Victim, or an Informant

As described in the section above, this offence involves the murder of a person who helped federal prosecutors by testifying in the criminal proceedings against a defendant in a criminal case.\(^{716}\) Although this offence is also labelled *putatively worthy victim*, a distinction this research makes between the two closely related crime victims is that the deceased victim in this category testified against the defendant in a different criminal case and because of that, the defendant had this victim killed. The crimes appear similar, with the before and after separating the motive for the murder, but a question posed in this research is whether the prosecutors might feel more indebted to the deceased victim and the victim’s surviving family members for the act of service the victim gave to the government. Could this murder create a sense of more duty toward the family on behalf of the prosecution?

\(^{716}\) 18 U.S.C. § 1513. For brevity, this crime will be referred to as Post-Trial Witness
TABLE 6.22 THE CASE DIRECTION FOR THE MURDER OF POST-TRIAL WITNESS CAPITAL OFFENCES

<table>
<thead>
<tr>
<th>Cases that Resulted in a Plea</th>
<th>Cases that Went to Trial</th>
<th>Total Adjudicated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>8</td>
<td>10</td>
</tr>
</tbody>
</table>

TABLE 6.23 THE INCLUSION OF VICTIM IMPACT EVIDENCE IN THE MURDER OF POST-TRIAL WITNESS CASES THAT RESULTED IN A PLEA

<table>
<thead>
<tr>
<th>VIE USED</th>
<th>Life Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>0</td>
</tr>
<tr>
<td>Yes NOI, VIE Included at Sentencing Hearing</td>
<td>1</td>
</tr>
<tr>
<td>Yes NOI, VIE Not Used at the Plea-Sentencing Hearing</td>
<td>1</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>2</td>
</tr>
</tbody>
</table>

Two murder of post-trial witness cases resulted in a plea agreement and of these cases, the government included victim impact evidence in one of them. Of the four categories of offences labelled *putatively worthy victim*, the Pre- and Post-Trial Witness Murder cases seem most detached from a juror’s sensibility. In the abstract, a person willing to testify against another individual takes courage and conviction. Yet, jurors may not relate to individuals potentially involved in or have direct knowledge about criminal activity. Although the actions on behalf of the deceased victim for the prosecution could be considered noble, it seems that jurors may not relate to the situation in which the deceased victim was involved. This could create a disparate results both in the prosecutions’ inclusion of victim impact evidence as well as how jurors incorporate such evidence in their sentencing considerations.

6.2.12 All Other Offences

The following categories of offences are grouped together due to the small number of cases in each offence. There is no connection between the types of crimes other than
they were all adjudicated as federal capital cases. Cases that resulted in a plea agreement on this table are the following: Civil Rights Offences Resulting in Death, Interstate Domestic Violence, Murder with Weapon of Mass Destruction, and Murder Involved in a Racketeering Offence.

Civil Rights Offences Resulting in Death was labelled *worthy victim*, as the concept of murdering another individual based upon violating that person’s rights protected by the Constitution or laws incenses most Americans.⁷¹⁷ Most Americans believe that all people should live within the law and should have the same protections. One case in this category resulted in a plea agreement, but there was no victim impact testimony and no further details given about this case.

Interstate Domestic Violence involves the intentional act of traveling somewhere with the purpose of killing an intimate partner.⁷¹⁸ This crime violates the values of trust, safety, and the sanctity that relationships represent to law-abiding citizens. Consequently, this is a *worthy victim* crime. In the one case that resulted in a plea agreement, the prosecution presented victim impact evidence.

Murder Involved in a Racketeering Offence involves a person within an enterprise who intends to commit crimes including kidnapping or murder for pecuniary gain.⁷¹⁹ This crime has the emotive facts of kidnapping but the vagueness of the criminal world that law-abiding citizens would not understand. Therefore, this crime was labelled as *unworthy victim*. Three of the five adjudicated cases resulted in a plea agreement. None of the cases produced victim impact evidence.

**TABLE 6.24 THE INCLUSION OF VICTIM IMPACT EVIDENCE IN ADDITIONAL CAPITAL CASES THAT RESULTED IN A PLEA**

<table>
<thead>
<tr>
<th>Crime Type</th>
<th>Cases that Resulted in a Plea Agreement</th>
<th>Use of VIE at Plea Sentencing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Rights Offence Resulting in Death</td>
<td>1</td>
<td>Yes</td>
</tr>
</tbody>
</table>

⁷¹⁷ 18 U.S.C. § 241
⁷¹⁸ 18 U.S.C. § 2261
⁷¹⁹ 18 U.S.C. § 1959
<table>
<thead>
<tr>
<th>Category of Offences</th>
<th>Total %</th>
<th>Total #</th>
</tr>
</thead>
<tbody>
<tr>
<td>Worthy victim</td>
<td>46.4%</td>
<td>28</td>
</tr>
<tr>
<td>Putatively Worthy victim</td>
<td>40.0%</td>
<td>4</td>
</tr>
<tr>
<td>Unworthy victim</td>
<td>15.4%</td>
<td>10</td>
</tr>
</tbody>
</table>

Prosecutors included victim impact evidence three times more often (46.4%) in *worthy victim* crimes than in *unworthy victim* offences in plea-sentencing hearings. Taking into consideration the fact that some victims in *worthy victim* crimes requested not to be involved in the legal proceedings would put the level of victim engagement even higher. It does not seem credible that family members of *unworthy victim* offences have a high level of engagement with prosecutors when the prosecutorial inclusion of victim impact evidence in these cases is only fifteen percent (15%). Even if some family members of *unworthy victim* crimes did indicate to prosecutors their lack of interest in participating in the legal proceedings, the overall patterns of low victim inclusion in *unworthy victim* offences shown throughout this chapter suggest that the prosecutors would not have considered using victim impact evidence in these offences anyway. Although plea agreements truncate the legal proceedings against the accused, in some ways, the results from prosecutors’ inclusion of victim impact evidence that resulted in a plea agreement might be more revealing. As cases go to trial and prosecutors have the right to include victim impact evidence, they may decide to include this evidence as a parting coup de grâce for jurors to consider during their deliberations for sentencing. It is possible that going to trial in a capital case may influence prosecutors to include such testimony more than
they would ordinarily consider. With this argument, cases that go to trial may skew the data more favourably away from this thesis’s hypothesis of that selective inclusion of victim impact evidence leads to arbitrary sentencing. Whereas with cases that result in a plea agreement, prosecutors have less need for this evidence as the case has come to a resolution. Therefore, prosecutors may have less inclination to engage the victims’ family members to ensure that they are invited to make a statement at the plea-sentencing hearing. In this consideration, cases that result in a plea agreement may be more indicative of prosecutorial selectivity with the inclusion of worthy victim family members’ impact statements. Following this, the incredibly low percentage of victim inclusion at the plea-sentencing hearings in unworthy victim offences could also be the truer marker of prosecutors’ frame of reference for the victim identification they seek between the victim impact statement and the juror. One remark made in the questionnaire by defence counsel epitomises this outlook: “The victims were really, really bad guys serving long terms in federal prison. Victim impact wasn’t argued for that reason.”

The 1991 ruling in Payne v. Tennessee brought the deceased victim’s family members into the courtroom beyond the gallery barrier. Before this, legal professionals considered the families as two-dimensional: grief-stricken and silent. As the politicisation of victims’ rights brought families greater participatory rights, the perception of the victims’ family members changed to vocal, retributive, and adversarial. Somehow in these endeavours, the victims’ grief took a less significant role in the effort to present an empowered victim in name of progress for victims’ rights. Victim advocates’ efforts to provide participatory rights to victims to have a more vocal role been largely successful. Since 1994, federal capital prosecutors overwhelmingly indicate their intention to provide victims the opportunity to address the court as part of the sentencing of the accused. The inclusion of the victim’s participatory right in the Notice of Intent is pro forma today. Yet, after the initial assurance of securing the ability to use this evidence, prosecutors’ actions in cases

720 On file with author.
that result in a plea agreement show very different outcomes than the initial proclamations.

In this chapter, the results show that prosecutors included victim impact evidence at the plea-sentencing hearing in only 26% of the cases. Despite prosecutors’ initial indication that they would provide this opportunity to the surviving family members, there is no public account given by prosecutors regarding why such a large percentage of victims are not involved in the plea-sentencing hearing. Did nearly three-quarters (74%) of victims’ family members choose to remain silent the one time they have the right to address the court in the legal proceedings? Data provided by defence counsel indicated in specific cases of worthy victim offences that victims’ family members clearly expressed their interest to remain silent during the legal proceedings against the accused, even in cases in which the victims’ family members were instrumental in with a plea agreement. This level of engagement would not have been known without the input from defence counsel and therefore the lack of victim participation in these worthy victim crimes would have been considered prosecutorial exclusion of the families. This shows the necessity for empirical research to include space for qualitative input whilst emphasising the request for quantitative data. As information was shared about worthy victim anecdotes, could the absence of victim impact evidence by victims’ family members in worthy victim cases be at the request of the family members?

Although victims’ family members have the legislative right to participate in the plea and sentencing hearings of the accused, this research shows that depending on the type of offence committed, certain families may be denied those participatory rights. The research demonstrates that family members of worthy victim offences are three times less likely to give a victim impact statement than families of worthy victim crimes. Yet this is only one stage of the adjudicated cases. As cases that go to trial have a heightened consequence due to the defendant facing the death penalty, patterns of prosecutors’ exclusion of victim impact evidence holds greater significance. The next chapter of the analysis determines if there is a correlation

722 Bryman, Social Research Methods 78.
between prosecutors’ use of victim impact evidence, the type of crime committed in the case, and the case outcome. This determination is significant because it has the potential to substantiate or disprove this thesis’ hypothesis that the type of offence is a leading indicator as to whether prosecutors will incorporate victim impact evidence in the legal proceedings. If the data of cases that went to trial show similar patterns of inclusion and exclusion of prosecutorial use of victim impact evidence to cases that resulted in a plea agreement, such intentional omission could produce arbitrary sentencing for certain defendants.
7  Prosecutorial Inclusion of Victim Impact Evidence in Capital Cases that Went to Trial

Federal capital cases are considered cases of national significance or interest. In order for the federal government to be able to have the jurisdiction over a case, the offence has to possess some link to interstate commerce or another federal interest, although that link can be as minor as murder with a firearm that has crossed state lines. In practice, federal capital murders generally involve drug or gang activity, violence in federal prison, participants in a federal trial, or terrorism.

Of the 467 cases that the federal government decided to seek the death penalty against the accused, 213 resulted in a trial in the US Courts. If a defendant is convicted of the capital charges, the next judicial step is the penalty phase of the trial. At present, there are only two options for a jury sentencing a defendant convicted of a federal capital crime: life without the possibility of release (commonly called parole) or the death penalty. Unlike states whose life sentences may allow a parole board to consider releasing a defendant after so many years of incarceration, the federal life sentence does not have that option.

At the sentencing phase of a federal capital trial, both the prosecution and defence present new evidence and arguments to the same jury, but the focus is on the defendant’s sentence. With the introduction of the modern federal death penalty, the Federal Death Penalty Act stated that the jury should be presented with evidence that would reduce the justification to sentence the defendant to death. Mitigating factors include: the defendant’s criminal history is not significant (suggesting the defendant does not pose a risk to others), the defendant committed the offence under emotional or mental disturbance, or the defendant’s background or character.

---

723 As discussed in the first part of the analysis, sixteen of those cases did not go to the penalty phase of the trial due to being acquitted or convicted of a lesser charge.
724 Sentencing Act of 1987, Pub. L. 100-182
725 18 U.S.C. 3592(a)(1)-(7)
726 Id.
The prosecution present evidence of aggravating factors to support the government’s pursuit of the death penalty. Such evidence includes a variety of statutory and non-statutory aggravators. In order for a defendant to be sentenced to death, the jury must find the defendant guilty of at least one statutory aggravating factor. Congress defined the statutory factors to include circumstances such as: previous convictions, the murder was especially heinous, cruel, or depraved, the defendant committed the act for pecuniary gain, or the defendant committed the offence after substantial planning.\textsuperscript{727} The Federal Death Penalty Act allows federal prosecutors to include other factors for the jury to consider.\textsuperscript{728} These are called non-statutory aggravating factors. Examples of these are: future dangerousness, gang membership, lack of remorse, and victim impact. \textit{Gregg} ordered that the evidence introduced for sentencing consideration must meet “clear and objective standards.”\textsuperscript{729} As the legal scholarship and case arguments on the issue of victim impact presented throughout this thesis show, however, there is much debate as to what is clear and objective.\textsuperscript{730} With the legal teams diametrically opposed to what is the appropriate sentence for the defendant, the teams work to convince the jury that the mitigating or aggravating factors exhibited at the penalty phase of the trial are the correct version of the defendant’s history and justify the appropriate sentence of life or death. The jury’s verdict must be unanimous; if one person is against sentencing the defendant to death, the decision is automatically a life sentence.

It is assumed that victims who participate in the legal proceedings against the accused support the prosecution’s pursuit of the death penalty.\textsuperscript{731} Prosecutors prepare this testimony to fit with their message: the death sentence is justice. Victims’ rights may have been successful in gaining a voice in the courtroom, but the prosecutors set the parameters. The Federal Death Penalty Act transferred the power of preparing

\begin{itemize}
\item \textsuperscript{727} 18 U.S.C. § 3592(c)
\item \textsuperscript{728} 18 U.S.C. § 3593(d)
\item \textsuperscript{729} \textit{Gregg} 428 U.S. at 196.
\item \textsuperscript{730} For an incisive article on the aggravating and mitigating evidence in general, see: Kirchmeier, \textit{Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme}.
\item \textsuperscript{731} Whilst this may be true for many victims, for others it is not. See: Krause, Murder, Mourning, and the Ideal of Reconciliation; Krause, Finding Light in Broken Hope; \textsc{Howard Zehr}, \textit{Transcending: Reflections of Crime Victims} (Good Publishing, 2001); \textsc{Zehr}, Changes Lenses. \textit{See generally:} Mark S. Umbreit & Marilyn Peterson Armour, \textit{Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community}, 36 65 (2011).
\end{itemize}
this statement from United States Probation and Pre-trial Services the Probation Office and “delegate[d] authority” of the victim impact statements to the United States Attorney Offices. This research questions whether the increased power gave prosecutors the discretion rather than the responsibility to obtain victim impact evidence from the victims in each capital case. As such, what was once a pre-sentencing report for the sentencing body became a tool for the prosecution in their pursuit of the death penalty.

Victim impact testimony would seem presumptively a strong weapon to support the prosecution’s demand for the death penalty. This thesis argues that, in practice this relates more specifically to the worthy victim cases. One means of seeking to persuade jurors to agree with prosecutors regarding the sentence is to make them emotionally involved. Jurors need to be invested in the emotional cost of the offence, both of the past and the future. The emotional hook for the future is the suggestion of future dangerousness as well as retribution. With the conviction, prosecutors have the authority to argue that the defendant is the ‘worst of worst’ in relation to all other criminal cases in America and the jury is justified in taking this person’s life. Who is served by keeping the defendant alive, is the implicit question that is asked when prosecutors during the penalty phase of the trial. This is the tie from the past to the future; the emotional link omnipresent throughout the legal proceedings. In worthy victim cases, prosecutors build the argument of retribution around the core belief that executing the defendant is the only correct path for the jury to take. One part of that evidence is to expose the jury to devastating loss of the family.

This thesis does not dispute that federal prosecutors overwhelming include victim impact testimony in capital cases. What it exposes is the interesting issue of when they do not. If victim family members are being denied the opportunity to provide victim testimony based on the prosecutors having the power to control its development and inclusion, then victims are being denied their participatory rights as victim and sentencing advocates assert. This thesis argues that the very reason that prosecutors exclude certain victim impact evidence is because it will not assist their

732 Harris Lord & Alexander, at, Recommendation Four.
733 H.R. 3355 Title VI, Section 60002 ‘Chapter 228, ‘Sec. 3593 ‘(a)’(2)
pursuit of the death penalty. Whereas sentencing and victim advocates argue that victim family members should be allowed to influence the defendant’s sentence through the participatory right given to them by Congress, prosecutors may recognise that, depending on the type offence that was committed, victim input may have the opposite effect.

Some support for such prosecutorial decisions come from Sundby’s prescient observations of jurors’ identification with the victim in capital cases. He observed that juror voting patterns between a life sentence and the death penalty correlated with whether jurors could imagine themselves (or their family) in the victim’s situation. There were circumstances of certain cases that a law-abiding citizen would be unlikely to be able to relate to because they have nothing to compare the case with in their lives. For example, most jurors would have a difficult time relating to a mother whose son was murdered while he was committing a crime as part of an initiation into a gang. Whilst jurors may feel sorry for the parent, such pity diminishes in comparison to the murders of other more worthy victims. Sundby argued that because of this inability to relate to the victim’s circumstances, jurors perceived the defendant as less dangerous than someone who committed murder in an environment or in circumstances that were familiar to the juror.

The research done by Phillips or Sundby observed that the way the victim has been considered in previous research limits the empirical understanding of the victims’ influence in the sentencing decisions. The majority of the research has emphasised the victims’ race or gender but leaves out social status. As discussed in Chapter Five, whilst some research has shown that victim impact evidence has mostly a neutral effect on the sentencing outcomes in capital cases, there are important distinctions that such research overlooks. Haney and Lynch’s work focuses on the role that race plays in jurors’ perceptions of aggravating evidence at the sentencing

734 Beloof, Weighing Crime Victims’ Interests in Judicially Crafted Criminal Procedure 1149; Cassell, In Defense 929; Erez, Who’s Afraid 553-4.
735 See generally: Sundby, Problem of Unworthy Victims.
736 Id. at 354-6.
737 Phillips, Status Disparities; Sundby, Problem of Unworthy Victims.
738 Phillips, Status Disparities 808.
739 Supra ft 641.
phase of a trial at which victim impact evidence is only one consideration.\textsuperscript{740} Eisenberg et al. studied capital case outcomes in pre- and post-\textit{Payne} cases in South Carolina to analyse whether the use of victim impact evidence influenced the sentencing decisions. The group found no discernible differences, but did not base the research specifically upon the use of victim impact evidence and sentencing outcomes; rather the assessment was made looking at general sentencing patterns over time.\textsuperscript{741} As Sundby’s research did not include capital cases after \textit{Payne}, his arguments cannot be used as convincingly in relation to how the victim impact statement influences juror sentencing decisions.\textsuperscript{742} But based on the interviews he conducted with jurors for his research, Sundby believed that victim impact evidence given by an ‘innocent’ victim’s family member would be less likely to influence further the jurors’ sentencing decision because their identification with that victim already creates a predisposition toward a death sentence for the defendant.\textsuperscript{743}

This thesis takes a different approach from Sundby with regards to juror – victim identification and the influence that victim impact evidence will have on capital sentencing outcomes. This thesis argues that in instances that prosecutors exclude victim impact testimony, it is due to the notion that jurors will not relate to victims in these \textit{unworthy victim} offences or see victims’ loss as grievous as others. Therefore, victims’ testimony would serve no purpose in prosecutors’ effort to convince a jury to sentence the defendant to death. Conversely, when testimony from surviving family members is included at trial, such testimony may have the opposite effect on \textit{unworthy victim} case outcomes and dissuade jurors from voting in favour of a death sentence. As an example, jurors who hear testimony from the mother whose son was murdered while serving time in prison are not likely to relate the mother’s situation and therefore discount her grief and loss. As part of the inability to relate to the victim’s mother, jurors may not perceive the crime committed as one of the ‘worst,’ which would justify sentencing the defendant to death. Overall, whilst analysis of the sentence outcomes could be an added endorsement of this thesis’ hypothesis, the

\textsuperscript{740} Lynch & Haney, \textit{Capital Jury Deliberation} 489-90.
\textsuperscript{741} Eisenberg, et al., \textit{Victim Characteristics and Impact Evidence} 311.
\textsuperscript{742} But see: Sundby, \textit{Problem of Unworthy Victims} 370-4.
\textsuperscript{743} Id. at 373
purpose of the analysis is to determine whether a correlation exists between the type of offence and federal prosecutors’ inclusion of the victim impact statement.

7.1 Examination of Federal Capital Offences that Went to Trial

7.1.1 Prosecutorial Use of Victim Impact Evidence Based on the Case Direction

**Figure 1 Prosecutorial Use of Victim Impact Evidence in All Adjudicated Federal Capital Cases**

Table 7.1 Prosecutorial Use of Victim Impact Evidence in All Adjudicated Federal Capital Cases

<table>
<thead>
<tr>
<th>Case Direction</th>
<th>Did Not File Notice of Intent (NOI)</th>
<th>Did Not Use VIE at Trial</th>
<th>Used VIE at Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guilty Plea</td>
<td>24%</td>
<td>50%</td>
<td>26%</td>
</tr>
<tr>
<td>Went to Trial</td>
<td>16%</td>
<td>20%</td>
<td>64%</td>
</tr>
</tbody>
</table>

The overall prosecutorial inclusion of victim impact evidence shows a strong increase between the cases that resulted in a plea and those that went to trial. As Table 7.1 shows, for all adjudicated cases, irrespective of the category of victim

---

744 There were 22 cases that went to trial that did not remember or did not respond. The categorical break-down of those cases is as follows: Worthy victim: 7; Putatively Worthy victim: 4; Unworthy victim: 11
worthiness, prosecutors increased victim participation 38% at both the formal plea-sentencing proceedings and the at the penalty phase of cases that went to trial. Another general indication that prosecutors may have seen the value of including victim impact testimony at trial is that for all cases that went to trial, there was a slight decrease (9%) in the cases that did not include victim impact in the Notice of Intent. Concerning prosecutorial measures with the passage of the CVRA, the data shows an increase in victim participation as well. For instance, for all cases that occurred after 2004 and the passage of the CVRA, federal prosecutors indicated victim impact as a non-statutory aggravator 94% of the time. Likewise, the general inclusion of this evidence—at both plea-sentencing hearings and at the sentencing phase of a capital trial—rose 19% after the passage of the CVRA. The CVRA appears effective in its mandate to federal prosecutors to include the victims’ right to be heard at the legal proceedings. Yet, in both pre- and post-CVRA cases, a consistent pattern emerges in the analysis of the categories of worthiness and the inclusion of victim impact evidence in the adjudicated cases.

7.1.2 Prosecutorial Use of Victim Impact Evidence Based Upon the Category of Victim Worthiness

<table>
<thead>
<tr>
<th>Use of VIE at Trial</th>
<th>Case Totals</th>
<th>Total%</th>
<th>Use of VIE at Plea</th>
<th>Case Totals</th>
<th>Total%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Worthy victim</td>
<td>59</td>
<td>96.7%</td>
<td>Worthy victim</td>
<td>13</td>
<td>46%</td>
</tr>
<tr>
<td>Putatively Worthy victim</td>
<td>13</td>
<td>42%</td>
<td>Putatively Worthy victim</td>
<td>4</td>
<td>40%</td>
</tr>
<tr>
<td>Unworthy victim</td>
<td>47</td>
<td>50%</td>
<td>Unworthy victim</td>
<td>10</td>
<td>15%</td>
</tr>
</tbody>
</table>

745 18 U.S.C. § 3771 (a) (4)
The selective patterns of prosecutorial use of victim impact evidence become more evident when cases are separated into the categories of worthiness. Unlike the general consideration of whether prosecutors included victim testimony in all cases, like in Table 7.1, the categories of victim worthiness reveal prosecutors’ possible bias. In worthy victim offences that went to the penalty phase of a capital trial, there was near universal inclusion (97%) of victim impact testimony. Out of 59 victims, the prosecution omitted victim impact statements only twice. Comparatively, in unworthy victim offences, prosecutors excluded victim testimony nearly half of the time. Victim participation was nearly double (47%) in worthy victim cases. The total number of cases between the two categories of worthiness is approximate enough to recognise that the number of victims’ families excluded from giving victim impact testimony is notable. It is doubtful that half of unworthy victim families rejected the opportunity to speak at the penalty phase of a capital trial whereas only 3% of worthy victim families chose not to participate in the legal proceedings.

As discussed in Chapter Six, including victim impact evidence at the defendants’ plea-sentencing hearing would come at no ‘cost’ regarding a potential change to the outcome of the defendant’s sentence. The argument made was that as a defendant’s
sentence was already determined, defence attorneys should not object to victim impact evidence being included in the formal plea sentencing hearings. This raised the question whether the frequency of prosecutors’ inclusion of victim impact evidence would change with cases that went to a capital trial. In theory, prosecutors’ inclusion of victim impact evidence should be static, if such evidence is not meant as a sentencing tool but a victim’s right to participate in the legal proceedings against the defendant. Yet, as the data shows, the frequency of prosecutors’ incorporation of victim participation between the plea sentencing proceedings and the penalty phase of a capital trial increased 38%. In particular, of the offences categorised by victim worthiness, prosecutorial use of victim impact evidence increased the most in worthy victim offences by 47%. This research suggests that the selective patterns of victim impact evidence use, which depend upon the type of offence that is committed, is an invidious sentencing structure used by federal prosecutors to assist with their attempt to obtain the death penalty for the defendant.

7.1.3 Cases that Did Not Include Victim Impact as a Non-Statutory Aggravator in the Notice of Intent

As further indication that prosecutors recognise the distinction of worthy victim cases is prosecutors’ patterns of filing the Notice of Intent to include victim impact as a non-statutory aggravator during the authorisation process. Prosecutors filed the Notice of Intent in 97.7%\(^{746}\) of worthy victim cases. For worthy victim cases that went to trial, the Notice of Intent was filed in 100%. The pattern is lower in unworthy victim cases. In this category of offences, prosecutors filed the Notice of Intent 72% of the time and victim impact evidence was used in 54% of cases that went to trial. In putatively victim worthy offences, prosecutors filed the Notice of Intent in 83% of the cases and of those that went to trial, victim impact evidence was used 87% of the time.

\(^{746}\) Prosecutors filed 90 out of 92 Notices of Intent in worthy victim cases. One kidnapping and one §844 did not have the NOI.
**Figure 3: The Adjudication Outcomes and Use of Victim Impact Evidence for Each Category of Offence**

<table>
<thead>
<tr>
<th>Victim worthy</th>
<th>Went to trial</th>
<th>No NOI</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Death Resulting from Offences involving</td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Murder with Weapon of Mass Destruction;</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Murder of a Federal Judge or Law</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Murder During a Hostage Taking</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Kidnapping</td>
<td>9</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Interstate Domestic Violence</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Death Resulting from Aggravated Sexual</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Conspiracy to Violate 18 U.S.C.</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Civil Rights Offenses Resulting in Death</td>
<td>1</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Carjacking</td>
<td>19</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>BankRobbery</td>
<td>9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Putatively victim worthy</td>
<td>Witness Killed Before Testimony</td>
<td>7</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Witness Killed After Testifying</td>
<td>1</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Murder for Hire</td>
<td>3</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>First-Degree Murder</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not victim worthy</td>
<td>Murder committed by the use of a firearm</td>
<td>1</td>
<td>6</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>Murder Involved in a Racketeering Offence</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Espionage</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>CCE-Drug Kingpin</td>
<td>14</td>
<td>12</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>Bringing In or Harboring Certain Aliens</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>BOP</td>
<td>9</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Guilty plea</td>
<td>Death Resulting from Offences involving</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Kidnapping</td>
<td>1</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Interstate Domestic Violence</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Civil Rights Offenses Resulting in Death</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Carjacking</td>
<td>6</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>BankRobbery</td>
<td>2</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Putatively victim worthy</td>
<td>Witness Killed Before Testimony</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Witness Killed After Testifying</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Murder for Hire</td>
<td>1</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>First-Degree Murder</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not victim worthy</td>
<td>Murder committed by the use of a firearm</td>
<td>5</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Murder Involved in a Racketeering Offence</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>CCE-Drug Kingpin</td>
<td>12</td>
<td>29</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>BOP</td>
<td>3</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%
If filing the Notice of Intent is of no cost to the prosecution, this data suggests that the prosecutors do not consider it cost-effective to their case strategy. Another consideration could be that it is a premeditated decision by federal prosecutors to not file a Notice of Intent. For example, if jurors hear facts or testimony about the victim that they cannot relate to, they are less likely to perceive the victim’s family’s loss in sympathetic terms, which could lead to a life sentence. For the cases that prosecutors failed to file the Notice of Intent, the case direction is almost equally split between cases that resulted in a plea and cases that went to trial. This suggests that such decisions were not an oversight by prosecutors, but rather an indication that the prosecution is more concerned with a strategy they consider to be most effective in producing a death sentence than with including victim impact testimony.

### 7.1.4 The Categories of Offences, the Use of Victim Impact Evidence, and the Case Outcome

Despite the overall increase of prosecutorial inclusion of victim impact evidence, the data shows that over one-third (36%) of federal death penalty cases do not include this evidence in the sentencing phase of a death penalty trial. If the inclusion of victim impact evidence is of no ‘cost’ to the prosecution, it could be argued that prosecutors would include this legally mandated evidence in every case. As has been shown, however, federal prosecutors do not include this evidence in all cases and the patterns suggest a correlation between this exclusion and the type of offence that is committed.

<table>
<thead>
<tr>
<th>Prosecutors Included Victim Impact Evidence</th>
<th>Life Sentence</th>
<th>Death Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>39</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>83%</td>
<td>17%</td>
<td></td>
</tr>
</tbody>
</table>
Prosecutors included victim impact testimony in a majority of *unworthy victim* cases that went to the penalty phase of a capital trial. Of those 47 cases in which prosecutors included victim impact evidence, juries returned a death verdict eight times (17%). On the other hand, in cases that prosecutors excluded victim impact testimony during the penalty phase of the trial, juries sentenced the defendant to death twelve times (30%). Although the victim impact testimony is only one part of the evidence that prosecutors present to the jury as a reason to sentence the defendant to death, Table 7.3 shows that this evidence does not result in a more favourable rate of death sentences and therefore suggests that the use of victim impact evidence in *unworthy victim* cases may be counterproductive to the prosecution's goal of obtaining a death sentence. From a cost benefit perspective, prosecutors have a disincentive to include victim testimony.

On the other hand, there is a correlation of between cases that do not include this evidence and a higher return of death verdicts. Whether this has to do with the prosecution’s strategy to focus on aggravating circumstances other than the victim’s family, such as the defendant’s criminal record and potential dangerousness; that jurors do not relate to the victim or the victim’s family; or that such outcomes are coincidental, requires closer examination of *worthy victim* case outcomes.
The worthy victim category of cases is striking in comparison to the other two categories of worthiness. First, for reasons unknown to this research, the prosecution elected not to include victim impact testimony in only two cases at the penalty phase of the trial (97%). This action alone strongly indicates prosecutors’ awareness of the value that the victim and the victims’ family can have on the juries’ sentencing decisions. Of the 59 cases that prosecutors included victim impact evidence, juries sentenced the defendants to death 57% of the time. This was the highest percentage of all case outcome possibilities in worthy victim cases.

The argument made by sentencing and victim advocates is that prosecutors should include victim impact testimony in all cases. Part of this perspective is that the advocates believe that greater victim participation will provide additional influence on the sentencing outcomes. This may be where the practical and ideological agendas of the two parties are in tension. Federal prosecutors may understand capital case strategies better than victim advocates as the data suggests that cases in which the victim is sympathetic (high social status) that the inclusion of victim impact statements increase the likelihood of a death sentence. Contrary to the notion that
increased exposure to victim impact evidence will produce more death sentences, as Table 7.4 shows, in *unworthy victim* offences, the exclusion of victim impact statements results in a slightly higher rate of death sentences (13% increase). If the perceived level of victim worthiness influences the juries’ sentencing verdicts, strategically it makes sense to include or exclude victims’ family participation based on the type of crime committed if the objective is to get the jury to sentence a defendant to death.

### 7.2 Individual Offences that Went to a Federal Capital Trial

As this research examined cases that resulted in a plea agreement, the following section analyses each individual offence in relation to prosecutors’ use of victim impact evidence in cases that went to trial.

#### 7.2.1 Continuing Criminal Enterprise

CCE offences are the drug trafficking offences that are called drug kingpin offences, as they involve a higher degree of money, narcotics, and federal violations that often result in murder. Unlike §924, which is also a drug trafficking offence, but on a much smaller (typically a neighbourhood or community), CCE cases involve a major drug enterprise network.

As was discussed in the last chapter, the rise in use of victim impact evidence could be an indication of the agenda rising from America’s proclaimed ‘war on drugs’ or of prosecutors’ decisions that once a case goes to trial, they are more willing to include a variety of evidence with the expectation that the victims’ testimony will reach a portion of the jurors. Yet as Sundby noted in his study, jurors perceive people involved in illegal activities such as drugs and violence as non-random, risk-taking victims and therefore less sympathetically than victims of other crimes.\(^{47}\) Following this, his research found a correlation between life sentences and defendants in drug-related crimes.

Prosecutors included victim impact evidence in CCE cases 47% of the time. Although the hypothesis for this research is that the type of offence committed in a capital crime influences federal prosecutors’ valuation and inclusion of victim impact evidence, the premise for this theory is that victim impact evidence will not be used if prosecutors do not believe it will not assist in their pursuit of the death penalty. When federal prosecutors included victim impact evidence in the penalty phase of the trial of CCE cases, jurors overwhelmingly returned a life sentence for the defendant. Comparatively, when impact testimony was excluded as evidence, only one defendant was sentenced to death. This data shows that there is a low correlation between victim impact evidence and the death sentence in CCE crimes, which suggests that jurors do not consider the victims’ deaths as a most grievous loss in comparison to other murders. Again, this data supports Phillips’s victim social status theory and Sundby’s hypothesis regarding victim behaviour as it relates to the facts of the crime. Although the data in Table 7.5 shows that jurors sentence the defendant to death at a slightly higher rate when prosecutors excluded victim impact testimony, the reason that the gap is not more significant could be related to the fact

---

748 In United States v. Stitt, prosecutors did not file victim impact as a non-statutory aggravator but included this testimony at trial. See supra ft. 588, 673.

749 The nine defendants were acquitted of the capital charges but not other charges.

750 This figure does not include the nine defendants who were acquitted, as they never went to the penalty phase of a capital trial.
that jurors may consider victims accused of being involved in criminal activity as non-random victims, victims killed during ‘business’, or as low-status.\textsuperscript{751}

Several issues arise from the CCE cases that went to trial. First, although prosecutors used victim impact evidence in less than half of the cases, it is higher than what this thesis expected. Comparatively, as prosecutors only used victim impact evidence in one of the twelve cases that resulted in a plea, this is a marked increase in prosecutorial engagement of the surviving victims’ family members.

The second observation also relates to prosecutors’ perceptions of victims in CCE cases. In nearly one-fourth of all of the CCE cases, prosecutors excluded victim impact as a non-statutory aggravator in the Notice of Intent: 12 cases that resulted in a plea agreement and 14 cases that went to trial. Before the case was authorised death eligible, prosecutors forfeited the right to include victim impact evidence in the legal proceedings against the accused. A majority of the Notices of Intent that were not filed came directly after the \textit{Payne} ruling, when the potential for this powerful evidence was not fully recognised by federal capital prosecutors. Yet with the politics of the increasing victims’ rights and the expansion of the federal death penalty, prosecutors began to more regularly to include victim impact as a non-statutory aggravator in the Notice of Intent.

The analysis shows another pattern regarding the Notice of Intent that may correlate with the political pressure surrounding victims’ participatory rights and the US Attorneys’ Offices. Beginning in 2004, federal prosecutors have included victim impact evidence as part of the Notice of Intent in every CCE case. At first glance it appears that federal prosecutors recognised the victims’ right to participate in the legal proceedings against the accused. Yet, of the adjudicated cases after 2004, the rate of inclusion by prosecutors shows a conflicting pattern rather than broader inclusion of the victims’ rights to participate at the sentencing hearing.

\textsuperscript{751} Phillips, \textit{Status Disparities} 808, 830; Sundby, \textit{Problem of Unworthy Victims} 364-5.
7.2.2 Murder Committed During a Crime of Violence or Drug-Trafficking

Table 7.6 The Inclusion of Victim Impact Evidence in Murder Committed During a Crime of Violence or Drug-Trafficking Cases that Went to Trial

<table>
<thead>
<tr>
<th>VIE USED</th>
<th>DP</th>
<th>LS</th>
<th>#</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Yes NOI, Used VIE at Trial</td>
<td>1</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>Yes NOI, Did Not Use VIE at Trial</td>
<td>2</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>3</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>3</td>
<td>21</td>
<td>24</td>
</tr>
</tbody>
</table>

Compared with CCE offences, which included victim impact testimony 47%, prosecutors’ more frequent use of victim impact evidence in §924 cases suggest that
prosecutors might have considered the speculation that violence affecting the local community would have greater influence with a jury than the unknown entity of a drug kingpin. However, it is possible that the inclusion of victim impact testimony in both CCE and §924 cases helped produce life verdicts rather than death sentences. In the cases that the prosecution excluded victim testimony from the penalty phase of the trial, thereby focusing on the dangerousness of the defendant rather than the harm caused to a victim’s family, there was a higher return of death verdicts. Despite the personal element that §924 cases may bring to court, with “risk-taking/anti-social”\textsuperscript{752} individuals, juries sentenced §924 defendants to life without the possibility of release 86% of the time.

For §924 crimes of drugs or violence, federal prosecutors included victim impact evidence 67% of the time in the cases that responded to the questionnaire. Although victim impact testimony is only one aspect of aggravating factors that prosecutors present as evidence, prosecutors utilised this evidence more often in §924 cases than other unworthy victim offences. Prosecutorial inclusion of victim impact statements does not appear to assist their efforts to obtain death sentences (7%) for the defendants when compared to cases in which prosecutors excluded victim testimony. In cases that prosecutors excluded this evidence, jurors sentenced defendants to death 28% of the time.

7.2.3 Carjacking

| TABLE 7.7 THE INCLUSION OF VICTIM IMPACT EVIDENCE IN CARJACKING CASES THAT WENT TO TRIAL |
|---------------------------------|----|---|---|
| VIE USED                       | DP | LS | #  |
| No Notice of Intent (NOI)      |    | 0  |    |
| Yes NOI, Used VIE at Trial     | 15 | 4  | 19 |
| Yes NOI, Did Not Use VIE at Trial |    |    |    |
| Did Not Remember/Respond       |    | 0  |    |
| Total                          | 15 | 4  | 19 |

\textsuperscript{752} Sundby, Problem of Unworthy Victims 357.
In carjacking cases that went to trial, prosecutors used victim impact evidence in every case. The high number of cases that went to trial (62%) and total inclusion of victim testimony strongly suggest that prosecutors consider victims of carjacking offences of worthy victim stature. In 79% of the cases that went to trial, the defendant was sentenced to death. Unlike CCE and §924 cases, victim impact testimony in carjacking cases showed a strong correlation between its use and the death penalty.

The examples in Chapter Four of the two cases that resulted in a plea agreement show how significant victims’ families are to prosecutors in carjacking cases. Prosecutors were adamant about going to trial in the two cases until the families specifically presented their opposition to the legal proceedings. As one family hired their own attorney to represent their legal interests to the prosecutors, it captures the powerful capacity that families of worthy victim offences hold. On the one hand, the prosecutors are likely to have believed that both of those cases could result in a death sentence given the character of the two deceased victims in the different crimes. On the other hand, it seems likely that the prosecutors determined that having the victims’ families either in conflict with them or not present for the court proceedings, would not help their pursuit for the death penalty.

### 7.2.4 Murder by a Federal Prisoner

**Table 7.8 The Inclusion of Victim Impact Evidence in Prison Inmate Murder Cases That Went to Trial**

<table>
<thead>
<tr>
<th>VIE Used</th>
<th>Lesser Conviction</th>
<th>DP</th>
<th>LS</th>
<th>#</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td></td>
<td>3</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>Yes NOI, Used VIE at Trial</td>
<td></td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Yes NOI, Did Not Use VIE at Trial</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td></td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>1</td>
<td>7</td>
<td>8</td>
</tr>
</tbody>
</table>

205
Bureau of Prison inmate murder cases used victim impact evidence in 25% of the cases. This is the lowest inclusion of victim impact evidence of all *unworthy victim* offences. If prosecutors’ decision to exclude victim testimony was intentional with the aim of obtaining the death penalty, their decision was accurate: 71% of the defendants sentenced to death when victim impact evidence was not included as part of prosecutors’ evidence. The lack of participation by the victims’ family supports the earlier suggestion that prosecutors regarded this offence more as a concern for possible future dangerousness within the prison setting than the harm this crime has brought to the victims’ families. Likewise, jurors would be more likely to be swayed by the argument of future dangerousness over pity for the family. Regarding the categories of *unworthy victim* crimes, jurors agreed with prosecutors’ justification for the death penalty in prison inmate murders more than any other federal offence as jurors sentenced defendants to death in 44% of these cases. Despite the fact that many of the findings in this category of crime support my hypothesis, the majority of case verdicts resulted in a life sentence for the accused.\(^{753}\) In this regard, the number of life sentence verdicts corresponds with Sundby’s assessment that when jurors consider a victim as being a non-random risk-taker, they are likely to view the victim’s death unsympathetically.\(^{754}\)

As with CCE and §924 crimes, an overarching question regarding the inclusion of victim impact evidence is whether the CVRA increased victim participation in *unworthy victim* crimes. Unlike the CCE category of offences, whose pending trials all indicated victim impact as a non-statutory aggravator, the BOP table includes cases that are still pending trial because federal prosecutors forfeited the right to include victim impact testimony during the authorisation process. Therefore, for the purpose of this table, those cases can be included without having gone to trial (or settled with a plea agreement) to know the outcome of prosecutors’ exclusion of this testimony.

---

\(^{753}\) This total also includes the one case that the defendant had a lesser conviction. This case may have also resulted in a life sentence.

\(^{754}\) Sundby, *Problem of Unworthy Victims* 357.
Unlike their perfunctory submissions to include victim impact as a non-statutory aggravator in the Notice of Intent after the CVRA, prosecutors continue to deny victims’ families the opportunity to address the court during the legal proceedings in prison inmate killing cases. Since 2004, prosecutors have only requested the right to use victim impact evidence in 16.7% of the prison inmate murder cases.

7.2.5 Bank Robbery

TABLE 7.9 THE INCLUSION OF VICTIM IMPACT EVIDENCE IN BANK ROBBERY CASES THAT WENT TO TRIAL

<table>
<thead>
<tr>
<th>VIE USED</th>
<th>DP</th>
<th>LS</th>
<th>#</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Yes NOI, Used VIE at Trial</td>
<td>6</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Yes NOI, Did Not Use VIE at Trial</td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>6</td>
<td>6</td>
<td>12</td>
</tr>
</tbody>
</table>

Prosecutors included victim impact evidence in every bank robbery case that responded to the questionnaire. Of those cases, the jury returned a death sentence verdict 66% of the time. The results, which are strikingly similar to carjacking, suggest that prosecutors understand the strong correlation between jurors’ identification with victims of worthy victim crimes and the death sentence.

7.2.6 Kidnapping

TABLE 7.10 THE INCLUSION OF VICTIM IMPACT EVIDENCE IN KIDNAPPING CASES THAT WENT TO TRIAL

<table>
<thead>
<tr>
<th>VIE USED</th>
<th>DP</th>
<th>LS</th>
<th>#</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Yes NOI, Used VIE at Trial</td>
<td>6</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Yes NOI, Did Not Use VIE at Trial</td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>
Kidnapping cases followed a nearly identical pattern to bank robbery offences. Prosecutors included victim impact evidence in every case that responded to the questionnaire. Also, the defendants convicted of kidnapping were sentenced to death in 63% of the cases.

As the majority of worthy victim cases that went to trial ends here in the data tables, it is noted that in every single worthy victim case that went to trial prosecutors had ensured that the Notice of Intent to include victim impact evidence was filed. In addition, of the entire category of worthy victim cases that went to trial, only two cases did not use it: one case in this category (§844) and one civil rights offence that resulted in death. This is unlike the unworthy victim category of offences, which saw an increase in the notification process after the CVRA but continued to have mixed results of prosecutors including this evidence at the both the plea-sentencing hearing and the penalty phase of a capital trial.

### 7.2.7 Murder for Hire

<table>
<thead>
<tr>
<th>VIE USED</th>
<th>DP</th>
<th>LS</th>
<th>#</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Yes NOI, Used VIE at Trial</td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Yes NOI, Did Not Use VIE at Trial</td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>0</td>
<td>9</td>
<td>9</td>
</tr>
</tbody>
</table>

The murder for hire cases included victim impact testimony in three of the nine cases, with no cases in this type of offence resulting in a death sentence. Ironically,
in the cases that went to trial, prosecutors included victim impact evidence nearly 50% less than at the hearings of cases that resulted a plea agreement.

This is the only type of offence in which prosecutors decreased their use of victim impact evidence. Because of this, speculation increases regarding the circumstances of the individual cases tried. With *putatively worthy victim* crimes, the offences are much more individualised than the other two categories, making the inclusion or exclusion of victim impact evidence in offences such as murder for hire almost as legally peculiar as the crime.

### 7.2.8 First-Degree Murder

**TABLE 7.12 THE INCLUSION OF VICTIM IMPACT EVIDENCE IN FIRST-DEGREE MURDER CASES THAT WENT TO TRIAL**

<table>
<thead>
<tr>
<th>VIE Used</th>
<th>Lesser Conviction</th>
<th>DP</th>
<th>LS</th>
<th>#</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td></td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Yes NOI, Used VIE at Trial</td>
<td></td>
<td>3</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Yes NOI, Did Not Use VIE at Trial</td>
<td></td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td></td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>1</td>
<td>5</td>
<td>5</td>
<td>11</td>
</tr>
</tbody>
</table>

First-degree murder cases had the highest percentage of prosecutorial inclusion of victim impact evidence in *putatively worthy victim* offences. With 86% of the cases including victim testimony, 43% of the cases resulted in a death sentence. All of the death sentences in this category of crime included victim impact evidence.

As a *putatively worthy victim* offence with the highest inclusion of victim participation and death sentences, the inclusion of victim testimony proved beneficial to the prosecutions’ efforts to obtain the death penalty in nearly half the cases.
7.2.9 Murder with the Intent of Preventing Testimony by a Witness, Victim, or Informant

Table 7.13 The Inclusion of Victim Impact Evidence in the Murder of Pre-Trial Witness Cases That Went to Trial

<table>
<thead>
<tr>
<th>VIE Used</th>
<th>Acquitted</th>
<th>DP</th>
<th>LS</th>
<th>#</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes NOI, Used VIE at Trial</td>
<td></td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Yes NOI, Did Not Use VIE at Trial</td>
<td>1</td>
<td>6</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>1</td>
<td>0</td>
<td>7</td>
<td>8</td>
</tr>
</tbody>
</table>

All but one of the pre-trial witness murder cases went to trial. Despite the fact that eight cases went to trial, only one included victim impact evidence and none of the cases resulted in the death penalty. Additionally, one defendant was acquitted. As was discussed in Chapter Four, the victims who were murdered had agreed to testify for the prosecution were likely to be people involved in criminal behaviour and had agreed to testify against another defendant as a means of avoiding charges or in exchange for a reduction in charges. Because of this, the time and cost analysis likely did not warrant the effort for prosecutors to include this testimony as evidenced by the data.

7.2.10 Retaliating Against a Witness, Victim, or an Informant

Table 7.14 The Inclusion of Victim Impact Evidence in the Murder of Post-Trial Witness Cases that Went to Trial

<table>
<thead>
<tr>
<th>VIE Used</th>
<th>Lesser Conviction</th>
<th>Acquitted</th>
<th>DP</th>
<th>LS</th>
<th>#</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Notice of Intent (NOI)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes NOI, Used VIE at Trial</td>
<td></td>
<td></td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Yes NOI, Did Not Use VIE at Trial</td>
<td>1</td>
<td>3</td>
<td></td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>Did Not Remember/Respond</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>1</td>
<td>3</td>
<td>0</td>
<td>4</td>
<td>8</td>
</tr>
</tbody>
</table>
Prosecutors included victim impact evidence 37% of the time in cases of retaliation against a witness who testified at trial. All of the cases that resulted in a capital conviction were given life sentences.

This research’s speculation that this putatively worthy victim crime might have created more of a sense of ‘duty’ for prosecutors toward the victims has some merit when compared to the inclusion of victim impact testimony in pre-trial witness victims. Yet, from a cost and time analysis perspective, the use of victim impact testimony did not produce results different to that of the pre-trial witness cases that did not include victim impact evidence.

7.2.11 Other Offences

The following categories of offences are grouped together due to the small number of cases in each offence. There is no connection between the types of crimes other than they were all adjudicated as federal capital cases. Cases that went to trial are in the table and discussed separately below.755

**Table 7.15 The Inclusion of Victim Impact Evidence in Additional Capital Cases that Went to the Penalty Phase of a Federal Capital Trial**

<table>
<thead>
<tr>
<th>Crime Type</th>
<th>USE of VIE in Cases that Went to the Penalty Phase of a Trial</th>
<th>Case Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bringing in or Harboring Certain Aliens</td>
<td>No NOI Yes, Used VIE No, Did not Use VIE</td>
<td>1 LS</td>
</tr>
<tr>
<td>Civil Rights Offences Resulting in Death757</td>
<td></td>
<td>3 LS 1 DP</td>
</tr>
<tr>
<td>Conspiracy to Violate 18 U.S.C.758</td>
<td></td>
<td>1 LS</td>
</tr>
<tr>
<td>Death Resulting from Aggravated Sexual Abuse</td>
<td></td>
<td>2 DP</td>
</tr>
</tbody>
</table>

755 Several cases from this category resulted in a plea agreement and are described in Chapter Six.
756 For the categorization of each crime, refer to Table 5.1, pages 140-1.
757 This statute was described in Chapter Six.
758 This statute, although listed separately, is similar to the Civil Rights Offences Resulting in Death, both in content and location in the United States Code book.
<table>
<thead>
<tr>
<th>Espionage</th>
<th>1 LS</th>
<th>1 LS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interstate Domestic Violence&lt;sup&gt;759&lt;/sup&gt;</td>
<td>3</td>
<td>3 LS</td>
</tr>
<tr>
<td>Murder during Hostage Taking</td>
<td>3</td>
<td>2 DP</td>
</tr>
<tr>
<td>Murder Involved in a Racketeering Offence&lt;sup&gt;760&lt;/sup&gt;</td>
<td>1</td>
<td>1 LS</td>
</tr>
<tr>
<td>Murder of a Court Officer or Juror</td>
<td>(DR)</td>
<td>1 DP</td>
</tr>
<tr>
<td>Murder of Federal Judge/Law Enforcement Officer</td>
<td>3</td>
<td>1 DP</td>
</tr>
<tr>
<td>Murder of Local Law Officer/Person Aiding in Federal Investigation</td>
<td>(DR)</td>
<td>1 LS</td>
</tr>
<tr>
<td>Murder with a Weapon of Mass Destruction</td>
<td>5</td>
<td>1 DP</td>
</tr>
<tr>
<td>Total</td>
<td>2(DR)&lt;sup&gt;761&lt;/sup&gt;</td>
<td>22</td>
</tr>
</tbody>
</table>

### 7.2.12 Other Observations from the Data Analysis

Three categories of cases that got minimal attention in this research are cases in which the authorisation was withdrawn and cases in which the defendant was acquitted or convicted of a lesser charge in a capital case. As the focus of this research was on the use of victim impact evidence, the cases in these categories ultimately did not have information relevant to this study. Yet, concerning the influence that victim participation can have in capital cases, it is worth noting this information.

Whether coincidental or not, none of the acquittals or cases in which the defendants were convicted of a lesser charge occurred in *worthy victim* cases.

For cases in which federal prosecutors withdrew their intention (authorisation) to seek the death penalty against the accused, defence counsel often wrote in the questionnaire that the reason that this occurred was that the accused’s co-defendants who were considered more culpable went to trial first and received a life sentence. It is not clear whether these cases moved forward as a non-capital trial or if prosecutors...

---

<sup>759</sup> This statute was described in Chapter Six.

<sup>760</sup> This statute was described in Chapter Six.

<sup>761</sup> Two cases did not respond (DR) in Table 7.15
offered the defendants a plea agreement. In either circumstance, the victims’ families would have had the right to give a victim impact statement during the official sentencing proceedings. It is unclear to what degree the prosecution included such testimony in these cases. This would also be true for cases in which the judge dismissed the death charges but were still adjudicated.

Three additional capital cases went to trial but the jury convicted the defendants of ‘lesser-included’ offences. This means that defendants went to trial facing the death penalty, but were found not guilty of certain elements necessary to make the case eligible for the death penalty. As part of the authorisation process, prosecutors indicated their intention to include victim impact evidence in these cases as well. Although there is no longer the distinct penalty phase as in capital cases, victims are still allowed to give testimony at the defendant’s sentencing before a judge. Despite this, of the three cases that responded, only one included the victims’ families’ impact statements.762 This pattern provisionally fits with this thesis’s hypothesis that the type of offence indicates the inclusion of victim testimony: the case that included victim impact testimony involved a witness killing of a childhood friend763 and the other two cases were prison inmate murders.

7.3 Conclusion

The data presented here suggests that prosecutors consider the merits of including victim impact evidence based on the type of offence committed. In the last two chapters, the research has examined: federal prosecutors’ patterns of use of victim impact evidence by type of offence; based on the categories of victim worthiness created for this research; in the cases prior to the Crime Victims’ Rights Act and after the legislation; in cases that resulted in a plea agreement compared to cases that went to the penalty phase of a trial; and examined the correlation between the category of worthiness, the use of the victim impact evidence, and the case outcome. With each test, the data verified that federal prosecutors use victim impact evidence in worthy victim cases more frequently than in unworthy victim offences or putatively worthy

762 See Appendix D.
763 Notes on file with author. (email from defence counsel, October 18, 2010)
victim crimes. Of the 50 post-CVRA federal capital cases that went to the penalty phase of a trial, ten did not include victim impact evidence. Of those ten cases, none of them were labelled victim worthy.

Federal prosecutors included victim impact evidence 81% of the time in worthy victim cases, 36% of the time in unworthy victim offences, and in 42% of putatively worthy victim cases. Federal prosecutors achieved death verdicts 56% of the time in worthy victim offences when victim impact evidence was introduced at the penalty phase of a capital trial. In fact, when prosecutors include victim impact evidence in unworthy and putatively worthy victim cases, there is a higher return of life sentences. The low percentages of prosecutorial use of victim impact evidence may occur due to prosecutors’ judgment that they are more likely to obtain a death sentence without the use of victim impact evidence.

The research conducted for this thesis supports Sundby’s and Phillips’ findings that there is a correlation between victims’ social status and death verdicts in capital cases. This research emphasises that the type of offence committed is a good indicator for whether the victims’ families will be asked to provide victim impact testimony. As Phillips’ empirical research found, capital punishment is influenced by victims’ overall social status.764 Phillips also articulated, “The concept of arbitrariness suggests that the legal facts of a capital case cannot fully explain the outcome: Social facts also shape the ultimate state sanction.”765 The data for this research shows that prosecutors selectively excluded victim impact evidence in 64% of federal capital cases labelled unworthy.

Selectivity is not arbitrary unless there is something legally irrelevant about the basis of the selection.766 Federal prosecutors use of victim impact evidence in capital cases produces arbitrary death sentences on several points. First, victims’ families should not be judged differently than other families due to the deceased victims’ actions. All families have suffered a grievous loss. Yet this thesis argues that this ‘loss’ in

765 Id. at 833.
*unworthy victim* crimes is apparently assessed as less valuable than other murders because of the deceased’s known risk of actions. Prosecutors have the right to argue aggravating factors against the accused, but should not have the right to exclude the testimony of victims’ families because they do not believe such evidence will assist their pursuit of the death penalty. The purpose of the sentencing phase of a capital trial is to allow jurors to consider aggravating and mitigating factors in determining the sentence. Prosecutors’ exclusion of certain victims’ families’ impact testimony based on their evaluation of strategic factors arguably usurps the function of the jury. Such decisions, based on opinion rather than evidence are susceptible to personal prejudice in a manner that can fairly be described as arbitrary.
8 Conclusion

The research conducted for this thesis demonstrates what victims’ rights proponents have said: the victim matters. Unfortunately, the data produced for this thesis suggests that the way the victim matters is far from what proponents hope. Rather, the data collected for this research tells a story of bias against victims’ families whose loved one was killed as a result of the victim’s actions related to the crime, suggesting that prosecutors use victim impact evidence based on the type of crime that resulted in the victim’s death. When prosecutors included victim impact evidence in *unworthy victim* cases during the sentencing phase of the trial, jurors sentenced a defendant to death 17% of the time. However, when prosecutors excluded victim impact evidence in *unworthy victim* cases, jurors returned death verdicts 30% of the time, nearly double in comparison. The data suggests that inclusion of victim testimony in *unworthy victim* cases reduces the likelihood of obtaining a death sentence. As Sundby observed, in the case of “an innocent victim,” jurors sentenced the defendant to death, but with “lowlife[]” victims, jurors more often sentenced such individuals to life.\(^767\) It appears that an ‘unworthy’ victim's family’s suffering is less valued in society’s eyes and prosecutors therefore follow suit. Patterns of excluding victim impact evidence in cases involving *unworthy victim* crimes could potentially produce arbitrary—and thereby unconstitutional—sentences for federal capital defendants. Moreover, despite the political rhetoric, such patterns result in the arbitrary, disrespectful, and manipulative treatment of crime victims.

Despite the *Payne* Court’s assurances that victim impact evidence can coexist with due process protections, the patterns of prosecutorial inclusion and exclusion of victim impact evidence in federal capital cases prove otherwise. In fact, as victim impact evidence was used in 97% of *worthy victim* cases and 50% of *unworthy victim* cases, the *Booth* Court’s concern of comparative worth between victims stands as correct.\(^768\) As stated earlier, defence counsel often do not question when or why victim impact evidence is not used – they are grateful not to have this evidence in their case. But what defence counsel miss by not inquiring further into prosecutorial

\(^768\) *Booth* 482 U.S. at 506 ft 8.
discretionary patterns is how this omission can have significant negative repercussions for their clients.

Politicians have tinkered with criminal justice policies for so many decades that it is difficult to discern whether legislation or policy is for political show, political ideology, or genuine consideration for the respective parties in the criminal justice system. Many former legislative crime control decisions recently have been altered, abandoned, or are currently under consideration for ratification. With politicians re-examining tough on crime policies that began with President Reagan, this thesis argues that until Congress or the courts can ensure that victim impact evidence is more than a strategic sentencing tool for either legal team, it should be abolished from criminal sentencing proceedings.

The interjection of victims’ rights proponents into criminal proceedings has forced a debate over defendants’ versus victims’ rights. This antagonism, and the dispute between victims’ rights proponents and prosecutors over a victim’s party standing, distract the traditional legal parties from the very real issues they confront in capital cases. Victim advocates counter that prosecutors’ uneven inclusion of victim participation is further proof that a constitutional amendment is necessary to ensure the even application of victims’ participatory rights. Yet, the fundamental question of what role crime victims want and should play cannot be answered until victims’ rights are extracted from retaliatory penal policies directed at the defendant and created ‘in the name of the victim.’ Such politically and ideologically driven challenges to the broader criminal justice system, and to prosecutors in particular, prevent critical analysis of prosecutorial discretion as it relates to prosecutors’ case strategy, office policy toward victims’ participatory rights, and patterns of victim impact inclusion. The empirical research findings presented in this thesis cast doubt

769 The United States Sentencing Commission voted to overturn decades-old federal legislation requiring drug-related offenders to complete their entire prison terms as a part of the ‘truth in sentencing’ crime control movement. The USSC agreed that prisoners did not need to spend decades in prison for non-violent drug-related offences.

upon the influence of and the purpose for the political rhetoric regarding victims’ participatory rights that has driven many of the criminal justice policies in America.

This thesis recommends that an Executive Order be issued to create a nonpartisan Task Force on Victims of Crime that includes crime victims, judges, prosecutors, defence attorneys, legal academics, mental health and trauma experts, and community members to examine the legislative policies and prosecutorial practice regarding victim impact evidence as well as victims’ broader participatory rights. The Task Force should be assigned the responsibility to create a national standard, so that victim input benefits all crime victims and identifies ways in which victims’ needs arising from the crime can be better identified and addressed in the absence of penal politics and uneven prosecutorial discretion.

The pursuit for victim standing in all criminal proceedings raises three important issues. First, why is it assumed that the most important judicial need of crime victims is related to the defendant’s sentence? Second, why do victims’ rights proponents adopt a zero-sum game approach that presupposes that in order to increase victims’ rights, the government must minimise defendants’ rights? Lastly, why does the foundational support for victims’ participatory rights come from victim’s rights proponents, and not prosecutors? These questions identify future research into why proponents are adamant to set victims’ rights against defendants’ rights. Throughout this research, I questioned my bias and reactions, and looked for areas of agreement with victims’ rights proponents. Whilst we do agree about how to provide victims with better care within the criminal justice system, the differences in our worldviews are striking. My interest in working with victims deeply affected by the horrific murder of a loved one is to try to address as many of their needs as possible within the criminal justice system. From what I understand, victims’ rights proponents emphasise ensuring victims’ voices throughout the criminal proceedings. In my view, those of us who stand for victims’ rights, should focus our advocacy less on ensuring victims’ participatory rights in the sentencing of the accused and more on how the defendant and the criminal justice system can address the victims’ needs, concerns, and questions that arise from the crime. When victims’ rights proponents
emphasise passage of the Victims’ Rights Amendment to ensure victims the right to be heard during sentencing proceedings, it calls into question whether the proponents are more interested in influencing retributive penal policies than in addressing victims’ needs within the criminal justice system.

The question remains: should victim impact statements be allowed? The victim’s voice is clearly one that the court and society needs to be more empathic toward and hear. But, as it stands, the voices we hear are selective. Victims are denied access or opportunity if they disagree with the prosecutor’s position. This circumstance is clearly demonstrated in the *Montour* case, when the prosecutor opposed the Autobee family’s participation at trial despite the family’s previous decade of support for the prosecution.⁷⁷¹ All victims should have the clear opportunity to present victim impact testimony. If this standard cannot be assured without selectivity or bias, then all victim impact statements should be excluded.

This raises an additional question of whether victim impact statements should be allowed specifically as part of the sentencing. At this time, I do not support such statements being permitted at a part of a defendant’s sentencing. Whichever legal team introduces such testimony, and overwhelmingly it is the prosecution, attorneys attempt to control the victim’s narrative for their purposes. Attorneys ‘prepare’ victims for testimony and at trial guide the testimony with questions rather than family members freely sharing. Victim’s statements are edited by and for the legal team as the victim’s tacit support for the attorneys’ sentencing position. Yet, eliminating victim impact testimony is a bit of a sticky wicket. As the sentencing hearing is the only place in which victims are able to participate in the proceedings, denying victims the opportunity to have their story memorialised might be experienced as another injustice. The US should examine the UK’s decision to remove the victim personal statement (VPS) as part of the sentencing. The VPS scheme allows for victims to share their stories with the court after the sentencing, not as a part of the sentencing proceedings. This structure provides greater opportunity for victims to speak with an authentic voice, not that of the legal team,

⁷⁷¹ See: p. 66
and share with the court what is most important to them. Otherwise, victims will continue to be used as pawns for the legal teams or crime control advocates who seek to use victims’ voices to further a crime control position.

If courts ask surviving family members why giving victim impact evidence is important, judges would likely learn families want the opportunity to speak about their loved one, plain and simple. Family members want their loved one to be memorialised the way they recall their child, sibling, parent; not as the court identifies them as a murder victim with the horrific facts linked to their final moments. I have yet to meet a victim’s surviving family member who would pass up a chance, regardless of what legal team provides the opportunity, to talk in court or to anyone related to the case about their loved one. Yet, whilst initial appearances may appear to be about the defendant, the reasons are often that families are trying to make sense of a senseless of the crime and to find meaning in their lives without their beloved.

The empirical research conducted for this thesis provides both academic and practical research opportunities. As my interest continues bridging how both scholars and practitioners can assist and inform better laws and practice, it is natural to consider ways to further the research collaboratively. One such possibility is a listening project with jurors who recently served in capital cases. As human recall can change as we forget, change our minds, or remember things differently than they were, it would be important to learn from experienced researchers about the best timeframe of when to conduct such interviews. The stories and information shared may provide a window into human behaviour, connection, and judgment.

Whilst victimologist researchers have analysed the role victim characteristics play in juror reception to victim impact evidence, most studies have used mock jurors with varying methods of impact evidence. Examination of juror perception and appraisal of victim impact evidence in capital cases could potentially have lasting effects on its use in legal proceedings. If a capital juror interview project similar to Sundby’s research were conducted, the findings might have greater merit with courts.
The census data can be expanded through an update that includes completed cases since 2007 to maintain an accurate assessment of federal prosecutors’ use of victim impact evidence. After conducting this research, I would obtain transcripts of the sentencing hearings to verify and review prosecutors’ use of victim impact evidence. Because court transcripts are impartial and accurate, there is less concern with defence attorney recall. As mentioned in Chapter Five, that form of research may be cost prohibitive, but because the GAO audits all US Attorneys’ cases, it may be helpful in facilitating access to court transcripts. If such transcripts were available, verifying the truth-value of the data presented in this census would further strengthen the research.

Moreover, if the database were to continue, it may be worth considering whether to include victim characteristics into the data. This would change the format from the simple univariate to multivariate, but having other researchers examine the research questions and methods again would strengthen the data. Including victim characteristics in the data could allow for cross-comparison with data about prosecutorial inclusion of victim impact evidence. For example, in carjacking cases that went to trial, prosecutors included victim impact evidence 100 per cent of the time. Fifteen defendants were sentenced to death and four defendants were sentenced to life. Researchers and legal officials examining sentencing disparities may want to investigate further the racial, gender, and social status of each victim. If case data were accessed through court records and research methods remain quantitative, this argument’s objectivity would be enhanced. The data should be available to all legal professionals and researchers to strengthen victim involvement in criminal proceedings in an apolitical, impartial, and universal manner.

The Federal Judicial Center772 (FJC) should be considered as a potential collaborator and funding source for future research regarding victim impact evidence in criminal proceedings. Judges have consistent and frequent contact with crime victims and although they are to remain neutral in criminal proceedings, no doubt judges have

772 The Federal Judicial Center is the education and research structure for the US federal courts.
opinions about including victim impact evidence. In a setting outside of the court and a trial, judges may be more forthcoming with ideas about how to incorporate judicial concerns. Judges have a legitimate concern regarding the inclusion of victim impact testimony in cases tried in their courts, as this evidence is frequently challenged, brought up as an appellate issue, and may be a reason for higher courts to strike a defendant’s death sentence and order a new sentencing hearing. Also, as judges have been most resistant to any form of social science data – qualitative or quantitative – submitted as case evidence, working alongside FJC may provide the legal community with a better understanding of the judiciary’s concerns, promote greater recognition for data amongst judges, and acknowledge how legal practice can benefit from empirical research.

Another important step is to assess how to integrate my research into my legal practice. It is clear that attorneys do not value research as much as I believe they should. When I announced my plans to return to school, my colleagues expressed disappointment, concern, or bewilderment. There is a pervasive attitude that to do good work, one must stay in the trenches and fight. Whilst I greatly admire my colleagues for their tireless work, I also know that such perspectives are not personally sustaining and do not offer reflective practice. If more attorneys included research and reflection in their practice, I believe that law could be simultaneously more detached from the outcomes and more humane towards victims, defendants, and legal counsel. This thesis offers clear proof, however, of how difficult it is to combine legal practice and research. Capital cases are demanding commitments for attorneys on both sides of a case that are difficult to understand or appreciate from a distance. At various points, especially leading up to and during trial, there is little ability to have a balanced workday (or life). The responsibilities, risks, and preparation involved are taxing and time-consuming, leaving little room for a balanced workday (or life), much less time for empirical research.

This is not to say that practitioners cannot or should not pursue research. In fact, I believe that practitioners would provide a perspective that observers may lack. Years

ago, I read an article written by a politician who was sent to prison for tax fraud. He wrote that being in prison taught him so much about the law and how wrong legislators were in many of their criminal justice acts. As a legislator, he believed the laws being passed were good for society and the offender. Whilst in prison, he was confronted with how ill-informed legislators were and the negative consequences prisoners faced because legislators often did not want to ‘hear from the other side.’

Research should play a greater role in American law. For many of the reasons discussed in this thesis, scholars have the expertise and willingness to commit time that analysis requires. Because attorneys are under court deadlines, their view of research is slightly skewed in comparison to the amount of consideration and analysis scholars are able to give a research subject. Writing a legal brief that is often based on another from a previous case and getting it to the judge is not the same as researching an academic argument that requires three hours to ascertain whether someone else has already made that one argument. It is my hope that practicing attorneys might find ways to join and lend their expertise to the important scholarly efforts that currently lack their input. As I learned in writing this thesis, simply thinking about an issue can take an enormous amount of time, effort, and commitment.

The research conducted for this thesis may be an example of the gap between academics and lawyers. It is possible that some scholars may not see the census of federal capital cases as significant because these cases are a smaller population of capital cases in America. But for lawyers, this research data is significant because federal cases tend be have greater legal significance. Moreover, this data is a census, not a sample, through 2007, which may bolster its credibility in legal arguments about arbitrary sentencing. Both legal practitioners and researchers have information that could strengthen a collective knowledge. A combination of practical knowledge and analytical research could yield powerful results that reveal legal injustices to both the victim and the accused, and in the end support better law.

774 Trust me, to no avail I have tried to find it.
If prosecutorial selectivity of victim impact evidence occurs in death penalty cases, similar practices and likely consequences occur in less serious crimes. Such selective patterns of use exposes an invidious sentencing structure used by federal prosecutors to assist with their pursuit of obtaining death sentences. Tragedy has touched whole lives, and all the families involved. The complexity, or travesty, is that victim worth is compared at all. This will not change until politicians, national leaders, crime control advocates, defence attorneys and prosecutors become apolitical about using victims for crime control or penal reform measures.
9 Bibliography

Humphries v. Ozmint, 397 F.3d 206 (4th Cir. 2005).
In re Amy, 636 F. 3d. 190 (5th Cir. 2011).
In re Antrobus, 563 F.3d 1092 (10th Cir. 2009).
In re Dean, 527 F.3d 391 (5th Cir. 2008).
In re Stewart, 552 F.3d 1285 (11th Cir. 2008).
People v. Kelly, 171 P.3d 548, 570 (Cal. 2007).
State v. Gray, 887 S.W.2d 369, 389 (Mo. 1994).
State v. Roberts, 948 S.W.2d 577, 604 (Mo. 1997).
United States v. Waldon, M.D. FL 3:00-CR-436-J25-TJC.
The Declaration of Independence, U.S., 1776.
Wayte v. United States, 470 U.S. 598.
Cargle v. Mullin, 317 F.3d 1196 (10th Cir. 2003).
Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn
Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011 (9th Cir. 2006).
Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process,
and Enhancing Compliance Monitoring Will Improve Implementation of the Act,
United States v. Hunter, No. 08-0410 (10th Cir. 2008).
James S. Liebman et. al., A Broken System, Error Rates in Capital Cases 1973-1995,
http://www2.law.columbia.edu/instructionalservices/liebman/
Amy L. Anderson & Cassia Spohn, Lawlessness in the Federal Sentencing Process:
American Bar Association, Guidelines for Criminal Justice Standards 4-1.2(c),
Defense Function Part I General Standards at


Paul Cassell, *Do crime victims have a right to hear restitution decisions announced in open court?*, THE WASHINGTON POST, June 2, 2014, at http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/02/do-
Selective Prosecution
Barry Lynn Creech,  Capital Policymaking and Criminal Enforcement, Report on Prosecution
The Wickersham Commission,  An Exposition and Test of a Formal Theory
WILLIAM J. CHAMBLISS & ROBERT SEIDMAN, LAW, ORDER, AND POWER (Addison-Wesley, 1982).


Roger Douglas, et al., Victims of Efficiency: Tracking Victim Impact Information through the System in Victoria, Australia, 3 Int'l Rev. of Victimol. 95 (1994).


Markus Dirk Dubber, Regulating the Tender Heart When the Axe Is Ready to Strike, 41 Buff. L. Rev. 85 (1993).


Robert Elias, Community Control, Criminal Justice and Victim Services, in Reorienting the Justice System: From Crime Policy to Victim Policy (Ezzat A. Fattah ed. 1986).


Edna Erez, Victim Participation in Sentencing: And the Debate Goes on, 3 Int'l Rev. of Victimology 17 (1994).


Reid Hastie, et al., *Inside the Jury* (The Lawbook Exchange, Ltd., 2004 (Reprinted by arrangement with Harvard University Press, 1983)).


Sylvia A. Law, In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights, 70 U. CIN. L. REV. 367 (2002).
Ken Levy, The Solution to the Problem of Outcome Luck: Why Harm is Just as Punishable as the Wrongful Action that Causes It, 24 LAW & PHIL. 263 (2005).
FREDERIC MAITLAND, JUSTICE AND POLICE (Macmillan & Co., 1885).
Jerry Markon & Timothy Dwyer, Moussaoui Gets Some Unusual Help, WA POST, 2006.
Lynn Marsella, Something about Carry: Supreme Court Broadens the Scope of 18 U.S.C. 924(C), 89 J. CRIM. L. & CRIMINOLOGY 973 (Spring 1999).
MARC MAUER, RACE TO INCARCERATE (The New Press, 1999).
RI. MAWBY & SANDRA WALKLATE, CRITICAL VICTIMOLOGY (Sage, 1994).


Gabe Mythen, *Cultural Victimology: Are We All Victims Now?, in THE HANDBOOK OF VICTIMS AND VICTIMOLOGY* (Sandra Walklate ed. 2007).


Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability, 26* J. RISK & UNCERT. 5 (2003).


STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY (Beacon Press, 1995).


Ernest van den Haag, Punishment as a Device for Controlling the Crime Rate, 33 Rutgers L. Rev. 706 (1981).


Appendix A.  SPSS Key for Cases that Went to Trial

Name

Case Resulted in:
1 = Acquittal
2 = Authorisation Withdrawn
3 = Authorisation Withdrawn at trial
4 = Clemency
5 = Death Sentence
6 = Death Sentence Vacated
7 = Dismissal by Judge
8 = Executed
9 = Guilty Plea
10 = Incompetent
11 = Innocent
12 = Killed/Died
13 = Lesser Conviction
14 = Life Sentence by Jury
15 = Life Sentence by Judge
16 = Pending
77 = Didn’t Remember
88 = Didn’t Respond
99 = Not Applicable

The government included victim impact information as a reason for seeking/agreeing to a plea agreement
0 = No
1 = Yes

The government included victim impact information as a reason for going to trial
0 = No
1 = Yes

The government included victim impact information as a reason for seeking the death penalty
0 = No
1 = Yes

Other
Leave as is

Did the government introduce VIE in any way at any point in the trial?
0 = No
1 = Yes

Victim Family Testimony was given during the innocence/guilt phase of the trial.
0 = No
1 = Yes

Victim Family Impact Testimony was given during the sentencing phase of the trial.
0 = No
1 = Yes
Victim family members personally gave testimony during the sentencing phase
0 = No
1 = Yes

The victim family impact statements were read aloud by the government attorneys.
0 = No
1 = Yes

Other
Leave as is

Government emphasised the impact of the crime on the victim’s family during the innocence/guilt phase of the trial.
0 = No
1 = Yes

Government emphasised the impact of the crime on the victim’s family during the sentencing phase of the trial.
0 = No
1 = Yes

The government emphasised the victim’s character as a justification for the death penalty
0 = No
1 = Yes

Were the circumstances “heinous, cruel, and depraved”? 
0 = No
1 = Yes

If you answered yes, did the government highlight the “heinous, cruel, and depraved” manner as a justification for the death penalty?
0 = No
1 = Yes

Other
Leave as is

The defence attorneys included victim family impact information during pre-trial discussions as a reason for seeking a plea agreement
0 = No
1 = Yes

Victim family testimony was introduced by the defence team and given during the sentencing phase of the trial.
0 = No
1 = Yes

Other
Leave as is

Casetype
1 = went to trial
2 = plea
3 = no NOI, not analysed
4 = not analysed due to lack on contact/no response
Appendix B. SPSS Key for Cases that Resulted in a Plea Agreement

Name

Case Resulted in:
1 = Acquittal
2 = Authorisation Withdrawn
3 = Authorisation Withdrawn at trial
4 = Clemency
5 = Death Sentence
6 = Death Sentence Vacated
7 = Dismissal by Judge
8 = Executed
9 = Guilty Plea
10 = Incompetent
11 = Innocent
12 = Killed/Died
13 = Lesser Conviction
14 = Life Sentence by Jury
15 = Life Sentence by Judge
16 = Pending
77 = Didn’t Remember
88 = Didn’t Respond
99 = Not Applicable

The government included victim impact information as a reason for seeking/agreeing to a plea agreement
0 = No
1 = Yes

The government included victim impact information as a reason for seeking the death penalty
0 = No
1 = Yes

Other
Leave as is

Did the government introduce VIE in any way at any point in the plea-sentencing hearing?
0 = No
1 = Yes

Victim family members personally gave testimony during the plea-sentencing phase
0 = No
1 = Yes

The victim family impact statements were read aloud by the government attorneys.
0 = No
1 = Yes

Other
Leave as is
Were the circumstances “heinous, cruel, and depraved”?

0 = No
1 = Yes

If you answered yes, did the government highlight the “heinous, cruel, and depraved” manner as a justification for the death penalty?

0 = No
1 = Yes

Other
Leaves as is

The defence attorneys included victim family impact information during pre-trial discussions as a reason for seeking a plea agreement

0 = No
1 = Yes

Other
Leaves as is

Casetype
1 = went to trial
2 = plea
3 = no NOI, not analysed
4 = not analysed due to lack of contact/no response
<table>
<thead>
<tr>
<th>Variable</th>
<th>SPSS Variable Name</th>
<th>Coding Instructions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant Name</td>
<td>DefName</td>
<td>Individual Name</td>
</tr>
<tr>
<td>District Court Case Number</td>
<td>D.CtDocket#</td>
<td>Specific Case Number</td>
</tr>
<tr>
<td>Year of Indictment</td>
<td>Year</td>
<td>1989…2009</td>
</tr>
</tbody>
</table>
| Federal Crime                | FedCrime           | 1 = Relating to Federal Health Care Offense  
2 = Civil rights Offenses Resulting in Death  
3 = Espionage  
4 = Death Resulting from Offenses Involving Transportation of Explosives, Destruction of Government Property, or Destruction of Property Related to Foreign or Interstate Commerce  
5 = Murder Committed by the Use of a Firearm During a Crime of Violence  
6 = Murder Committed by the Use of a Firearm During a Drug Trafficking Crime  
7 = Murder Committed in a Federal Government Facility  
8 = First Degree Murder  
9 = Murder of a Federal Judge or Law Enforcement Official  
10 = Murder of a Foreign Official  
12 = Murder by a Federal Prisoner  
13 = Murder of a State or Local Law Enforcement Official or Other Person Aiding in a Federal Investigation; Murder of a State Correctional Officer  
14 = Kidnapping  
15 = Murder During a Hostage Taking  
16 = Murder of a Court Officer or Juror  
17 = Murder with the Intent of Preventing Testimony by a Witness, Victim, or Informant  
18 = Retaliatory Murder of a Witness, Victim or Informant  
19 = Civil Action to Restrain Harassment of a Victim or Witness  
20 = Mailing of Injurious Articles with Intent to Kill or Resulting in Death  
21 = Interference with Commerce by Threats or Violence (The Hobbs’ Act)  
22 = Murder for Hire  
23 = Murder Involved in a Racketeering Offence  
24 = Use of Unlawful Flight to Avoid Prosecution Warrants (UFAPS)  
25 = Bank-robbery-related Murder or Kidnapping  
26 = Mail, Money, or Other Property of United States  
27 = Murder Related to a Carjacking  
28 = Death Resulting from Aggravated Sexual Abuse, Sexual Abuse of a Minor or Ward, or Abusive Sexual Contact  
29 = Murder Related to Sexual Exploitation of Children  
30 = Murder of a National of the United States, While Such National is Outside the United States  
31 = Criminal Offenses Committed by Certain Members of the Armed Forces and by Persons Employed by or Accompanying the Armed Forces Outside the United States  
32 = Death Resulting from Aircraft Piracy |
<table>
<thead>
<tr>
<th><strong>Federal Crime</strong></th>
<th><strong>FedCrime</strong></th>
<th><strong>See Above</strong></th>
</tr>
</thead>
</table>
| **Government Filed Notice of Intent Citing Victim Impact Evidence** | **NOIVIE** | **1 = Yes**  
 **3 = No NOI**  
 **5 = Pre Payne** |
| **Did USA emphasise VIE as a reason for a plea?** | **VIE4plea** | **1 = Yes**  
 **3 = No NOI**  
 **4 = Pending Trial Not Contacted**  
 **5 = Pre Payne**  
 **6 = Dismissed or Unauthorised**  
 **77 = Didn’t Remember**  
 **88 = Didn’t Respond**  
 **99 = Not Applicable** |
| **Did USA emphasise VIE as a reason for going to trial?** | **VIE4trial** | **1 = Yes**  
 **3 = No NOI**  
 **4 = Pending Trial Not Contacted**  
 **5 = Pre Payne**  
 **6 = Dismissed or Unauthorised**  
 **77 = Didn’t Remember**  
 **88 = Didn’t Respond**  
 **99 = Not Applicable** |
| **Did USA emphasise VIE as a reason for the death penalty?** | **VIE4death** | **1 = Yes**  
 **3 = No NOI**  
 **4 = Pending Trial Not Contacted**  
 **5 = Pre Payne**  
 **6 = Dismissed or Unauthorised**  
 **77 = Didn’t Remember**  
 **88 = Didn’t Respond**  
 **99 = Not Applicable** |
| **Did the government use victim impact evidence at trial?** | **VIEused** | **0 = No**  
 **1 = Yes**  
 **3 = No NOI**  
 **4 = Pending Trial Not Contacted**  
 **5 = Pre Payne**  
 **6 = Dismissed or Unauthorised**  
 **77 = Didn’t Remember**  
 **88 = Didn’t Respond**  
 **99 = Not Applicable** |
| **Did the government introduce victim impact evidence during the innocence/guilt phase of** | **VIEInnGuilt** | **0 = No**  
 **1 = Yes**  
 **3 = No NOI**  
 **4 = Pending Trial Not Contacted** |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the government introduce victim impact evidence during the sentencing phase of the trial?</td>
<td>VIESent</td>
<td>No</td>
<td>Yes</td>
<td>No NOI</td>
<td>Pre Payne</td>
<td>Dismissed or Unauthorised</td>
<td>Didn’t Remember</td>
<td>Didn’t Respond</td>
<td>Not Applicable</td>
</tr>
<tr>
<td>Was the family active in resolving the case with a plea agreement?</td>
<td>FamActivePlea</td>
<td>No</td>
<td>Yes</td>
<td>No NOI</td>
<td>Pending Trial Not Contacted</td>
<td>Pre Payne</td>
<td>Dismissed or Unauthorised</td>
<td>Didn’t Remember</td>
<td>Didn’t Respond</td>
</tr>
<tr>
<td>Did the government emphasise the victim’s character?</td>
<td>VictimChar</td>
<td>No</td>
<td>Yes</td>
<td>No NOI</td>
<td>Pending Trial Not Contacted</td>
<td>Pre Payne</td>
<td>Dismissed or Unauthorised</td>
<td>Didn’t Remember</td>
<td>Didn’t Respond</td>
</tr>
<tr>
<td>Did the government emphasise victim impact evidence in the innocence/guilt phase of the trial OR the entering of plea hearing?</td>
<td>FamImpInnPlea</td>
<td>No</td>
<td>Yes</td>
<td>No NOI</td>
<td>Pending Trial Not Contacted</td>
<td>Pre Payne</td>
<td>Dismissed or Unauthorised</td>
<td>Didn’t Remember</td>
<td>Didn’t Respond</td>
</tr>
<tr>
<td>Did the government emphasise victim impact evidence in the sentencing phase of the trial?</td>
<td>FamImpSent</td>
<td>No</td>
<td>Yes</td>
<td>No NOI</td>
<td>Pending Trial Not Contacted</td>
<td>Pre Payne</td>
<td>Dismissed or Unauthorised</td>
<td>Didn’t Remember</td>
<td>Didn’t Respond</td>
</tr>
<tr>
<td>Was the crime argued as heinous, cruel, or depraved?</td>
<td>Heinous 0 = No 1 = Yes 3 = No NOI 4 = Pending Trial Not Contacted 5 = Pre Payne 6 = Dismissed or Unauthorised 77 = Didn’t Remember 88 = Didn’t Respond 99 = Not Applicable</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If so, did the government justify HCD as a reason for the death penalty?</td>
<td>HeinousJustDP 0 = No 1 = Yes 3 = No NOI 4 = Pending Trial Not Contacted 5 = Pre Payne 6 = Dismissed or Unauthorised 77 = Didn’t Remember 88 = Didn’t Respond 99 = Not Applicable</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial Direction of Case</td>
<td>Casetype 1 = Went to Trial 2 = Plea 3 = No NOI 4 = Pending Trial Not Contacted 5 = Pre Payne 6 = Dismissed or Unauthorised 7 = Defendant Killed or Died After Authorisation 8 = Incompetent</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is there an additional comment by the attorney?</td>
<td>Comment 0 = No 1 = Yes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The attorney’s comment</td>
<td>AttyWrote If applicable, individual response</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Case Outcome</td>
<td>Status of Case (final list) 1 = Acquittal 2 = Authorisation Withdrawn 3 = Authorisation Withdrawn at Trial 4 = Clemency 5 = Death Row 6 = Death Sentence Vacated and Authorisation Withdrawn 7 = Dismissal After Notice byJudge 8 = Executed 9 = Guilty Plea 10 = Incompetent After Authorisation 11 = Innocent 12 = Killed or Died After Authorisation 13 = Lesser Included Conviction 14 = Life Sentence from Jury</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Life Sentence from Judge</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Pending Trial</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix D: All cases with metadata
<table>
<thead>
<tr>
<th>DETDOCKEY</th>
<th>DEFNAME</th>
<th>Year</th>
<th>YearLabel</th>
<th>CrimeType</th>
<th>VictimWorthy</th>
<th>DVR</th>
<th>VIE Used</th>
<th>Case Analysis</th>
<th>Case direction</th>
<th>Status of case</th>
</tr>
</thead>
<tbody>
<tr>
<td>D. IL No. 99-9R-CR-580</td>
<td>Cooper, Alex</td>
<td>1999</td>
<td>1 Post-Payne</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>NA</td>
<td>Pre Payne</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>D. IL No. 99-9R-CR-580</td>
<td>Davis, Randall Anthony</td>
<td>1999</td>
<td>1 Post-Payne</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>NA</td>
<td>Pre Payne</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>D. IL No. 99-9R-CR-580</td>
<td>Chandler, David Ronald</td>
<td>1999</td>
<td>1 Post-Payne</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>NA</td>
<td>Pre Payne</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>E.D. NY CR No. 99-00340-B (BR)</td>
<td>Peraza, Thomas</td>
<td>1999</td>
<td>1 Post-Payne</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>NA</td>
<td>Pre Payne</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>D. NY No. 99-9R-CR-238</td>
<td>Peflo, Bilal</td>
<td>1999</td>
<td>1 Post-Payne</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>NA</td>
<td>Pre Payne</td>
<td>Miscellaneous</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>D. DC CR No. 91-9R-CR-904</td>
<td>Saffet, Zeyd Hasan Abd Latif</td>
<td>1993</td>
<td>1 Post-Payne</td>
<td>Death Resulting from Aircraft Piracy</td>
<td>Victim worthy</td>
<td>NA</td>
<td>Pre Payne</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Dismissed after notice by judge</td>
</tr>
<tr>
<td>E.D. TX No. 99-99-CR-9</td>
<td>Villamol, Balbina</td>
<td>1999</td>
<td>1 Post-Payne</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>NA</td>
<td>Pre Payne</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>D. IL No. 99-9R-CR-984</td>
<td>Villamol, Reynaldo Sanchez</td>
<td>1999</td>
<td>1 Post-Payne</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>NA</td>
<td>Pre Payne</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>E.D. LA CR No. 99-806</td>
<td>Brown, Oliver</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>E.D. MI CR No. 92-81172</td>
<td>Brown, Reginald</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Innocent</td>
<td>N/A</td>
<td>Innocent</td>
</tr>
<tr>
<td>M.D. GA CR No. 92-81MAC-WDO</td>
<td>Carrington, Arlie</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>M.D. GA CR No. 92-81MAC-WDO</td>
<td>Chambers, Tony</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>E.D. MI CR No. 92-81172</td>
<td>Culbert, Stacy</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes No</td>
<td>No No</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D. DC CR No. 92-9R-CR-284-01</td>
<td>Gaikow, Anthony</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>E.D. LA CR No. 99-996</td>
<td>Green, William</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>D. DC CR No. 92-9R-CR-284-01</td>
<td>Harris, Mario</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>D. DC CR No. 92-9R-CR-284-01</td>
<td>Hoyle, Mark</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>E.D. OK CR No. 91-9R-1022</td>
<td>Huching, James Newwood</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>E.D. VA CR No. 92-9R-CR-68</td>
<td>Johnson, Casey</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Adjudicated cases</td>
<td>Death row - 2255</td>
<td></td>
</tr>
<tr>
<td>W.D. NY CR No. 99-1594-C</td>
<td>Johnson, Darryl</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D. DC CR No. 92-9R-CR-284-01</td>
<td>McCollough, John</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>E.D. OK CR No. 91-9R-1022</td>
<td>McCollum, Milt</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>E.D. OK CR No. 91-9R-1022</td>
<td>Molina, Ramon Medina</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>N/A</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>M.D. PA CR No. 92-200</td>
<td>Murray, Michael</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Authorisation withdrawn</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>E.D. MI CR No. 92-81172</td>
<td>Otterburn, Mervyn</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D. DC CR No. 92-9R-CR-68</td>
<td>Pearson, Wayne Anthony</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes No</td>
<td>No No</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>E.D. VA CR No. 92-9R-CR-68</td>
<td>Rees, James</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>E.D. VA CR No. 92-9R-CR-68</td>
<td>Thomas, Vernon</td>
<td>1992</td>
<td>2 Post- Payne, pre-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No No</td>
<td>No No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>Court</td>
<td>Case No.</td>
<td>Defendant</td>
<td>Victim worthy</td>
<td>No-NGI</td>
<td>No-NGI</td>
<td>Authorisation withdrawn</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>----------</td>
<td>----------------------</td>
<td>---------------</td>
<td>--------</td>
<td>--------</td>
<td>--------------------------</td>
<td>------------------------------</td>
<td>--------------</td>
<td>-------------</td>
<td></td>
</tr>
<tr>
<td>E.D. VA CR No. 3:95CR45</td>
<td>Damon, Marvin</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
<td>Death row - 2255</td>
<td></td>
</tr>
<tr>
<td>M.D. GA CR No. 92-CR-142</td>
<td>Williams, George Travis</td>
<td>1992</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>no NGI</td>
<td>Adjudicated cases</td>
<td>Dismissal after notice by judge</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>E.D. MI CR No. 92-81127</td>
<td>Williams, Michael</td>
<td>1992</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>NGI</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>E.D. MI CR No. 92-81127</td>
<td>Brown, Terrance</td>
<td>1993</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>NGI</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>S.D. FL No. 93-252-CR-UUB</td>
<td>Crummie, Chedrick</td>
<td>1993</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Acquitted</td>
<td>Acquitted</td>
<td></td>
</tr>
<tr>
<td>S.D. MI CR No. 93-896</td>
<td>Garza, Jean Richard</td>
<td>1993</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
<td>Executed</td>
<td></td>
</tr>
<tr>
<td>E.D. VA No. 93-CR-131</td>
<td>Oscar, Jean Claude</td>
<td>1993</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Dismissed or died after Authorization</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>N.D. NY CR No. 94-CR-328</td>
<td>Diaz, Walter</td>
<td>1994</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>E.D. TX No. 4:94-CR-121-Y</td>
<td>Hail, Orlando C.</td>
<td>1994</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Dismissed</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
<td>Death row - 2255</td>
</tr>
<tr>
<td>E.D. LA CR No. 94-981</td>
<td>Hardy, Paul</td>
<td>1994</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>Civil Rights Offenses Resulting in Death</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Authorisation withdrawn</td>
<td>Authorisation withdrawn</td>
<td></td>
</tr>
<tr>
<td>D.C. CR No. 94-121</td>
<td>McCauley, Donald M.</td>
<td>1994</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>E.D. PA CR No. 94-555</td>
<td>Trindell, Tyrone</td>
<td>1994</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>NGI</td>
<td>Adjudicated cases</td>
<td>Authorisation withdrawn</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>W.D. MO CR No. 94-00017-04</td>
<td>Vest, James</td>
<td>1994</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>W.D. MO CR No. 94-00017-04</td>
<td>Vest, Mark</td>
<td>1994</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>N.D. NY CR No. 94-CR-328</td>
<td>Vest, Steve</td>
<td>1994</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>N.D. TX No. 4:94-CR-121-Y</td>
<td>Webster, Bruce</td>
<td>1994</td>
<td>2 Post-Pro, pro-FDPA</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Dismissed</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>D.M. CR No. 95-536-MV</td>
<td>Acosta, John Barry</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>NGI</td>
<td>Adjudicated cases</td>
<td>Dismissed or Unauthorised</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>N.D. GA CR No. 1:95-CR-928</td>
<td>Battle, Anthony</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>BOP</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
<td>Death row - 2255</td>
<td></td>
</tr>
<tr>
<td>E.D. MO CR No. 4:95CR352</td>
<td>Bonds, Andre</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>Carjacking</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D.K. CR No. 94-10129-01</td>
<td>Chabrotre, Benjamin</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Authorisation withdrawn</td>
<td>Death Sentence Vac and Auth Withdrawn</td>
<td></td>
</tr>
<tr>
<td>E.D. NY CR No. 95-9870</td>
<td>Chen, Pai Xin</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>E.D. NY CR No. 95-9870</td>
<td>Chen, Jie Wu</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>E.D. VA CR No. 95-99085</td>
<td>Daniel, Mario</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not</td>
<td>No-NGI</td>
<td>Adjudicated cases</td>
<td>Guilty/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
</tr>
<tr>
<td>E.D. LA CR No. 94-581</td>
<td>Davis, Les</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>Civil Rights Offenses Resulting in Death</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
<td>Death row - Appeal</td>
</tr>
<tr>
<td>D/M CR No.</td>
<td>95-518-MV</td>
<td>DeLaTorre, Jesse</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>------------</td>
<td>------------</td>
<td>------------------</td>
<td>------</td>
<td>--------------</td>
<td>------------------</td>
<td>------------------</td>
<td>----</td>
<td>----</td>
<td>------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>D. NM CR No.</td>
<td>95-491 LIH</td>
<td>Havard, Richard</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Didn’t Remember</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>N/D. TX CR No.</td>
<td>6/95-CR-00015-C</td>
<td>Jones, Louis</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>N/D. TX CR No.</td>
<td>5/85-CR-00017-C</td>
<td>Manto, Roy Ray</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>Civil Rights Offenses Resulting in Death</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorized</td>
<td>Authorization withdrawn</td>
<td>N/A</td>
</tr>
<tr>
<td>D. NM CR No.</td>
<td>95-518-MV</td>
<td>Macias, Maxon</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>D. CO CR No.</td>
<td>96-00488-M</td>
<td>McVeigh, Timothy James</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>W/D. MO CR No.</td>
<td>94-001948</td>
<td>Moore, Darrin B., Sr.</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>N/D. TX CR No.</td>
<td>5-95-CR-00017-C</td>
<td>Mungia, Elie Troino</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorized</td>
<td>Authorization withdrawn</td>
<td>N/A</td>
</tr>
<tr>
<td>N/D. TX CR No.</td>
<td>5-95-CR-00017-C</td>
<td>Mungia, Ricky Rivera</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Offenses Resulting in Death</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorized</td>
<td>Authorization withdrawn</td>
<td>N/A</td>
</tr>
<tr>
<td>D. NM CR No.</td>
<td>95-518-MV</td>
<td>Najar, Vincent</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>D. KS CR No.</td>
<td>94-001219-01</td>
<td>Nguyen, Phouc H.</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>D. CO CR No.</td>
<td>96-00488-M</td>
<td>Nicholas, Tony Lyon</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>E/D. NY CR No.</td>
<td>95-0070</td>
<td>Pong, Yua Zhang</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorized</td>
<td>Authorization withdrawn</td>
<td>N/A</td>
</tr>
<tr>
<td>D. NM CR No.</td>
<td>95-491</td>
<td>Prosper, Ernesti</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>E/D. VA CR No.</td>
<td>3/95CR-45</td>
<td>Williams, Robert Russell</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No NDI</td>
<td>No NDI</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>W/D. MO CR No.</td>
<td>94-001944-01</td>
<td>Wytrich, Kevin</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Dismissed or Unauthorized</td>
<td>Authorization withdrawn</td>
</tr>
<tr>
<td>E/D. VA CR No.</td>
<td>3/95CR00887</td>
<td>Beckford, Dean Anthony</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No NDI</td>
<td>No NDI</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>E/D. VA CR No.</td>
<td>3/95CR00887</td>
<td>Beckford, Devon Dale</td>
<td>1995</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>E/D. CA CR No.</td>
<td>96-114012-ER</td>
<td>Bennett, Darrell Ray</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>Murder committed by the use of a firearm during a crime of violence or a drug trafficking crime (§924)</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorized</td>
<td>Authorization withdrawn</td>
<td>N/A</td>
</tr>
<tr>
<td>M/D TN CR No.</td>
<td>9/6-00884</td>
<td>Cable, Donald Thomas</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>Murder for Hire</td>
<td>Paid victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>E/D. VA CR No.</td>
<td>3/95CR00887</td>
<td>Carras, Lionel</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No NDI</td>
<td>No NDI</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>D. NJ CR No.</td>
<td>96-576-(Rodriquez)</td>
<td>Clary, Moses</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>BankRobbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>S/D. NY CR No.</td>
<td>96-CR-515 (MWF)</td>
<td>Cuff, John</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No NDI</td>
<td>No NDI</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>E/D. VA CR No.</td>
<td>3/95CR00887</td>
<td>Dennis, Claude</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No NDI</td>
<td>No NDI</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>M/D PA CR No.</td>
<td>4-94-CR-270</td>
<td>Hornet, David Paul</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>BOP</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Pending trial</td>
<td>N/A</td>
</tr>
<tr>
<td>S/D. NY CR No.</td>
<td>96-CR-515 (MWF)</td>
<td>Hunter, Clarence</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>N/D. AL CR No.</td>
<td>96-B-028-NE</td>
<td>Holland, Charles</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
</tr>
<tr>
<td>N/D. AL CR No.</td>
<td>96-B-028-NE</td>
<td>Holley, Marvin Lee</td>
<td>1996</td>
<td>3 Post-FDPA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>Case Number</td>
<td>Location</td>
<td>Defendant Name</td>
<td>Victim Involved</td>
<td>Victim Adjudicated</td>
<td>Guilt/Innocence Phase</td>
<td>Penalty Phase</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------------</td>
<td>----------</td>
<td>----------------</td>
<td>----------------</td>
<td>--------------------</td>
<td>-----------------------</td>
<td>---------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. VA CR No. 97-00314-A</td>
<td>Johnson, Raheem</td>
<td>Murder for Hire</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Life sentence from jury</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. MO CR No. 4:97 0141 ERW (TCM)</td>
<td>Holder, Norris G.</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Death row - 2255</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. VA CR No. 97-00314-A</td>
<td>Johnson, Shaheem</td>
<td>BankRobbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Guilty plea at trial</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. NY No. 97 CR 269 (DLC)</td>
<td>Frank, Deric</td>
<td>BOP</td>
<td>Not victim worthy</td>
<td>No</td>
<td>Guilt/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>M.D. PA CR No. 3-CR-96-005</td>
<td>Otero, Julio</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. AR No. LR-CR-97-243</td>
<td>Lee, Daniel Louis</td>
<td>First-Degree Murder</td>
<td>Putatively victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Death row - 2255</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. AR No. LR-CR-97-243</td>
<td>Kehoe, Chevy</td>
<td>First-Degree Murder</td>
<td>Putatively victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Death row - 2255</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. CA CR No. 97-00087</td>
<td>Thomas, Richard</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No</td>
<td>Guilt/Innocence Phase Only</td>
<td>Life sentence from jury</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. NY CR No. 97-672 (S-3) (ERK)</td>
<td>Dhinsa, Gurmeet Singh</td>
<td>Murder of a Federal Judge or Law Enforcement Officer</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. VA CR No. 97-0529 JAP</td>
<td>Colón-Miranda, Andrés</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No</td>
<td>Guilt/Innocence Phase Only</td>
<td>Life sentence from jury</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. NY CR No. 97-672 (S-5) (ERK)</td>
<td>Dhinsa, Gennaro Singh</td>
<td>Murder for Hire</td>
<td>Putatively victim worthy</td>
<td>No</td>
<td>Guilt/Innocence Phase Only</td>
<td>Dismissed after notice by judge</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MO No. 4-97-03141 EBW (TCM)</td>
<td>Allen, Billie Jean</td>
<td>BankRobbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. FL CR No. 97-00087</td>
<td>Thomas, Richard</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No</td>
<td>Guilt/Innocence Phase Only</td>
<td>Life sentence from jury</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. CA CR No. 97-00087</td>
<td>Colon-Miranda, Andrés</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No</td>
<td>Guilt/Innocence Phase Only</td>
<td>Life sentence from jury</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. AR CR No. F96-026 (HRH)</td>
<td>Walter, Abram</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Dismissed after notice by judge</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. NC No. 3:97CR23-P</td>
<td>Barnette, Aquila Marcivici</td>
<td>BankRobbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Guilt/Innocence Phase Only</td>
<td>Life sentence from jury</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. WMN-96-0458</td>
<td>Jones, Anthony</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No</td>
<td>Guilt/Innocence Phase Only</td>
<td>Life sentence from jury</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. VA No. 3:95CR00087</td>
<td>Thomas, Richard</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No</td>
<td>Guilt/Innocence Phase Only</td>
<td>Guilty plea</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Offences:**
- Murder Involved in a Racketeering Enforcement Official
- Murder of a Federal Judge or Law Enforcement Official
- Murder for Hire
- Kidnapping
- BankRobbery
- CCE-Drug Kingpin
- BOP
- Murder for Hire
- BOP
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for Hire
- Murder for H
<table>
<thead>
<tr>
<th>Court</th>
<th>Case Number</th>
<th>Defendant</th>
<th>Victim worthy</th>
<th>Yes/No</th>
<th>Not Applicable</th>
<th>Miscellaneous</th>
<th>NA/No</th>
<th>Incompetent after Authorization</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.D. CA No. 98-317-CBM</td>
<td>Guem, Ray</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. PIM-48-0520</td>
<td>Iansen, Wilks</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MO CR No. PIM-48-0502</td>
<td>Fogg, Dennis</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. MO No. 98-00311-0195-CR-2</td>
<td>Inomovra, Edwin B.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. NY CR No. 98-CR-778</td>
<td>Koo, Charles Michael</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. L-68-73</td>
<td>Lane, Robert</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N.D. FL CR No. 98-7373-RV</td>
<td>Lawrence, Jonathan Bekey</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>T.D. MD No. L-98-73</td>
<td>Lane, Robert</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. LA No. 98-123-185</td>
<td>Locust, Jermaine</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. ME CR No. 98-09348</td>
<td>McAlston, Antonio</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. NY No. 98-99 CR 1021</td>
<td>Mohamed, Hadi Khamsi</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. MO No. 98-00311-0195-CR-2</td>
<td>Orca, Arbelada</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. 3:98-00035 (NIXON)</td>
<td>Shakir, Jamal</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. 3-98-00035 (NIXON)</td>
<td>Shakir, Jamal</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. TX No. W99CR070</td>
<td>Bernard, Brandon</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. TX CR No. 99-07555</td>
<td>Carpenter, Antonio</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. CA No. 98-184-160 (RED)</td>
<td>Perez, Luis Garcia</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MA No. 98-0311-0195-CR-2</td>
<td>Serra, German</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. VA No. 2 HCB-47</td>
<td>Seibert, Richard Thomas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. MO No. 98-00311-0195-CR-2</td>
<td>Tello, Placido</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. IL CR No. 98-30822-93D</td>
<td>Westoverland, Guy</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>M.D. TN CR No. 3-98-00575 (NIXON)</td>
<td>Young, Donald</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. PA CR No. 98-362</td>
<td>Azcona, Wilfredo Martinez</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. PR CR No. 98-044-4C6</td>
<td>Alejandro Joel Rivera</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. TX CR No. W99CR070</td>
<td>Bernard, Brandon</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. TX CR No. 99-20155</td>
<td>Carpenter, Antonio</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C.D. CA No. 98-997-CBM</td>
<td>Green, Roy</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. PIM-48-0520</td>
<td>Hajjesa, Wilks</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. MO CR No. 98-00311-0195-CR-2</td>
<td>Hommerova, Erica B.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. IL CR No. 98-30022-93D</td>
<td>Koo, Charles Michael</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. LA No. 97-93-145</td>
<td>Ricks, Richard</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. ME CR No. 98-00556</td>
<td>Poulos, Lendas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. 98-00556</td>
<td>Poulos, Lendas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. 98-00556</td>
<td>Poulos, Lendas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. 98-00556-0195-CR-2</td>
<td>Orca, Arbelada</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. 3:98-00035 (NIXON)</td>
<td>Shakir, Jamarl</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C.D. CA No. 98-184-160 (R)</td>
<td>Perez, Luis Garcia</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. MO No. 98-00311-0195-CR-2</td>
<td>Serra, German</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. VA No. 2 HCB-47</td>
<td>Seibert, Richard Thomas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. MO No. 98-00311-0195-CR-2</td>
<td>Tello, Placido</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. IL CR No. 98-30822-93D</td>
<td>Westoverland, Guy</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>M.D. TN CR No. 3-98-00575 (NIXON)</td>
<td>Young, Donald</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. PA CR No. 98-362</td>
<td>Azcona, Wilfredo Martinez</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. PR CR No. 98-044-4C6</td>
<td>Alejandro Joel Rivera</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. TX CR No. W99CR070</td>
<td>Bernard, Brandon</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. TX CR No. 99-20155</td>
<td>Carpenter, Antonio</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court</td>
<td>Case No.</td>
<td>Name</td>
<td>Date</td>
<td>Phase</td>
<td>Victim Worthy</td>
<td>Responsible Authorisation with</td>
<td>Judgment</td>
<td>Sentence</td>
</tr>
<tr>
<td>-------------</td>
<td>-----------------</td>
<td>-----------------------</td>
<td>-------</td>
<td>-------------------------------</td>
<td>-----------------------</td>
<td>------------------------------</td>
<td>--------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>W.D. VA</td>
<td>No. 00-CR-104</td>
<td>Church, Walter Leight</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty/Innocence Phase Only</td>
<td>Death row</td>
</tr>
<tr>
<td>W.D. VA</td>
<td>No. 00-CR-104</td>
<td>Edly, Samuel Stephen</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. CA</td>
<td>CR No. 00-CR-2001</td>
<td>Garcia, Rico</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>D. CO</td>
<td>CR No. 00-CR-531</td>
<td>Gray, Kevin</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>W.D. MO</td>
<td>No. 00-CR-395</td>
<td>Hankel, Carl</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>W.D. NC</td>
<td>No. 00-CR-74</td>
<td>Jackson, Richard</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. IA</td>
<td>No. 3:01-CR-0348</td>
<td>Johnson,Angelina</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Death row - 2255</td>
</tr>
<tr>
<td>W.D. VA</td>
<td>No. 3:00-CR-0026</td>
<td>Johnson, Colman</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>S.D. IL</td>
<td>CR No. 00-CR-209</td>
<td>Kass, Carl</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. IL</td>
<td>CR No. 00-CR-143</td>
<td>Lafinand, Sonky</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. NY</td>
<td>No. 3:00-CR-269</td>
<td>Matthews, Leon</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>S.D. IL</td>
<td>CR No. 00-CR-40044</td>
<td>McKeech, Richard</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. NY</td>
<td>No. 00-CR-209</td>
<td>McMillan, Christopher</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>D. DC</td>
<td>No. 1:00-CR-0157</td>
<td>Moyer, Richard</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. CA</td>
<td>CR No. 00-CR-413</td>
<td>Pham, Trung Thanh</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>S.D. NY</td>
<td>No. 00-CR-0761</td>
<td>Qunie, Alan</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. TX</td>
<td>No. 00-CR-250</td>
<td>Robinson, Julian Omar</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>S.D. NY</td>
<td>No. 00-CR-0761</td>
<td>Rodriguez, Diego</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. AL</td>
<td>No. 00-CR-422</td>
<td>Robolphs, Eric Robert</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>C.D. CO</td>
<td>No. 00-CR-551</td>
<td>Sablin, Ray</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>C.D. CO</td>
<td>No. 00-CR-551</td>
<td>Sablin, William</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>S.D. IL</td>
<td>CR No. 00-CR-413</td>
<td>Sahakian, David Michael</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>D. MD</td>
<td>CR No. AW89-0159</td>
<td>Sachar, Steven</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. NY</td>
<td>No. 00-CR-269</td>
<td>Tecker, Tekubah Shabha</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Death row - 2255</td>
</tr>
<tr>
<td>M.D. FL</td>
<td>No. 3:00-CR-436-225-TDC</td>
<td>Walden, Karl</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>S.D. NY</td>
<td>No. 00-CR-1008</td>
<td>Williams, Elijah Bobbly</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>S.D. NY</td>
<td>No. 00-CR-1008</td>
<td>Williams, Michael</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>S.D. NY</td>
<td>No. 00-CR-1008</td>
<td>Williams, Xavier</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. MD</td>
<td>No. 01-CR-1367</td>
<td>Apron, Marcus</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. MD</td>
<td>No. 01-CR-1367</td>
<td>Apron, Marcus</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. MD</td>
<td>No. 01-CR-1367</td>
<td>Apron, Marcus</td>
<td>2000</td>
<td>Post-FDPA</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Guilty plea</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>Offence</td>
<td>Victim worthy</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
<td>Cases that went to penalty phase</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------------------------------------------</td>
<td>---------------</td>
<td>-------------------</td>
<td>----------------------------------</td>
<td>----------------------------------</td>
<td>---------------------------</td>
<td>-------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murder with a Weapon of Mass Destruction; Murder of a National to the United States, While Such a National is During a Crime of Violence or a Drug Trafficking Crime (§924)</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murder committed by the use of a firearm during a crime of violence or a drug trafficking crime (§924)</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murder for Hire</td>
<td>Putatively victim worthy</td>
<td>No</td>
<td>NOI</td>
<td>No</td>
<td>NOI</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carjacking</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carjacking</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kidnapping Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carjacking</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carjacking</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Didn't Respond</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interstate Domestic Violence Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised Authorisation withdrawn</td>
<td>N/A</td>
<td>Guilt/Innocence Phase Only</td>
<td>Authorisation withdrawn</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Case Number</td>
<td>Defendant Name</td>
<td>Crime Description</td>
<td>Victim Worthy</td>
<td>Case Disposition</td>
<td>Sentence</td>
<td>Authorisation Withdrawn at Trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------------</td>
<td>----------------</td>
<td>------------------</td>
<td>---------------</td>
<td>------------------</td>
<td>---------</td>
<td>----------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N.D. IN No. 2:01-CR-077</td>
<td>Taylor, Styles</td>
<td>Murder of a National to the United States, While Such a National is in the Care, Custody, or Control of a Person Who, With Malice, Treachery, Treachery, or Callous Indifference, Causes the Death of a Person by means of a Crime of Violence to the Person of Another</td>
<td>Yes</td>
<td>Dismissed or Unauthorised</td>
<td>Life sentence from jury</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N.D. IN No. 2:01-CR-077</td>
<td>Thomas, Kevin</td>
<td>Murder of a National to the United States, While Such a National is in the Care, Custody, or Control of a Person Who, With Malice, Treachery, Treachery, or Callous Indifference, Causes the Death of a Person by means of a Crime of Violence to the Person of Another</td>
<td>Yes</td>
<td>Dismissed or Unauthorised</td>
<td>Life sentence from jury</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. PA No. 01-CR-512</td>
<td>Williams, Jamain</td>
<td>CCE-Drug Kingpin</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death sentence</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. PA No. 01-CR-512</td>
<td>Williams, Vincent</td>
<td>CCE-Drug Kingpin</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>W.D. TN CR No. 01-20041</td>
<td>Wilson, Bryant Lakenh</td>
<td>Bank Robbery</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. SC No. 02-CR-902</td>
<td>Bisham, Brandon</td>
<td>Murder for Hire</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death row - 2255</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. NY CR No. 1:02-CR-00451-MBM</td>
<td>Bisco, Chad</td>
<td>Bank Robbery</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilt/Innocence Phase Only</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. DC No. 02-CR-256</td>
<td>Binyamin, Leonidas</td>
<td>Destruction, Murder of a National to the United States, While Such a National is in the Care, Custody, or Control of a Person Who, With Malice, Treachery, Treachery, or Callous Indifference, Causes the Death of a Person by means of a Crime of Violence to the Person of Another</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. MO No. 4:02-CR 0557</td>
<td>Bolden, Robert</td>
<td>First-Degree Murder</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. TX CR No. 02-216</td>
<td>Bourgeois, Alfred</td>
<td>BOP</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C.D. CA CR No. 02-00938</td>
<td>Bridgewater, Wayne</td>
<td>CCE-Drug Kingpin</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C.D. CA CR No. 02-00938</td>
<td>Chance, David Alan</td>
<td>CCE-Drug Kingpin</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N.D. IN No. 2:02-CR-116</td>
<td>Corley, Odell</td>
<td>Witness Killed Before Testimony</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. MD CR No. 02-CR-410</td>
<td>Coster, Aaron Damaco</td>
<td>Witness Killed Before Testimony</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. SC No. 02-CR-902</td>
<td>Faikos, Chudwik</td>
<td>CCE-Drug Kingpin</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. FL No. 02-CR-20572</td>
<td>Gomila-Luken, Luis</td>
<td>Witness Killed Before Testimony</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. CT No. 02-216</td>
<td>Gonzalez, Fausto</td>
<td>First-Degree Murder</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. MA CR No. 02-CR-10101</td>
<td>Green, Darryl</td>
<td>CCE-Drug Kingpin</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. MA CR No. 02-CR-00856-GB</td>
<td>Griffin, Robert Leo</td>
<td>CCE-Drug Kingpin</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. NV CR No. 02-00852</td>
<td>Hatton, Charles</td>
<td>Witness Killed Before Testimony</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D. NY CR 02-CR-00451-MBM</td>
<td>Henderson, Darryl</td>
<td>CCE-Drug Kingpin</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Acquittal</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. NY CR No. 02-778-S (1)-S3</td>
<td>Janes, Richard</td>
<td>Murder for Hire</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. MA CR No. 02-220</td>
<td>Kanamaru, Fumia</td>
<td>Murder During a Hostage Taking</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. SC No. 02-CR-256</td>
<td>Karake, Francois</td>
<td>Destruction, Murder of a National to the United States, While Such a National is in the Care, Custody, or Control of a Person Who, With Malice, Treachery, Treachery, or Callous Indifference, Causes the Death of a Person by means of a Crime of Violence to the Person of Another</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. MA CR No. 02-220</td>
<td>Krylov, Pete</td>
<td>Murder During a Hostage Taking</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N.D. GA No. 02-CR-18</td>
<td>LeCroy, William Emmanuel</td>
<td>CCE-Drug Kingpin</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death sentence</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. MA CR No. 02-00938-GRK</td>
<td>Little, Gary Joe</td>
<td>BOP</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.D. NY CR No. 02-778-S (1)-S3</td>
<td>Maffey, Ronald</td>
<td>Murder for Hire</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. MA CR No. 02-00938-GRK</td>
<td>MtHeczy, Michael Patrick</td>
<td>BOP</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td>No</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
C.D. CA CR No. 02-00938-GHK
Stinson, John William 2002 3 Post-FDPA

D. MA CR No. 02-CR-10061
Merris, Brandon 2002 3 Post-FDPA

D. MD No. 02-CR-410
Taylor, Michael Lafayette 2002 3 Post-FDPA

D. AZ CR No. 03-CR-730
Cisneros, Luis 2003 3 Post-FDPA

D. AZ CR No. 02-00938-GHK
Stinson, John William 2002 3 Post-FDPA

D. AZ CR No. 03-CR-730-Eppinger, Paul E. 2003 3 Post-FDPA

D. MA CR No. 02-CR-10061
Merris, Brandon 2002 3 Post-FDPA

D. MD No. 02-CR-410
Taylor, Michael Lafayette 2002 3 Post-FDPA

D. AZ CR No. 03-CR-730
Eppinger, Paul E. 2003 3 Post-FDPA

D. MA CR No. 02-CR-10061
Merris, Brandon 2002 3 Post-FDPA

D. MD No. 02-CR-410
Taylor, Michael Lafayette 2002 3 Post-FDPA

D. AZ CR No. 03-CR-730-Eppinger, Paul E. 2003 3 Post-FDPA

D. MA CR No. 02-CR-10061
Merris, Brandon 2002 3 Post-FDPA

D. MD No. 02-CR-410
Taylor, Michael Lafayette 2002 3 Post-FDPA

D. AZ CR No. 03-CR-730-Eppinger, Paul E. 2003 3 Post-FDPA

D. MA CR No. 02-CR-10061
Merris, Brandon 2002 3 Post-FDPA

D. MD No. 02-CR-410
Taylor, Michael Lafayette 2002 3 Post-FDPA

D. AZ CR No. 03-CR-730-Eppinger, Paul E. 2003 3 Post-FDPA
<table>
<thead>
<tr>
<th>Case Number</th>
<th>District</th>
<th>Defendant</th>
<th>Case Type</th>
<th>Victim worthy</th>
<th>Dismissed or Unauthorised</th>
<th>Authorisation withdrawn</th>
<th>Cases that went to penalty phase</th>
<th>Final Disposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>D. PK CR No. 05-CR-773</td>
<td>E.D. NY</td>
<td>Geronimo Olmeda, David</td>
<td>Murder Involved in a Racketeering Offense</td>
<td>Yes</td>
<td>Dismissed or Unauthorised</td>
<td>Authorisation withdrawn</td>
<td>No</td>
<td>Dismissal</td>
</tr>
<tr>
<td>D. KS No. 2:05-CR-00135-DMF</td>
<td>E.D. NY</td>
<td>Hargrove, Domonick R.</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>No</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>D. MD No. 8:05 CR-00049-REDH</td>
<td>E.D. NY</td>
<td>Hix, James Allen</td>
<td>Murder For Hire</td>
<td>Putatively victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Death Row - Appeal</td>
</tr>
<tr>
<td>E.D. VA CR No. 05-CR-46</td>
<td>E.D. VA</td>
<td>Le, Cong Guo</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D. MD No. 1:05 CR-00105-PM</td>
<td>E.D. VA</td>
<td>Lighty, Kenneth Jamal</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>No</td>
<td>Death Row - Appeal</td>
</tr>
<tr>
<td>E.D. NY CR No. 1:03-CR-00029-NGG</td>
<td>E.D. VA</td>
<td>Massaro, Joseph</td>
<td>Murder Involved in a Racketeering Offense</td>
<td>Not victim worthy</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>No</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>S.D. CH CR No. 02-05-155</td>
<td>E.D. NY</td>
<td>Maybey, John Richard</td>
<td>Intimate Domestic Violence</td>
<td>Victim worthy</td>
<td>Dismissed or Unauthorised</td>
<td>Authorisation withdrawn</td>
<td>No</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>D. AZ CR No. 05-CR-170</td>
<td>E.D. VA</td>
<td>Rivera, Angel R</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>S.D. TX No. 03-CR-221</td>
<td>E.D. TX</td>
<td>Williams, Tyrone</td>
<td>Bringing In or Harboring Certain Aliens</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>No</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>S.D. NY No. 7:04-CR-00103-SCR</td>
<td>E.D. NY</td>
<td>Barnes, Khalid</td>
<td>Murder For Hire</td>
<td>Putatively victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. OK CR No. 04-100-M-S</td>
<td>E.D. OK</td>
<td>Barrett, Kenneth Eugene</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>No</td>
<td>Death row - 2255</td>
</tr>
<tr>
<td>W.D. VA No. 4:04 CR-78083-ILK</td>
<td>E.D. VA</td>
<td>Bedikian, Louis Benjamin</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>E.D. NY CR No. 04-966 (S-4) (FB)</td>
<td>E.D. NY</td>
<td>Brown, Nicole</td>
<td>Murder For Hire</td>
<td>Putatively victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised</td>
<td>No</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY CR No. 04-966 (S-4) (FB)</td>
<td>E.D. NY</td>
<td>Brown, Nicole</td>
<td>Murder For Hire</td>
<td>Putatively victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised</td>
<td>No</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. AR No. 4:04-CR-243</td>
<td>E.D. AR</td>
<td>Cisneros, Ismael</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Yes</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. AR No. 4:04-CR-243</td>
<td>E.D. AR</td>
<td>Cisneros, Ismael</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>No</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY No. 04-966 (S-4) (FB)</td>
<td>E.D. NY</td>
<td>Clay, Yves</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>No</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. MD No. 1:04-CR-00029-MEU</td>
<td>E.D. MD</td>
<td>Gardner, Shawn Earl</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D. DC CR No. 04-128</td>
<td>E.D. DC</td>
<td>Gregg, Larry</td>
<td>Murder For Hire</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY CR No. 04-966 (S-4) (FB)</td>
<td>E.D. NY</td>
<td>Gordon, Lorenzo</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY CR No. 04-966 (S-4) (FB)</td>
<td>E.D. NY</td>
<td>Goodwin, Sean</td>
<td>Murder For Hire</td>
<td>Putatively victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised</td>
<td>No</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. MD No. 1:04-CR-00029-MEU</td>
<td>E.D. MD</td>
<td>Harris, Sheldan</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. LA No. 2:04-CR-00017-RHB-SS</td>
<td>E.D. LA</td>
<td>Johnson, John</td>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>No</td>
<td>Death Row - Appeal</td>
</tr>
<tr>
<td>E.D. NY No. 04-966 (S-4) (FB)</td>
<td>E.D. NY</td>
<td>Jordan, Peter</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY No. 1:04-966 (S-4) (FB)</td>
<td>E.D. NY</td>
<td>Looper, Wilber</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY CR NO. 04-966 (S-4) (FB)</td>
<td>E.D. NY</td>
<td>McGree, Kenneth</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY No. 1:04-966 (S-4) (FB)</td>
<td>E.D. NY</td>
<td>Mitchell, Willy Edward</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY CR No. 04-0156</td>
<td>E.D. NY</td>
<td>Pepin, Travis, Brian</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>W.D. VA No. 4:04 CR-78083-ILK</td>
<td>E.D. VA</td>
<td>Plunket, Antoine</td>
<td>Murder For Hire</td>
<td>Putatively victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised</td>
<td>No</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. VA No. 04-CR-243</td>
<td>E.D. VA</td>
<td>Rivera, Dana</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
</tbody>
</table>

**Notes:**
- **Post-FDPA** indicates Post-Federal Death Penalty Act.
- **Authorisation withdrawn** indicates that the authorisation for the death penalty was withdrawn.
- **Dismissed or Unauthorised** indicates that the case was dismissed or the authorisation was not forthcoming.
- **Cases that went to penalty phase** indicates that the case went to the phase where the penalty was determined.
- **Final Disposition** indicates the final outcome of the case.
- **Guilt/Innocence Phase** indicates the phase where guilt or innocence was determined.
- **Acquittal** indicates that the defendant was found not guilty.
- **Death Row - Appeal** indicates that the case was appealed from death row.
- **Death Row - 2255** indicates that the case was appealed from death row under 2255.
<table>
<thead>
<tr>
<th>District</th>
<th>Case Number</th>
<th>Defendant Name</th>
<th>Conviction Date</th>
<th>Crime Description</th>
<th>Victim worthy</th>
<th>Yes/No</th>
<th>Adjudication Status</th>
<th>Case Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>D. MD No. 04-CR-55</td>
<td>Rodriguez, Allison, Jr.</td>
<td>2004-4-4-CVRA lead-up</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death row - Appeal</td>
</tr>
<tr>
<td>W.D. TX No. 2:04-CR-201254-GBD-emp</td>
<td>Maldonado, Shannon</td>
<td>2004-4-4-CVRA lead-up</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death row - Appeal</td>
</tr>
<tr>
<td>W.D. TX No. 2:04-CR-201254-GBD-emp</td>
<td>Maldonado, Sonny Adams</td>
<td>2004-4-4-CVRA lead-up</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Pending Trial Not Conracted</td>
<td>Pleading trial</td>
<td>N/A</td>
</tr>
<tr>
<td>W.D. VA No. 5:05-0014:5-SCW</td>
<td>Simmons, Brian</td>
<td>2004-4-4-CVRA lead-up</td>
<td>Kidnapping</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. LA No. 2:04-CR-00017-HEB-SS</td>
<td>Smith, Joseph</td>
<td>2004-4-4-CVRA lead-up</td>
<td>BankRobbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Pending Trial Not Conracted</td>
<td>Pleading trial</td>
<td>N/A</td>
</tr>
<tr>
<td>W.D. MO No. 4:04-CR-08295-GAF</td>
<td>Street, John P.</td>
<td>2004-4-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. TN No. 1:04-CR-00180-1</td>
<td>Taylor, Ray</td>
<td>2004-4-4-CVRA lead-up</td>
<td>Carjacking</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death row - Appeal</td>
</tr>
<tr>
<td>S.D. FL No. 04-CR-60216</td>
<td>Wilson, Kenneth</td>
<td>2004-4-4-CVRA lead-up</td>
<td>Murder of a Federal Judge or Law Enforcement Official</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY No. 1:04-CR-01016-NDD</td>
<td>Wilson, Ronald</td>
<td>2004-4-4-CVRA lead-up</td>
<td>Carjacking</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death row - Appeal</td>
</tr>
<tr>
<td>D. MD No. 8:05 CR-00393-DKC</td>
<td>Amador, Jorge</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D. MD No. 8:05 CR-00393-DKC</td>
<td>Argueta, Antonio</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence by Jury</td>
</tr>
<tr>
<td>D. DC CR No. 05-0100 (RWR)</td>
<td>Ball, Antwuan</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. NY No. 05-CR-0060 (S-3) (NGG)</td>
<td>Basciano, Vincent</td>
<td>2005-5-4-CVRA lead-up</td>
<td>Murder involved in a Racketeering Offense</td>
<td>Not victim worthy</td>
<td>No</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D. KS CR No. 05-10090-01-06-MLB</td>
<td>Bchan, Scott</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>C.D. CA No. 8:05 CR-0074</td>
<td>Carrubba, Jost</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>N.D. CA No. 05-00328-MMC</td>
<td>Cother, Dennis, Jr.</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. CA No. 05-00167 (WIA)</td>
<td>Dixon, Edgar</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>E.D. MI No. 05-60025</td>
<td>Duncan, Norman</td>
<td>2005-5-4-CVRA lead-up</td>
<td>BankRobbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>W.D. MO No. 4:05-CR-00344-GBS</td>
<td>Eye, Gary</td>
<td>2005-5-4-CVRA lead-up</td>
<td>Civil Rights Offense Resulting in Death</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>N.D. CA No. 05-00167 (WIA)</td>
<td>Forn, Enrique</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>W.D. NY No. 2:05-00107</td>
<td>Friend, Valen</td>
<td>2005-5-4-CVRA lead-up</td>
<td>Witness Killed After Testifying</td>
<td>Punitively victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D. MD No. 6:05-CR-08160-CTSH</td>
<td>Gliha, Noah</td>
<td>2005-5-4-CVRA lead-up</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death row - Appeal</td>
</tr>
<tr>
<td>E.D. VA No. 1:05-CR-00264-TSE</td>
<td>Harper, Thomas Monroe</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death row - Appeal</td>
</tr>
<tr>
<td>W.D. PA No. 2:05-CR-00317-TFM</td>
<td>Hannon, Kevin Levy</td>
<td>2005-5-4-CVRA lead-up</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilty plea</td>
</tr>
<tr>
<td>D. SC No. 6:05 CR-0227-DBBH</td>
<td>Hase, Eric Preston</td>
<td>2005-5-4-CVRA lead-up</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
</tr>
<tr>
<td>E.D. TN No. 1:05-CR-51</td>
<td>Jackson, David Lee</td>
<td>2005-5-4-CVRA lead-up</td>
<td>ROP</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>C.D. CA No. 05-00120</td>
<td>Johnson, Antonio Lassin</td>
<td>2005-5-4-CVRA lead-up</td>
<td>Kidnapping</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>E.D. MI No. 2:05-CR-08357-CTSH</td>
<td>Johnson, Herman Norman</td>
<td>2005-5-4-CVRA lead-up</td>
<td>Witness Killed Before Testimony</td>
<td>Punitively victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>S.D. OH No. 2:05-CR-00013-GLP-1</td>
<td>Laventure, Darrell</td>
<td>2005-5-4-CVRA lead-up</td>
<td>BankRobbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>S.D. WV CR No. 2:05-00107</td>
<td>Lecco, George</td>
<td>2005-5-4-CVRA lead-up</td>
<td>Witness Killed After Testifying</td>
<td>Punitively victim worthy</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>D.C. CA No. 05 CR 578</td>
<td>Ledezma, Jose</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>-----------------------</td>
<td>---------------</td>
<td>------</td>
<td>------------</td>
<td>------------------</td>
<td>-------------------</td>
<td>-----</td>
<td>----</td>
<td>-----------------</td>
</tr>
<tr>
<td>D. NM No. 05-924</td>
<td>Lujan, Larry</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>Kidnapping</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Pleading Trial Not Contacted</td>
</tr>
<tr>
<td>E.D. NY CR No. 05-401</td>
<td>Mott, James</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>E.D. MD No. 08:05 CR 00393-DKC</td>
<td>Mendoza, Juan</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Pleading Trial Not Contacted</td>
</tr>
<tr>
<td>M.D. GA No. 4-05-CR-00021-CDL-GMF</td>
<td>Nelson, Michael Antonio</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>First-Degree Murder</td>
<td>Potentially victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>E.D. MI No. 05-46025</td>
<td>O</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>N.D. CA No. 05-00352-MMR</td>
<td>Peterson, Aquil</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>N</td>
<td>Dismissed or Unauthorised</td>
</tr>
<tr>
<td>D. ND CR No. 3:05-CR-00101-BRE</td>
<td>Ponzio, Michael Alan</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>E.D. NY No. 05-492</td>
<td>Price, Gerard</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>N</td>
<td>Dismissed or Unauthorised</td>
</tr>
<tr>
<td>D. AZ No. 05-0272-PHX-JAT</td>
<td>Rico, Jose Rios</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>C. D. CA No. 05 CR 578</td>
<td>Roberts, Raol</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>No</td>
<td>No</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>W.D. MO No. 4-05-CR-00344-GDS</td>
<td>Landeren, Steven</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>Civil Rights Offenses Resulting in Death</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>W.D. PA No. 2:05-CR-00385-TPM</td>
<td>Solomon, Adani</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>Federal conspiracy by the use of a firearm during a crime of violence or a drug trafficking crime (§924)</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>E.D. MI No. 05-00825</td>
<td>Wimbo, Kevin</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>Bank Robbery</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Dismissed or Unauthorised</td>
<td>Authorisation withdrawn</td>
</tr>
<tr>
<td>C.D. CA No. 05-CR-020</td>
<td>Williams, Michael Dennis</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>N</td>
<td>Dismissed or Unauthorised</td>
</tr>
<tr>
<td>D. DC CR No. 05-0100 (RWR)</td>
<td>Wilson, David</td>
<td>2005</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>N</td>
<td>Dismissed or Unauthorised</td>
</tr>
<tr>
<td>D. PR No. 06-568 (SAP)</td>
<td>Alao-Santiago, Raymond</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>Carjacking</td>
<td>Victim worthy</td>
<td>No</td>
<td>No</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>D. CT 7:06CR160 (PED)</td>
<td>Aprat, Ando</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Pleading Trial Not Contacted</td>
</tr>
<tr>
<td>D. CT 7:06CR160 (PED)</td>
<td>Aprat, Ando</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>CCE-Drug Kingpin</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Pleading Trial Not Contacted</td>
</tr>
<tr>
<td>E.D. AR No. 4-06-CR-00041 GTH</td>
<td>Baker, Antonio Domenico</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>Federal conspiracy by the use of a firearm during a crime of violence or a drug trafficking crime (§924)</td>
<td>Not victim worthy</td>
<td>No</td>
<td>No</td>
<td>Dismissed or Unauthorised</td>
</tr>
<tr>
<td>S.D. IN EV06-CR-0014-01-Y/H</td>
<td>Barnes, Jarvis</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>Carjacking</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>W.D. VA No. 06 CR 00001</td>
<td>Cato, Carlos David</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>BOP</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>D. MD No. 1:06-CR-00393-FPM</td>
<td>Dinkin, James</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>Witness Killed Before Testimony</td>
<td>Potentially victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>N.D. OH No. 3:06-CR-00770-JGC-1</td>
<td>Gates, Thomas A.</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>Federal conspiracy by the use of a firearm during a crime of violence or a drug trafficking crime (§924)</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>D. MD No. 1:06-CR-00393-FPM</td>
<td>Gilbert, Melvin</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>Federal conspiracy by the use of a firearm during a crime of violence or a drug trafficking crime (§924)</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>N</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>W.D. KY No. 5:06-CR-00029-TRR</td>
<td>Green, Steven</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>Conspiracy to Violate 18 U.S.C</td>
<td>Victim worthy</td>
<td>Yes</td>
<td>Y</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>S.D. IN EV06-CR-0014-01-Y/H</td>
<td>Jordan, Gabriel</td>
<td>2006</td>
<td>Post-CVRA</td>
<td>Federal conspiracy by the use of a firearm during a crime of violence or a drug trafficking crime (§924)</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
</tr>
<tr>
<td>Case Number</td>
<td>District</td>
<td>Defendant Name</td>
<td>Charged Offense</td>
<td>Victim worthy</td>
<td>Dismissed or Unauthorized</td>
<td>Authorisation withdrawn</td>
<td>Result</td>
<td></td>
</tr>
<tr>
<td>-------------</td>
<td>---------------</td>
<td>---------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>--------------</td>
<td>--------------------------</td>
<td>-------------------------</td>
<td>-------------------------</td>
<td></td>
</tr>
<tr>
<td>D. PR No. 06-36 (JAF)</td>
<td>Lopez-Miria, Rodney</td>
<td>Carjacking</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>N.D. OH No. 1:05-CR-00399-WD</td>
<td>Moonib, Duane</td>
<td>Intimate Domestic Violence</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>E.D. TX No. 1:06-CR-00101-T</td>
<td>Mosher, Ellis Short</td>
<td>BOP</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Life sentence from jury</td>
<td></td>
</tr>
<tr>
<td>D. PR No. 06-58 (JAF)</td>
<td>Riera-Croqui, Ekkard</td>
<td>Carjacking</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>S.D. FL No.01-71-CR</td>
<td>Sanchez, Ricardo</td>
<td>Carjacking</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death row - Appeal</td>
<td></td>
</tr>
<tr>
<td>E.D. VA No. 3:07-CR-433</td>
<td>Smith, Danny</td>
<td>Carjacking</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Guilty plea at trial</td>
<td></td>
</tr>
<tr>
<td>D. HI No. 1:06-CR-00073-DAE</td>
<td>Williams, Nuarem</td>
<td>First-Degree Murder</td>
<td></td>
<td>Yes</td>
<td>Pending Trial Not Contacted</td>
<td>Pending trial</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>E.D. TX No. 1:05-CR-000355</td>
<td>Bacote, Michael</td>
<td>BOP</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>D. MD No. 1:07-CR-00149-WDQ</td>
<td>Burton, Harry</td>
<td>ECE-Drug Kingsn</td>
<td></td>
<td>No</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>D. MD No. 8:07-CR-00199-WRT</td>
<td>Davis, Earl</td>
<td>BOP</td>
<td></td>
<td>Yes</td>
<td>Dismissed or Unauthorized</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>E.D. TX No. 1:07-CR-1:08-CR-000358</td>
<td>Duncan, Joseph</td>
<td>Carjacking</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>E.D. TX No. 1:07-CR-1042</td>
<td>Eloy, Joseph</td>
<td>BOP</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Death row - Appeal</td>
<td></td>
</tr>
<tr>
<td>M.D. FL No. 8:07-CR-0:272966</td>
<td>Julian, Amarnie Michael</td>
<td>Carjacking</td>
<td></td>
<td>No</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>N.D. AL No. 2:07-CR-243-RBP-ZEO</td>
<td>Mitchell-Johnston, William, Jr</td>
<td>BankRobbery</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Pending trial</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>E.D. PA No. 1:07-CR-00349-SEU</td>
<td>Phillips, Maurice</td>
<td>Murder for Hire</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>E.D. VA No. 3:07-CR-00003-DE</td>
<td>Smith, Danny Damon</td>
<td>BOP</td>
<td></td>
<td>No</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>E.D. MD No. 1:07-CR-00149-WDQ</td>
<td>Taylor, Donald Scott</td>
<td>Murder for Hire</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>E.D. TX No. 1:07-CR-9212</td>
<td>Trohle, Jason</td>
<td>BOP</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Pending trial</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>D. AK No. 5:07-CR-0:0111-RR-RDR-AR</td>
<td>Wade, Noah</td>
<td>BOP</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>M.D. NC No. 1:04-CR-00844-AB</td>
<td>Abarca, DeMario James</td>
<td>Carjacking</td>
<td></td>
<td>No</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>D. MD No. 0:05-056</td>
<td>Byers, Patrick Albert, Jr</td>
<td>Murder for Hire</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>D. MD No. 1:07-CR-9212</td>
<td>Taylor, Donald Scott</td>
<td>Murder for Hire</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>D. MD No. 3:08-CR-134-ICJ</td>
<td>Umasa, Alejandro Enrique</td>
<td>ECE-Drug Kingsn</td>
<td></td>
<td>No</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>M.D. PA No. 4:08-CR-16</td>
<td>Ranoux, David</td>
<td>BOP</td>
<td></td>
<td>No</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>E.D. PA No. 3:08-CR-16</td>
<td>Ranoux, David</td>
<td>BOP</td>
<td></td>
<td>No</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>E.D. CA No. 0:08-CR-9259</td>
<td>Sabino Joseph Cabarrasa</td>
<td>BOP</td>
<td></td>
<td>No</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
<tr>
<td>N.D. NC No. 3:08-CR-134-ICJ</td>
<td>Umasa, Alejandro Enrique</td>
<td>ECE-Drug Kingsn</td>
<td></td>
<td>No</td>
<td>Yes</td>
<td>Adjudicated cases</td>
<td>Death row - Appeal</td>
<td></td>
</tr>
<tr>
<td>D. MD No. 1:05-CR-70</td>
<td>Williams, Ritz</td>
<td>BOP</td>
<td></td>
<td>No</td>
<td>No</td>
<td>Authorisation withdrawn</td>
<td>Pending trial</td>
<td></td>
</tr>
</tbody>
</table>
| District | Case Number | Name          | Race | Post-CVRA | BOP | Victim Worthy | No. of Adjudicated Cases | Cases That Went to Penalty Phase | Placement
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>E.D. TX 1:09-CR-00015-MAC-KFG All</td>
<td>Garcia, Edgar B.</td>
<td>2009</td>
<td>Post-CVRA</td>
<td>BOP</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>E.D. TX 1:09-CR-00015-MAC-KFG All</td>
<td>Snarr, Mark</td>
<td>2009</td>
<td>Post-CVRA</td>
<td>BOP</td>
<td>Not victim worthy</td>
<td>Yes</td>
<td>No</td>
<td>Adjudicated cases</td>
<td>Cases that went to penalty phase</td>
</tr>
<tr>
<td>D. CO No. 09</td>
<td>Watland, Gary</td>
<td>2009</td>
<td>Post-CVRA</td>
<td>BOP</td>
<td>Not victim worthy</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Pending trial</td>
</tr>
</tbody>
</table>