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“An Existential Moment of Moral Perception”: Declarations of Life And the Capital Jury Re-Imagined

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“AN EXISTENTIAL MOMENT OF MORAL PERCEPTION”¹:
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AND THE CAPITAL JURY RE-IMAGINED

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ABSTRACT

In many ways, death penalty jurisprudence, as well as its social status, have evolved at a rapid rate recently in the United States. This has occurred as the Supreme Court has twice declared capital punishment to be specifically unconstitutional in the last decade, in Atkins v. Virginia, 536 U.S. 304 (2002) and Roper v. Simmons, 543 U.S. 551 (2005), and as five states within four years have repealed it from within their criminal justice systems. (New York, New Jersey, Illinois, New Mexico, and Connecticut.) However, in other ways, the system has continued to lag, hardly moving from its difficult reinstatement under the “guided discretion” standard of Gregg v. Georgia, 428 U.S. 153 (1976), and of course, through its continued aggressive use in several states around the country.

This Article takes a new stance from within this dualist world, by taking an old decision, Payne v. Tennessee (1991), and re-interpreting it from an entirely new perspective. More specifically, it argues that, contrary to current jurisprudence, documents such as “Declarations of Life”-- notarized documents that request that, in the event of the signer’s homicide, juries do not


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inflict the death penalty on their murderers--should be fully admissible in court as forms of victim impact evidence. While Payne is a decision that has been largely criticized from within legal scholarship for many years, this Article argues that it is a decision with many different possible interpretations, none of which have been approached in the twenty-one years since its decision. In particular, Payne was a decision that not only inserted the concept of victim impact statements into death penalty jurisprudence, it also created an entirely new concept of relevance, one that took account of changing social and political mores. It is a conception of relevance from which documents such as Declarations of Life can fit, as they create equality within the landscape of relevant documents in death penalty sentencing and also are legally relevant within the specific definitions of Payne. In particular, with victim impact evidence, our legal system has already sanctioned one point in the capital trial in which arbitrariness is allowed to flourish, in the belief that certain information is necessary for the jury to be able to make its decision on life or death. It is at this point that documents such as Declarations of Life should also be made available to the jury under Payne.

In its conclusion, this Article argues that documents like Declarations of Life, if allowed for within the evidentiary confines of Payne, may also allow for a type of intervention within the processes of moral disengagement that research has revealed makes up the majority of death penalty decision-making. This sort of intervention is at least partially what the victims’ rights movement was attempting to do twenty years ago, but data on capital trials have revealed that capital sentencing is an area in which jurors are still removed from society’s debates about retribution, punishment, and responsibility. In the context of American society’s continuing debates on capital punishment, this Article argues that when jurisprudence removes documents such as Declarations of Life from the sentencing process, it limits the jury’s ability to morally
reflect on its decision and then transmit to transit it back to society, in the communicative, democratic enterprise that jury service, even in the death penalty realm, is designed to be.
"I, the undersigned, being of sound and disposing mind and memory, do hereby in the presence of witnesses make this Declaration of Life.

I hereby declare that should I die as a result of a violent crime, I request that the person or persons found guilty of homicide for my killing not be subject to or put in jeopardy of the death penalty under any circumstances, no matter how heinous their crime or how much I may have suffered. The death penalty would only increase my suffering.

I believe it is morally wrong for my death to be the reason for killing another human being.

I request that the Prosecutor or District Attorney having the jurisdiction of the person or persons alleged to have committed my homicide not file or prosecute an action for capital punishment as a result of my homicide.

I request that this declaration be made admissible in any trial of any person charged with my homicide and read and delivered to the jury.

I request the court to allow this declaration to be admissible as a statement of the victim at the sentencing of the person or persons charged and convicted of my homicide; and, to pass sentence in accordance with my wishes.

I request that the governor or other executive officer(s) grant pardon, clemency or take whatever action is necessary to stay and prohibit the carrying out of the execution of any person or persons found guilty of my homicide.

I, the undersigned, being of sound and disposing mind and memory, do hereby in the presence of witnesses make this Declaration of Life.
This declaration is not meant to be, and should not be taken as, a statement that the person or persons who have committed my homicide should go unpunished.

I request that my family and friends take whatever actions are necessary to carry out the intent and purpose of this declaration; and, I further request them to take no action contrary to this Declaration.

During my life, I want to feel confident that under no circumstances whatsoever will my death result in the capital punishment of another human being . . .

I affirm under the pain and penalties for perjury that the above Declaration of Life is true.”

I. INTRODUCTION

In April 2012, Connecticut joined New Jersey, New Mexico, New York and Illinois as the latest in a series of states to repeal the death penalty in the United States. Connecticut’s decision, which the Governor called “a historic moment . . . a moment for sober reflection,” nonetheless exempted from abolition the eleven men currently on death row in the state. According to the Associated Press, “many officials insisted on this exception as a condition of support, which is really about punishing two particular individuals, Steven Hayes and Joshua Komisarjevsky.”

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These two men, who were sentenced to death in November 2010 and December 2011, were convicted in the murders of Jennifer Hawke-Petit and her two teenage daughters, in a gruesome crime that horrified much of the state. The crime became even more of a public issue after the District Attorney announced the State would be pursuing the death penalty against Hayes and Komisarjevsky, as members of Ms. Hawke-Petit’s church began to publically wonder whether that is what she would have wanted. There were some indications that Mrs. Hawke-Petit—a member of a United Methodist congregation with a strong and public anti-death penalty stance—may have even signed a document known as a “Declaration of Life.”

According to its proponents, an estimated 10,000 Americans have signed Declarations of Life—notarized documents that request that, in the event of the signer’s own homicide, prosecutors do not seek, and juries do not inflict, the death penalty on their killer. While the list of the Declaration’s signers includes several luminaries—including former New York Governor Mario Cuomo, actors Martin Sheen and Susan Sarandon, and New York Congresswoman Carolyn McCarthy (whose husband Dennis was murdered by Colin Ferguson, in the 1993 attack on passengers on the Long Island Railroad)—for years now, the document’s practical significance has appeared limited. For while Declarations of Life have circulated in anti-death

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8 Id.
penalty circles for some time, until the Hawke-Petit crimes, there was no indication that any actual murder victim had ever signed one.

""She was a nurse and she would not cause harm to anyone,"" said Lucy Earley, one congregant who The New York Times interviewed after the Hawke-Petit murders, adding that she had “notarized at least a dozen declarations during an appeal at the church and . . . thought Mrs. Hawke-Petit’s was among them.”

In the ensuing national media coverage of the Petit murders, the relevance of Mrs. Hawke-Petit’s opposition to capital punishment became a highly contested issue. The prosecutorial community claimed that Mrs. Hawke-Petit’s personal beliefs, even if verified, were not relevant to the case: “‘Our job is to enforce the law no matter who the victim is or what the victim’s beliefs are,’” said John A. Connelly, a veteran prosecutor in Waterbury who was not involved in the Cheshire case. “‘If you started imposing the death penalty based on what the victim’s family felt, it would truly become arbitrary and capricious.’” The issue became even more contested when Dr. Petit, who had survived the attack on his wife and daughters, began to publically state his support for the death penalty. In one interview after the murders, Dr. Petit admitted that it was “likely that his wife was against the death penalty,” but said that the two did not discuss it, and that he did not know whether she had ever signed a Declaration of Life. “‘If


10 Id.

she signed a document, I never saw it,’ Petit said, adding that such a declaration was not with family records when he opened them after the killings.”\textsuperscript{12}

Despite the numerous issues regarding Declarations of Life raised by the Hawke-Petit murders, scholarly perspectives regarding their role in capital punishment prosecution are extremely limited. In “Voices of the Victims: Capital Punishment and a Declaration of Life,” William Peterson briefly mentions the Hawke-Petit crimes, in order to argue that Declarations of Life should not be used by prosecutors nor heard by juries.\textsuperscript{13} Peterson emphasizes the multitude of practical problems that would be associated with the enforcement of Declarations of Life, including conflicts between family members, and concerns that Declarations would “open the floodgates,” to a range of informal evidence about the victim’s beliefs, including “evidence of religious beliefs, political convictions, and even conversations with friends.”\textsuperscript{14}

In the only other scholarship to directly address Declarations of Life, Wayne A. Logan agrees with Peterson that such documents should not be admissible at trial, but he does state that they should be enforceable on prosecutors. Comparing Declarations of Life to advance medical directives and living wills, Logan rests his argument on society’s interest in vindicating the autonomy of the individual. “The fact that a declaration has been completed by a murder victim, of course, in no way negates the reality that the state’s moral order and laws have been transgressed,” Logan writes. “At the same time, however, the victim’s unequivocal aversion to


\textsuperscript{13} According to Peterson, the only place where Declarations of Life might be appropriate is in clemency proceedings. William R. Peterson, “Voices of the Victims: Capital Punishment and a Declaration of Life,” \textit{27 REV. LITIG.} 769 (2008).

\textsuperscript{14} \textit{Id.} at 786-87.
the maximum punishment raises serious concerns over the moral legitimacy of the death penalty under such circumstances.”

In this Article, I will expand upon the sparse secondary source treatment of Declarations of Life, while at the same time making a distinct argument from either Peterson or Logan. Instead of focusing on whether Declarations of Life should be enforceable as sentencing opinions, I will argue that such documents should instead be admissible during the capital trial as relevant victim impact evidence. I will therefore focus this Article on only one small aspect of Declarations of Life: the section that requests that “this declaration be made admissible in any trial of any person charged with my homicide and read and delivered to the jury,” and that the court “allow this declaration to be admissible as a statement of the victim at the sentencing of the person or persons charged and convicted of my homicide; and, to pass sentence in accordance with my wishes.”

This Article will begin by providing the cultural and legal background for Declarations of Life, by analyzing the history of the document and its relationship to the victims’ rights movement as a whole. It then goes on to evaluate the current federal and state case law on the use of “mercy opinions”--currently the closest proximate to Declarations of Life-- in capital trials. This section analyzes the law’s resistance to mercy opinions, and argues that this resistance reflects a misguided understanding of the Supreme Court’s decision in Payne v. Tennessee and on victim impact evidence as a whole.

Part II expands about this analysis by then going back to the text of Payne itself. This Section argues that both the decision’s language and its underlying rationales create ample room

15 Logan, supra note 7, at 42, 46.

for mercy opinions and Declarations of Life as forms of victim impact statements, and that assertions to the contrary reflect a cramped vision of what can be considered relevant in capital trials. Both death penalty abolitionists and criminal law theorists tend to see victim impact statements as irrelevant—either to the defendant’s guilt or to the public wrongs intended to be addressed by a capital trial. However, this Article argues that relevance in the context of a capital trial is hardly a static entity. As social, political, and cultural conditions change, so, too, do theories of relevance. And in the 21 years since the Supreme Court first declared victim impact evidence admissible in *Payne*, the victim’s voice has become a deeply engrained aspect of capital trials. More specifically, relevance has come to mean the specific harm of a murder and the moral blameworthiness of the murderer. The potential danger of creating arbitrary capital sentences has become acceptable once again in exchange for giving the jury a wider deliberative range for deciding life or death.

Therefore, rather than continuing to debate over the legal justifications for victim impact evidence, this Article argues that both death penalty abolitionists and criminal law theorists would do better to see what other opportunities exist within *Payne*. One option I see is Declarations of Life: anti-death penalty documents that meet the same standards of legality that the Supreme Court allowed for victim impact statements within *Payne*. In allowing documents such as Declarations of Life, I argue that these documents allow for what *Payne* suggested, by expanding upon the capital jury’s existing deliberative range, while at the same time narrowing the evidentiary boundaries of what might be considered prejudicial within that range. I also argue that documents such as Declarations of Life would allow the capital jury to engage with societal debates about the death penalty, moving it from its current frequent position of moral
disengagement to the “existential position of moral perception” that is at the core of the sentencing phase of a capital trial.

II. DECLARATIONS OF LIFE: A NEW WAY FOR VICTIM’S RIGHTS

Even from within the world of death penalty opponents, signers of Declarations of Life occupy a unique vantage point. While most other death penalty opponents center their opposition to capital punishment on political, religious, or philosophical grounds, the Declaration of Life, “in effect, an insistence that society not ‘kill my killer’—connects opposition to the death penalty with events beyond the grave.”

However, as unique as Declarations of Life are from within broader abolitionist discourse, much of their rhetoric comes from a much more mainstream voice: the victims’ rights movement. In the 1980s and 1990s, the victims’ rights movement successfully advocated for several pieces of federal legislation, constitutional amendments in almost every state, and, in what many activists consider to be their penultimate victory, the right for affected family members to give victim impact statements at capital trials. As a social movement, victims’ rights advocated for a virtual transformation in the American criminal justice system, contesting “the fairness of legal procedures that are distant and unresponsive to crime victims’ grief and


rage. By transforming courts into sites for the rituals of grieving, the movement seeks to make private experiences part of public discourse.”

This transformation hardly came without its critics. Instead, the movement has attracted a wide array of dissenters, who have criticized the movement for its association with conservative politics, and with the backlash against defendants’ rights. As Lynne Henderson, herself a crime victim, wrote in 1992, “Common assumptions about crime victims—that they are all ‘outraged,’ and want tougher law enforcement—underlie much of the current victim’s rights rhetoric.”

However, as scholarly criticism of the victims’ rights’ movement has continued, on the grassroots level there have been some radical reformulations of victims’ rights rhetoric. Declarations of Life, and their use by religious communities opposed to capital punishment, is one example of this transformation.

A. Cherishing Life After Death

The Declarations of Life movement has gone through several waves of publicity since first beginning fifteen years ago. In 1994, Sister Camille D’Arienzo, a nun associated with the “Cherish Life Circle,” in Brooklyn, New York, wrote the first Declaration of Life, basing it a poem by the Catholic poet Vic Hummert. According to Sister Camille, she first wrote the document as a response to the New York Gubernatorial campaign, in which candidates George


Pataki and Mario Cuomo publically battled over whether the state legislature should reinstate the death penalty.\textsuperscript{22}

Early interviews with Sister Camille made clear that she did not necessarily envision Declarations of Life being used in a legal context: instead, they were intended to be a symbol of religious obligation, allowing individuals to take personal responsibility for their beliefs. “‘Long ago, it stopped being about winning,’” Sister Camille told The National Catholic Reporter in 1995. “What it has become is doing what we can. I really trust the Holy Spirit is with us and the power of God is within us. It is a prophetic stance and prophesy doesn’t come in armies.’”\textsuperscript{23} At most, Sister Camille said, the signers of the Declaration of Life hoped to have “some influence” on the legal system: “‘It provides the opportunity for a person who feels powerless against capital punishment to speak for himself and exert some influence on the legal system. We hope that they would hear the desire of the individual.’”\textsuperscript{24}

After George Pataki won the state governorship in 1995, and the New York legislature reinstated capital punishment, Declarations of Life faded from public view, appearing only occasionally in profiles in Catholic magazines and newspapers.\textsuperscript{25} In 1997, however, the movement re-emerged as a public presence, as the trial of Oklahoma City bomber Timothy McVeigh and the impending execution of Pennsylvania murderer David Paul Hamer together

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created a new sense of urgency among abolitionist activists. After reading about the Declaration of Life in a magazine, Hamer contacted Sister Camille by mail, who then visited him on death row. An article about their relationship in the Catholic magazine *America* in 2001 led numerous readers to ask for copies of the Declaration of Life.\(^{26}\)

As the movement gained strength, activists slowly began to use the rhetoric of victims’ rights more forcefully. Professor Stephen Bright, from the Southern Center for Human Rights in Atlanta, explained why so many advocates felt the need to carry the mantle of victims’ rights: “The political climate now favors those who are tough on crime and support the death penalty,” he said. ‘But I think people who are not caught up in that are trying to say, ‘Not in my name, not for me.’”\(^{27}\) Mario Cuomo, who signed a Declaration of Life after losing the gubernatorial race in 1994, agreed: “I am a believer in victims’ rights,” he told *The Boston Globe*, adding that:

‘It’s appropriate to consult the victims or their relatives in deciding a victim’s punishment. In capital cases, a relative or a prosecutor sometimes says the death penalty would do justice to the deceased. ‘Well in my case,’ he went on a bit more emphatically, ‘they’re not going to be able to make that argument because I don’t consider it justice. If I get murdered and if victims’ rights have anything to do with the sentence, my posthumous poetry will be useful to the question.’\(^{28}\)


The Cherish Life Circle did not reappear in the press until 2004, after the New York State Supreme Court declared another moratorium on capital punishment. In interviews, Sister Camille and other advocates expressed great relief with the court’s ruling, but appeared chastened. When asked about overwhelming public support for capital punishment, Sister Camille said that she recognized that “many good people support the death penalty,” and that substantive legal change was unlikely. “I understand very clearly that those who oppose the death penalty and those who support it have a bridge that connects—the cherishing of life,’ she said . . . ‘There is something in us who so reverence life that we want to punish those who take it.”

B. Mercy Opinions and the Law’s Resistance

Given this history, there remains a sense among many Declarations of Life advocates that the documents carry with them relatively limited legal value. This caution may be a reflection of the Cherish Life Circle’s particularly non-confrontational religious identity—or it could be a function of the movement’s almost exclusive focus on influencing prosecutorial discretion, an area of the law that social movements have almost never infiltrated. Indeed, the few prosecutors


who have commented on Declarations of Life have almost universally dismissed them as irrelevant to their decision-making. In 1998, James Polley, director of government affairs for the National District Attorneys Association, would say only that when it comes to documents such as Declarations of Life, “‘It is the State versus Jones, not Smith versus Jones,’” and that “‘If people don’t like the laws, that’s what the legislative election process is all about.’”  

However, if prosecutorial discretion is infamous for being impenetrable to legal challenges, then the jury system is the opposite, with appellate review often ordering new capital trials based on improper jury selection, instructions, and arguments. But here, too, legal doctrine has been extraordinarily resistant to documents such as Declarations of Life.  

While there is no known case in which a judge has denied the introduction of a Declaration of Life in front of a jury (since, again, until the Hawke-Petit case, there was no indication that any murder victim had ever signed one), there have been multiple attempts by defendants and family members to introduce their closest equivalents: “mercy opinions.” These statements come in different forms, but in general, they express a surviving family member’s opposition to capital punishment for the defendant. And for the past twenty years, the state and federal courts have consistently denied defendants the right to introduce them.  

The earliest case in which the denial of a mercy opinion formed the basis for an appeal was Robison v. Maynard, decided in 1987. Olan Randle Robison, who appealed Oklahoma’s denial of state habeas relief for his murder conviction and death sentence, claimed that the trial

31 Lloyd, supra note 27.  


33 829 F. 2d 1501 (10th Cir. 1987).
court had erred when it refused to allow one of his victim’s sisters to testify that she did not want
the death penalty to be imposed upon him. Robison asserted that by disallowing this testimony,
the trial court deprived him of the right to present relevant mitigating evidence, as permitted
under Lockett v. Ohio.\footnote{438 U.S. 586 (1978).} “He [Robison] contends that one of the reasons underlying imposition
of the death penalty is the sanction of retribution,” the court wrote. “Assuming the validity of
that contention, Petitioner argues testimony of a family member of the victim urging the jury to
reject the death penalty would have been strong evidence mitigating that sanction.”\footnote{Robison, supra note 33, at 1504.}

The Robison court agreed that a mercy opinion might be considered mitigating evidence--
in that it would “suggest [that] the penalty should not be imposed”-- but decided that it would not be relevant mitigating evidence.\footnote{Id.} “At best,” the court concluded, such evidence “would be a gossamer veil which would blur the jury's focus on the issue it must decide.”\footnote{Id. at 1505.} In dicta, the
Robison court also noted that in its recent decision in Booth v. Maryland, the Supreme Court had
prohibited “victim impact statements” from being introduced in capital trials, and that this
decision also worked against the defendant’s request.\footnote{Id. See also Booth v. Maryland, 482 U.S. 496 (1987)).}

After the Supreme Court’s shift on victim impact evidence four years later in Payne v. Tennessee, Robison again brought his case to the 10th Circuit, but the court again denied his
motion for a new trial. “We are loath to extend Payne as petitioner would like us to do,” the
court declared. “We cannot agree that Payne portends admissibility of any evidence other than

\footnote{438 U.S. 586 (1978).}

\footnote{Robison, supra note 33, at 1504.}

\footnote{Id.}

\footnote{Id. at 1505.}

\footnote{Id. See also Booth v. Maryland, 482 U.S. 496 (1987)).}
that related to the victim and the impact of the victim's death on the members of the victim's family. 39

Over the next twenty years, capital defendants have continued to ask that mercy opinions be admitted into court, usually asking that they be considered as a form of victim impact evidence. But the state courts have consistently followed the Robison court, declaring that Payne did not end the ban on victim sentencing opinions, only the ban on victim impact statements. 40

In so holding, the state courts have erected a steep barrier to almost all types of mercy opinions, by making a formal distinction between victim impact evidence that expresses “fact,” on one hand, and victim impact evidence that expresses “opinion,” on the other.

In Campbell v. State, for example, a Florida trial court allowed Sue Zann Bosler, who had survived a brutal attack that had killed her father, to tell the jury about the impact that Campbell’s attack had had on her: “With tears streaming down her face, she [Bosler] described the savage murder and the pain she endured. Between tears, she relayed to the jury how the stabbing resulted in taking the side and part of her brain out of her skull.” 41

At the same time that it upheld this testimony, however, the Florida Supreme Court also upheld the trial court’s decision not to allow Bosler to also tell the jury that her father, a minister, had been firmly opposed to the death penalty, and that in the past several years, she had become

39 943 F.2d 1216, 1217 (10th Cir. 1991).

40 State and federal courts have also followed Robison’s holding by declaring that mercy opinions cannot be considered relevant mitigating evidence under Lockett v. Ohio. While I believe that both of the Robison court’s rationales for excluding mercy opinions are misguided, I focus in this Article only on the first rationale: that mercy opinions are not relevant victim impact evidence under Payne.

firmly against it as well: “Campbell argues that the court should have allowed Sue Zann to testify that Billy was opposed to the death penalty,” the court stated. “We disagree. The victim’s opposition to the death penalty is unrelated to the defendant’s culpability . . . and thus is irrelevant to sentencing.” 42

Several years later, in Greenville State, the Arkansas Supreme Court likewise refused to allow the defendant to present a letter from his victim’s wife, in which she gave him her forgiveness and expressed her desire that he be given a life sentence. “We conclude that Robison v. Maynard, supra, and its progeny are persuasive,” the court wrote. “Opinions on the appropriate sentence from family members of the victim would be confusing to the jury and interfere with its role. . . Indeed, such testimony would have the potential or reducing a trial to ‘a contest of irrelevant opinions.’” 43

In 2007, the California Supreme Court refused to allow friends of a murdered activist to testify about the victim’s opposition to the death penalty himself. (The testimony was offered to “rebut the testimony of Taylor’s [the victim’s] mother, brother, and daughter, who spoke of the effects his killing had on the family.”44) This time, the court dismissed the idea of a “mercy opinion” with one brisk sentence: “There is no material, logical, or moral connection between the effects of a defendant’s crime on the victims’ family and the victim’s views on capital punishment, whatever they may have been.”45

42 679 So.2d 720, 725 (Fla. 1986). For more on Sue Zann Bosler’s story, see Section II.B, infra.
43 Greene v. State, 37 S.W.3d 579, 585-86 (Ark. 2001) (quoting Robison, supra note 33, at 1524.)
44 People v. Lancaster, 158 P.3d 157, 191 (Cal. 2007).
45 Id.
However, while the state courts have consistently refused to admit mercy opinions using this fact vs. opinion division, other types of opinion evidence are often admitted as victim impact evidence in capital trials, even though they, too, are technically prohibited under Payne. As Wayne Logan describes, “‘In Witter v. State, for instance, the wife of the decedent read a statement in which she asked the jury to ‘show no mercy.’ The Supreme Court of Nevada unanimously concluded that the witness’s comment did not amount to an ‘opinion’ but rather constituted a request that the jury return the most ‘severe sentence it felt appropriate.’”

Given the absence of such a formal barrier between “fact” and “opinion” for other kinds of victim impact evidence, it is not entirely clear where the courts’ resistance to mercy opinions comes from. The small body of literature that has explored this question has ventured that the courts’ resistance to mercy opinions simply reflects the continuing tension between individual factors and the need for consistency in capital sentencing, a worry about opening the floodgates to more vindictive opinions, or a sense that “mercy” is no different from “sympathy,” which is seen to be irrelevant to the “reasoned moral response” that the capital juror is being asked for.47 In their attempts to encourage courts to reconsider mercy opinions, scholars have suggested a variety of innovative ways in which they might be introduced into the trial—through pre-trial


47 See e.g., Stephen P. Garvey, “‘As the Gentle Rain from Heaven’: Mercy in Capital Sentencing,” 81 CORNELL L. REV. 989 (1996); Vander, supra note 32, at 721-22. In California v. Brown, the Supreme Court held that a penalty phase instruction that “jurors must not be swayed by ‘mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,’ did not violate the Eighth or the Fourteenth Amendments. 479 U.S. 538, 540 (1987). In her concurring opinion, Justice O’Connor used a phrase that many future “mercy opinion” decisions cited: “[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime, rather than mere sympathy or emotion.” Id. at 545. (emphasis added) (O’Connor, J. concurring).
“forgiveness conversations” with defense counsel, through “mercy instructions” from the judge, through “model definitions” of mercy, or even through a special “mercy stage,” which would come after the penalty stage.48

However, such attempts at reinvention are not necessary. While the scholars of mercy opinions shy away from it, perhaps because of their disagreements with the holdings of Payne overall, in fact, the victim impact statement is an ideal site for the introduction of mercy opinions into capital trials. And although the state and federal courts have dismissed any connection between Payne and mercy opinions, in doing so, I believe that they are using cramped, hyper-technical definitions of relevance, instead of thinking broadly about what victim impact evidence symbolizes in the capital punishment process. With victim impact evidence, our legal system has already sanctioned one point in the capital trial in which arbitrariness is allowed to flourish, in the belief that certain information on specific harm and moral blameworthiness is necessary for the jury to be able to make its decision. Therefore, it is precisely at this point that mercy opinions, and their as of yet unused cohort, Declarations of Life, should also be made available to the capital jury.49

II. MERCY AND PAYNE: RE-CONCEPTUALIZING VICTIM IMPACT EVIDENCE IN CAPITAL TRIALS


49 For the remainder of this Article, I will use the term “mercy opinions” in my argument, given that that is where the jurisprudence on these issues is currently stalled. However, whenever I see any relevant differences between the introduction of mercy opinions and of Declarations of Life, I will note it as such.
Ever since the Supreme Court held in *Payne* that the admission of victim impact statements in capital trials does not violate the Constitution, capital defendants like Olan Randle Robison, have tried to argue that mercy opinions should qualify as relevant victim impact statements. However, as noted, the courts have responded to these requests by claiming that *Payne* only ended the bar on victim impact statements, and not the bar on victim opinion statements about sentences of life or death.

This focus on the technical scope of *Payne* was eventually joined by a more substantive response. Even if *Payne* did not overrule *Booth*’s prohibition on opinion evidence, the state courts began to rule that such evidence was nonetheless not relevant to the twin aims of victim impact evidence: to show “the specific harm” and “moral blameworthiness” of the defendant’s actions, and to “counteract” the defendant’s presentation of mitigating evidence. In *Greene v. State*, for example, an Arkansas case in which the defendant tried to introduce a statement from his victim’s widow, the court seemed perplexed by the very idea of a mercy opinion as a victim impact statement. “Again, the issue comes down to whether the proffered evidence from Edna Burnett is relevant,” the court said. “We conclude that penalty recommendations from family members of the victim are not relevant . . . Certainly, the penalty recommendation from Edna


51 See Payne, *supra* note 16, at 803, fn. 2. (“Our holding today is limited to the holdings of *Booth v. Maryland*, 482 U.S. 496, 1987), and *South Carolina v. Gathers*, 490 U.S. 809 (1989), that evidence and argument relating to the victim and the impact of the victim’s death on the victim’s family are inadmissible at a capital sentencing hearing.”).


Burnett that Greene proposes would not counteract mitigating evidence or show the human cost on the victim’s family.”

It is beyond the scope of this Article to scrutinize whether *Payne* did or did not technically overrule *Booth*’s ban on opinion evidence. However, the lower courts’ seemingly reflexive dismissal of mercy opinions as irrelevant to the purposes of victim impact evidence is the more important issue at stake. Therefore, I will try to unpack the courts’ antipathy by looking back at the multiple meanings within *Payne* itself.

A. *From Booth to Payne*

The issue of victim impact evidence first came to the Supreme Court in the form of *Booth v. Maryland* in 1987, when the Court first addressed whether the admission of information relating to the “personal characteristics” of a murder victim, the “emotional impact” of the killing on the victim’s family, or the “family members’ opinions and characterizations of the crimes and the defendant” violated the Eighth Amendment. The majority opinion dismissed the use of all such information on the basis of relevance, arguing that “while the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing.” Specifically, the *Booth* court argued that the individual qualities of the victim, and the effect of a murder on a family, were “wholly unrelated to the blameworthiness of a particular defendant,” since defendants were usually unaware of the personal qualities of either the victim

54 *Id.* at 585-6.

55 *Booth*, *supra* note 38, at 502.

56 *Id.* at 504.
or their family.\textsuperscript{57} Given this, the Court ruled that victim impact evidence created “a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.” \textsuperscript{58}

The Court upheld their \textit{Booth} decision two years later, holding in \textit{South Carolina v. Gathers} that \textit{Booth} also applied to statements made by a prosecutor.\textsuperscript{59} But then, in 1991, a reconfigured Court reversed course, ruling in \textit{Payne} that victim impact testimony, given in the trial of a defendant accused of murdering a young mother and her daughter, was not unconstitutional.

In one of the most frequently quoted sections from the \textit{Payne} opinion, Chief Justice Rehnquist began by describing the disputed testimony at stake. The victim’s mother, in speaking about how her grandson, Nicholas, had been affected by the murders of his mother and sister, gave the Tennessee trial court the following testimony:

‘He [Nicholas] cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him yes. He says I’m worried about my Lacie.’\textsuperscript{60}

Writing for the majority, Justice Rehnquist disputed both \textit{Booth} and \textit{Gathers’} claims that testimony like this was irrelevant to the jury’s decision. According to Rehnquist, the majority in \textit{Booth} gave no historical, legal, or cultural rationale for two of its main holdings: first, that victim impact evidence was irrelevant to the defendant’s “blameworthiness”; and second, that “only

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.} at 503.

\textsuperscript{59} 490 U.S. 805, 811 (1989).

\textsuperscript{60} \textit{Payne}, \textit{ supra} note 16, at 815.
evidence relating to blameworthiness is relevant to the capital sentencing decision.”

While moral blameworthiness is certainly important to the sentencing decision, Rehnquist wrote, *Booth* did not play adequate attention to another question: to the “specific harm” caused by the defendant’s actions, a factor which has historically also been critical in assessing culpability. “[T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of criminal law, both in determining the elements of offense and in determining the appropriate punishment,” Rehnquist wrote. And in order to assess “specific harm,” the State should be permitted to introduce evidence that showed the victim’s “uniqueness as an individual human being.” This is particularly appropriate, Rehnquist noted, given the nearly unlimited ability of the capital defendant to present his or her story as a unique human being through mitigating evidence.

In their concurring opinion, meanwhile, Justices Scalia, O’Connor and Kennedy directly confronted the question of moral blameworthiness. Unlike what *Booth* held, the concurring justices asserted, victims’ pain was relevant to moral blame, “Murder has foreseeable consequences,” Scalia wrote, recalling his dissent from *Booth*. “When it happens, it is always to distinct individuals, and after it happens, other victims are left behind.” He went on:

Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles: and just as defendants appreciate the web of relationships and dependences in which they live, they know that their victims are not

61 *Id.* at 819.

62 *Id.* at 825.

63 *Id.*

64 *Id.* at 823.

65 *Id.* at 827.
human islands, but individuals with parents or children, spouses or friends or defendant.\textsuperscript{66}

Payne also stated that, more broadly, it was critical to give the jury a wider deliberative range in which to respond to a capital crime, despite the potential for arbitrary decision-making that it might create (thus addressing head on one of the key tensions within capital punishment caselaw).\textsuperscript{67} Early on in his majority opinion in Payne, Rehnquist quoted approvingly from Gregg v. Georgia, the decision that re-instated capital punishment in 1976:

We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging arguments . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. \textit{We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.}\textsuperscript{68}

According to Rehnquist, the problem with Booth was that it did not follow this expansive logic, and by prohibiting victim impact evidence, the decision prevented “the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.\textsuperscript{69}” At its core, then, Payne is about the Supreme Court’s sense that in order to properly

\textsuperscript{66} Id. at 838 (Scalia, J. concurring).

\textsuperscript{67} Over the past thirty years, the Supreme Court has slowly expanded the range of information that can come before jury, through evidence such as victim impact statements and mitigation. In McGautha v. California, 402 U.S. 183, 202 (1971) decided a year before capital punishment was temporarily abolished by Furman v. Georgia, 408 U.S. 238 (1972), the Court described this alternative vision of the jury’s role. In the context of a capital trial, Justice Harlan claimed, juries must “‘do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.’” There was no use in trying to “guide” the jury’s discretion, since “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.” \textit{Id.} at 203.

assess whether or not a defendant should live or die for his crime the jury must be allowed to hear a wider range of information than might otherwise be justified.  

Payne’s holding provoked highly critical responses from the minority justices, ranging from a furious defense of stare decisis (“Power, not reason, is the new currency of this Court's decision-making,”  

Justice Marshall wrote in a scathing dissent, issued on the same day of his retirement), to reiterations of Booth’s claims (“aspects of the character of the victim unforeseeable to the defendant at the time of his crime are irrelevant to the defendant’s ‘personal responsibility and moral guilt,’”) to protestations about the unique structure of the criminal trial (“The premise that a criminal prosecution requires an even-handed balance between the State and the defendant is also incorrect.”).  

Payne also provoked, and continues to provoke, a wide range of scholarly criticism. Among other critiques, scholars have responded to Payne by describing victim impact statements as “inflammatory and prejudicial,” by arguing that “specific harm” is unforeseeable and thus irrelevant to the defendant’s moral culpability, by predicting that such evidence would produce sentences based on the victim’s perceived social or moral “worth,” creating “mini-trials” on the victim’s character, and by claiming that victim impact evidence would distort the entire penalty stage, undermining the “reasoned moral response” that was supposed to be the essence of the

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69 Id. at 827 (emphasis added).

70 When it comes to this analogy only, Payne’s comparison of victim impact statements with mitigating evidence is consistent. The scholars who assail the “randomness” of victim impact statements forget that mitigating evidence rests on the same “feelings, sentiments, and melodrama” that they so vigorously reject in Payne.

71 Id. at 844. (Marshall, J. dissenting).

72 Id. at 860-61. (Stevens, J. dissenting).

73 Id. at 860.
jury’ decision. A number of critics also saw Payne as representing the worst tendencies of the victims’ rights movement, with three year-old Nicholas standing in as a blameless cultural icon.

However, within the decade, even Payne’s harshest critics began to realize that victim impact evidence held more than just temporary appeal. While Payne did not mandate victim impact evidence, only lifting the per se ban on its use, in the 21 years since Payne was decided, victim impact evidence has proved enormously popular, with the federal government, the U.S. military, and nearly all of capital states allowing victim impact statements to play a role in capital trials. As Wayne Logan, an early opponent of Payne, noted in 1999, “Some eight years after Payne was decided, it is now readily apparent that victim impact evidence is here to stay, and indeed will likely come to enjoy even broader use in capital trials.”

As a result of the seeming immovability of Payne, some criminal law scholars have shifted their focus, from how to overrule the decision to how to deal with its existence. For example, some scholars have suggested that there should limits on who can give victim impact statements; others have dissected what the term “impact” should mean; and others have warned against the


77 See Logan, supra note 74, at, 176.
overuse of victim impact evidence in an age of terrorism and mass murder. 78

In some ways, this Article’s analysis of Payne and mercy opinions follows this scholarly trajectory: I take the continued existence of Payne for granted and focus on ways to make victim impact evidence less inflammatory, more limited, and less prejudicial. At the same time, however, I occupy a different vantage point than most other criminal law theorists and abolitionist scholars, who, for the most part, continue to agree with the dissenting justices in Payne that victim impact evidence is irrelevant to a capital sentencing decision. While there are other reasons to disagree with the Court’s decision in Payne, I believe that it had its theories of relevance right: that relevance as a legal concept changes as societal values change. Indeed, the dangers of limiting the scope of relevance has become clear over the past two decades, as victims and defendants alike have struggled to convince courts that expressions of mercy are relevant in the context of a capital trial within the context of Payne.

B. The Equalizing Relevance of Mercy

Aside from the specific holdings of Payne, I would begin by arguing that mercy opinions should be considered relevant in capital trials because opinions expressing the desire for vengeance, in contrary, are considered relevant all the time.

Despite Payne’s instructions that victim impact evidence should be limited to impact, rather than opinion evidence, the lower courts consistently allow opinions recommending death to come before the jury. In one case out of Illinois, for example, the appeals court affirmed the admissibility of the following statement offered by the victim’s wife (the court held that “closure” did not necessarily mean “death”):

My family and I are very confident that all of you will return a quick verdict, which will send a message to my children, society, and the law enforcement community that we simply not tolerate or accept our last means of protection being annihilated on our streets. Renew our faith in the criminal justice system and bring a phase of closure to this ongoing nightmare that fills our lives. 79

Even with less explicit language, the entire structure of the victim impact stage creates a presumption in the jury’s mind that the victim prefers the death penalty. The prosecution almost always presents the testimony, and with few rules or limitations on its content, the effect is often deeply biased towards death. In Timothy McVeigh’s trial, for example, twenty-seven family members testified about the impact of the murders on their families, with children figuring prominently. One witness, for example, spoke about her young son’s reaction to news of the bombing:

“They had set up an area in the bar of the hotel, and we went in there and they had the TVs on. And Patrick started screaming. He was really upset, and he was upsetting the other people, because he said: ‘I don't want my dad to be dead. I don't want my dad to be dead.’ And so he was seeing all the pictures on TV. So they took us up to a room so the other people wouldn't be so upset.” 80

As at least one state Supreme Court has admitted, such emotional testimony is almost always seen by the jury as a way to advocate for the death penalty, creating “the possibility that some jurors will assume that a victim impact witness prefers the death penalty when otherwise silent on that question.” 81

However, while victims in favor of the death penalty can express their explicit or implicit sentencing desires through their victim impact statement, there is simply no place in the capital

79 Logan, supra note 74, at 168-69 (emphasis added).


81 Koskovich, supra note 50, at 502-3.
trial for victims who are opposed to the death penalty to speak. Although there is no reason to suspect that those who oppose the death penalty suffer any less pain than other victims, by giving a victim impact statement “they become part of the prosecution’s efforts to kill.”

As Brian Vander has noted,

If the victim’s family does not wish to seek vengeance, they are left with two equally unappealing options. They may choose to remain silent . . . [or] they may take the stand in an effort to convey to the jury their opposition to death. How this may be done without the admissibility of mercy opinions is difficult to imagine. One certainly would not expect the father of a murder victim to denigrate his son's reputation or claim that he was not significantly affected by his son's death.

In 2002, the dilemmas that faced the “merciful victim” were memorialized in a report called *Dignity Denied: The Experience of Murder Victims’ Family Members Who Oppose the Death Penalty*, put together by a group called Murder Victims’ Families for Reconciliation (MVFR). MVFR collected the stories of family members who had experienced “indifference, discrimination, and in some instances, abuse,” after making clear to prosecutors that they were opposed to the death penalty.

One story that *Dignity Denied* tells is that of Sue Zann Bosler, who, as described earlier, was attacked by James Bernard Campbell, a stranger who broke into her home and then killed her father. According to media coverage at the time, during Campbell’s trial, Bosler “gave ‘deep,’ ‘dramatic,’ and ‘emotionally moving’” testimony . . . Sue Zann was the prosecution's ‘blockbuster witness,’ who, through her wrenching testimony, helped secure the death

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82 Blume, *supra* note 78, at 257.


84 *Id.* According to a spokesperson at MVFR, *DIGNITY DENIED* is no longer in print.
penalty.\textsuperscript{85} The jury heard her testimony, and then gave Campbell a sentence of death.\textsuperscript{86}

However, over the next ten years, as his appeals accumulated, Bosler visited Campbell a number of times in prison, and over time, she came to believe that her father, a pacifist minister, would have never wanted his execution. As a result, by the time of Campbell’s third sentencing hearing, Bosler “desperately wanted to convince the jury not to impose the death penalty. But the prosecution and the judge threatened to jail her for contempt of court if she tried to communicate her position to the jury.”\textsuperscript{87} In a strategy designed by her lawyer, therefore, when the prosecutor began his questioning by asking Bosler what she did for a living, she replied, “I do hair and I work full time to try to abolish the death penalty.”\textsuperscript{88} According to an interview with Bosler several years later, “The judge, barely able to control his rage, ordered the jury out of the room and told Bosler if she mentioned the death penalty again she would be thrown in jail.”\textsuperscript{89}

Bosler’s desperation to tell her story to the jury reveals the deep emotional urgency behind many victim impact statements. It is this need to tell a story, to bear witness, to “breathe life” into murdered bodies,\textsuperscript{90} that the numerous critics of \textit{Payne} have ignored in their almost

\textsuperscript{85} Sullivan, \textit{supra} note 41, at 601 (quoting \textit{48 Hours: My Father’s Killer} (CBS television broadcast, Oct. 2, 1997)).

\textsuperscript{86} Id.


\textsuperscript{88} Id.

\textsuperscript{89} Id.

\textsuperscript{90} As Thomas Block writes in his description of the trial of his wife’s murderer (before \textit{Payne} was decided and victim impact evidence was permitted): “We were there for Beth, but our voices were silenced; we were not allowed to ‘breathe’ life into her.” Cait Clarke and Thomas Block,
universal focus on the problem of vengeful victims. Victim impact statements are sometimes a way to express vengeance, but they are also stories of particularized pain, narratives that “invite[] empathetic concern in a way that abstractions and general rules do not, and encourage[] appreciation of complexity.” This has become clear given that even many victims who are deeply opposed to the death penalty--individuals who know that their testimony will be used to advocate for a punishment that they despise--still have an intense desire to have a face at capital trials. Congresswoman Carolyn McCarthy, for example, who later signed a Declaration of Life and is a public opponent of the death penalty, nonetheless spoke at Colin Ferguson’s trial, where she told him she thought he was “evil.” Charisse Coleman, another death penalty opponent whose brother, Russell, was murdered, explained her decision to speak:

> Why did I choose to testify? Why not at least honor my opposition to capital punishment by staying silent, by not participating in a process that could lead to an outcome I found insupportable? It’s a fair question, and not one I can necessarily answer to anyone’s satisfaction, least of all my own. What I can say is that, along with the opportunity to speak my love and sorrow in the public forum of the murder trial, and my decision to embrace that opportunity, came an agreement to enter a sort of devil’s compact.

Coleman went on to describe the essence of that devil’s compact: “The fact that my

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91 According to Paul Gewirtz, the cold shoulder that many scholars give victim impact statements stems from a perspective in which storytelling is not really about “alternative way of knowing and persuading, but rather about a strategic value of storytelling as an alternative way of promoting a particular substantive point of view.” Paul Gewirtz, “Victims and Voyeurs: Two Narrative Problems at the Criminal Trial,” in LAW’S STORES: NARRATIVE AND RHETORIC IN THE LAW 142 (Peter Brooks and Paul Gewirtz, eds. 1996).


93 Charisse Coleman, “Matters of Life and Death,” in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 21 (James A. Acker and David R. Knapp, eds. 2006).
desire to bear witness overpowered some of my deepest beliefs about right and wrong only added to the confusion and suffering of being a murdered man’s sister. . . My decision to speak just became another stone weight onto the pile of wrongness that had been accumulating since the moment of Russell’s death.”

This “wrongness” epitomizes the kind of experience that a victim opposed to the death penalty most often confront if he or she wants to give a victim impact statement, in the context of how Payne is currently being interpreted by the courts.

C. The Legal Relevance of Mercy

However, there is another reason, aside from equity, that mercy opinions should be considered relevant under the dictates of Payne. Indeed, the lower court decisions that dismiss mercy opinions as irrelevant are employing a language that simply does not cohere with ordinary theories of relevance, given the broad scope of relevance in sentencing proceedings in particular, or given the unique definitions of relevance within Payne itself.

Even in ordinary circumstances, the standard for relevance is extraordinary broad, including “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” And while the Federal Rules of Evidence do not technically apply to sentencing hearings, if anything, the scope of relevance has traditionally been even broader in sentencing hearings.

94 Id. at 22.
95 F.R.E. 401.
96 As Gewirtz notes, “At the sentencing stage, the jury is not being asked to find a fact (Did the defendant do it?) but to make a judgment about an appropriate punishment. That judgment includes implementing retribution, which inevitably draws upon an emotional element.” Gewirtz, supra note 91, at 145.
Indeed, the broad scope of relevance in sentencing proceedings is one of the underlying values of *Payne*. According to the majority justices, the *Booth* justices were being disingenuous when they claimed that a narrower scope of relevance existed in capital sentencing opinions. As Rehnquist noted in his majority opinion, “Whatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material… ‘a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.’”\(^97\)

*Payne* also created a new concept of relevance in its decision, regarding the connection between relevance and changing social and cultural mores. In one famous moment from the *Payne* decision, Scalia responded to Justice Marshall’s complaint about the violation of the doctrine of *stare decisis*, by claiming that it was actually *Booth*, not *Payne*, that broke from changing cultural and social understandings about harm, blameworthiness, and relevance. As he wrote, “*Booth’s* stunning *ipse dixit*, that a crime’s unanticipated consequences must be deemed ‘irrelevant’ to the sentence conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victim’s rights’ movement.”\(^98\) Just as the victim’s rights movement made it clear to Justice Scalia that victim pain was now relevant to the sentencing decision, the fact that at least 10,000 individuals have signed Declarations of Life-- and dozens of family members have tried to ask for mercy in court to no avail for more than twenty years- makes the case that these documents should also be considered relevant under this standard.

More specifically, when it comes to *Payne’s* emphasis on “specific harm,” mercy opinions often meet this standard, as they include testimony about the harm that a death sentence would

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\(^97\) *Payne*, *supra* note 16, at 821 (internal citations omitted).

\(^98\) *Id.* at 834. (Scalia, J. concurring).
have on a family that opposes the death penalty (and on their memories of their loved one). Declarations of Life, for their part, explicitly make this specific harm connection: “I request that the person or persons found guilty of homicide for my killing not be subject to or put in jeopardy of the death penalty under any circumstances, no matter how heinous their crime or how much I may have suffered,” they state. “The death penalty would only increase my suffering.” And when it comes to the moral blameworthiness of the defendant, mercy opinions also often meet the relevance standard, as they set up an entirely different equation between moral guilt and proper punishment. As Zann Bosler told the judge right before he threatened her with contempt, “I respect his life and value it here on this earth, and I believe in life.”

The one caveat, however, to the notion that mercy opinions and Declarations of Life can be considered legally and ethically relevant under Payne is the decision’s other main aim, which, in the majority’s words, is to “counteract” the defendant’s presentation of mitigating evidence. But, the very notion that victim impact evidence needs to “counteract” the defendant’s evidence is an unnecessary tension within Payne, and it does not cohere with the core of the decision itself. As Justice Stevens noted in his dissent, the idea of victim impact evidence being used to “balance” mitigating evidence goes against very structure of a criminal trial, in which “[t]he Constitution grants certain rights to the criminal defendant and imposes special limitations on the State.”

What Stevens didn’t note, but particularly relevant to mercy opinions, is the ways in which this “balancing” argument puts directly into Supreme Court doctrine the erroneous

99 Declaration of Life, supra note 2 (emphasis added).
100 Mcthenia, supra note 48, at fn. 63.
102 Id. at 860. (Stevens, J. dissenting).
assumption that all victims want defendants to die for their crimes.

If *Payne* is really about balancing, then it may indeed hold no place for mercy opinions or Declarations of Life. However, if it is really about specific harm, moral blameworthiness, and relevance as a social construct as much as a legal one, then it is a decision with a morally consistent core, and there is no reason why a mercy opinion or a Declaration of Life should not fit into that core.

**D. The Broadened Yet Narrowed Relevance of Mercy**

However, at the same time that *Payne* expands the range of information deemed relevant to a jury’s decision, one in which I argue that mercy opinions and Declarations of Life fit, it does not imagine that all of this information will actually come before a jury. Indeed, in overruling *Booth*, *Payne* explicitly states that some victim impact statements may still be too prejudicial, and that if such evidence “renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.”[^103] This is where the *Payne* decision turns from constitutional to evidentiary issues: while the Court held that the Eighth Amendment did not erect a *per se* bar to a state’s use of victim impact evidence, it also did not prohibit the states courts from prohibiting or even just limiting the kind of victim impact evidence that it hears, through the lens of a prejudice analysis. In fact, the *Payne* majority explicitly stated that, in the context of victim impact evidence, “The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs.”[^104]

In other words, relevant information is not always the same as admissible information,


[^104]: *Id.*
and that, is where standards of prejudice enter into the equation. For example, a mercy opinion or Declaration of Life might be described as prejudicial if it was so emotionally overwhelming that it had the effect of leading the jury to believe that it had no choice but to follow the desires of the victim.

However, when a mercy opinion or Declaration of Life is fairly described as unduly prejudicial, “holding the evidence to be relevant under Rule 401 but excludable under Rule 403 sends a very different message to society than does merely excluding the evidence as irrelevant under Rule 401.” As Peter Nicolas describes, in his analysis of evidence of sexual orientation in criminal trials, “[W]hile exclusion of evidence under Rule 403 is concerned about the message that admitting the evidence will send to the jury and a judgment about the capacity of the jury, exclusion pursuant to Rule 401 is concerned with the message that will be sent to society at large.” In other words, the courts’ persistent refusal to admit that mercy opinions could even be considered “relevant” in a capital trial sends a troubling message, to both the victims involved and to society at large. In short, this refusal says: “Your desire for mercy means nothing to this court, even if your desire for vengeance would.”

Indeed, part of the problem with the current system under Payne is that, by in large, the state courts have failed to develop any set of evidentiary standards for victim impact evidence--on relevance, prejudice, or otherwise. Nor, for that matter, have the state legislatures defined or


\[106\] Id. at 848-49. (emphasis added).
limited admissible victim impact evidence, as is allowed by *Payne*, through statute. As a result, victim impact evidence now exists in nearly all capital states and in the federal government, with little to no guidance or parameters on its use.

In order to reign in some of the excesses of *Payne*, while still allowing for a broad scope of relevance, scholars have suggested various measures: i.e., that courts require that victim impact evidence be submitted in writing prior to trial; that trial judges work harder to keep these statements as brief as possible (perhaps even requiring a question-and-answer format); that courts give more careful jury instructions to avoid the possibility of “inferential errors”; and that these instructions remind the jury that victim impact evidence is not the same as aggravating evidence.

When it comes to mercy opinions, I believe that documents like Declarations of Life—signed, notarized documents with limited emotional content—are exactly the kind of document that this more careful deployment of *Payne* encourages. It is also the kind of document that

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107 One notable exception to this trend is Oklahoma, which initially disallowed mercy opinions when *Robison* was first decided. But Oklahoma now allows all opinion evidence in by statute. In *Ledbetter v. State*, the Oklahoma Supreme Court upheld this statute, bucking the national trend by holding that *Payne v. Tennessee* had indeed overruled all of *Booth v. Maryland*, and that victim opinion evidence was also now admissible. 933 P.2d 880, 881 (Okl. Cr. 1997). Notably, however, the *Ledbetter* court cautioned that in making the assessment of whether to admit opinion evidence, the trial court must use extraordinary care, such that “any opinion as to the recommended sentence should be given as a straightforward, concise response to a question asking what the recommendation is; or a short statement of recommendation in a written statement, without amplification.” *Id.* The Oklahoma courts have generally held to this standard, ruling in several cases that while opinion evidence was allowed, that specific victims’ opinions were too inflammatory, and that new trials were therefore warranted. *See, e.g.*, Conover v. State, 933 P.2d 904 (Okl. Cr. 1997); Washington v. State, 989 P.2d 960 (Okla. Crim. App. 1999); Miller v. State, 29 P.3d 1077 (Okl. Cr. 2001); Malone v. State, 168 P.3d 185 (Okl. Cr. 2007).

addresses worries like Peterson’s that by allowing in mercy opinions, the Supreme Court would be “opening the floodgates,” to all forms of potential evidence. In addition to the simplicity and reliability that comes from such a simple document, Declarations of Life are also inherently less prejudicial than other forms of mercy opinions, because they emanate from the primary victim, thereby avoiding the “slipperiness of identification,” that so often occurs when both the murder victim and his or her family are referred to as the “victim.” And while other kinds of mercy opinions might also be admissible, I would suggest that Declarations of Life, in terms of both their broadened scope (in terms of relevance) yet narrow impact (in terms of scrutiny for prejudice) are one way in which to revitalize the much-maligned Payne.

However, the remains another concern that both criminal law scholars and abolitionists might worry about in weighing the benefits of introducing documents like mercy opinions and Declarations of Life to capital trials. Namely, if mercy opinions and Declarations of Life may become admissible, then why not with them documents such as “Declarations of Death”?

For criminal law theorists, this notion may be particularly troubling, given traditional conceptions of the American criminal justice and jury system, both of which are supposedly structured in order to vindicate public, and not private, wrongs. And abolitionist scholars might worry that in a country in which the majority of individuals still support the death

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109 Joh, supra note 74, at 29. As Vik Kanwar notes “The language of the declaration [of life] could strategically undercut even relevant victim impact statements' calls for vengeance based on suffering or the heinousness of the crime. Ironically, this ultimate act of inclusion is perhaps the only way to get away from the problems of the current centrality of secondary victims, from indeterminacy of standing to ambiguous standards of relevance for victim impact statements urging either mercy or vengeance.” Vik Kanwar, “Capital Punishment as ‘Closure,’: The Limits of a Victim-Centered Jurisprudence,” 27 N.Y.U. REV. L. & SOC. CHANGE 215, 250 (2001-2002).

110 See e.g., Kanwar, supra note 109, at 225 (“The transition from private justice to public prosecution has been a recurrent and powerful pattern in modern legal systems”); Yoshino, supra note 74, at 1884 (“The fundamental, differentiating factor in American criminal law lies in our adoption of a system of public prosecution.”) (internal citations omitted).
that allowing in documents like Declarations of Life could only open the floodgates to other, more troubling kinds of “declarations.” However, I would argue that our criminal justice system contains within it norms and structures that would, in fact, allow for a jurisprudence that permits mercy opinions and Declarations of Life, but would continue to exclude opinions explicitly advocating death.

First, as discussed, there is the fact that such opinions are already practically allowed, under the current structure of *Payne* and the lack of regulation of victim impact evidence’s emotional evidence in most capital cases. In addition, however, I would argue that the American jury trial is explicitly an institution that was designed to dampen down personal vengeance. In particular, the criminal trial as a defendant-protecting tradition is particularly well-rooted when the possible punishment is death.

It is true that many abolitionist critics see *Furman v. Georgia’s* “death is different” language as constituting a vision that has never really been fully fulfilled. However, while this disillusionment may very well be justified, I would argue that the very fact that there still is a “death is different” theory—a cultural theory, even if not a current jurisprudential one—remains critical. And while it is a theory that has stagnated in some ways, it has not disappeared. For example, “death is different” led to a focus on wrongful executions in Illinois, leading to a statewide moratorium on capital punishment in 2003. Four other states have likewise abandoned

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\[112\] See Carol S. Steiker and Jordan M. Steiker, “Judicial Developments in Capital Punishment Law,” in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 47-75 (James Acker et al., eds. 2003).
capital punishment for similar reasons in the past five years.113 And “death is different” has also led to a growing sense of unease with certain populations ever receiving the death penalty, leading to the end of executions for the mentally retarded and for juveniles nationwide.114 While these new forms of the “death is different” doctrine may not be the ones that abolitionist scholars would themselves choose, they nonetheless signal something abidingly distinct about the death penalty, something rooted, perhaps, in the “aspirational” tone of the Eighth Amendment itself.115 However, neither our criminal justice system, nor our Constitution, was ever structured in order to dampen down mercy or forgiveness.

III. CONCLUSION: THE CAPITAL JURY RE-IMAGINED

Finally, apart from the relief that they might offer the families of murder victims opposed to the death penalty, I believe there is one more reason why documents such as Declarations of Life should be allowed into the sentencing phase of capital trials: to address the moral discourse gap that currently exists in the world of death penalty decisions.

In *Caldwell v. Mississippi*, the Supreme Court affirmed the importance of the jury understanding its moral responsibilities when it reversed the death sentence in a case in which the prosecutor suggested that the appellate court had the final responsibility for the verdict. “[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will


rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role,” Justice Marshall wrote. “Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in be overturned on appeal.”116 Marshall suggested that the jury’s understanding of its responsibilities was particularly important for mitigating evidence, since the appellate court generally does not consider the kind of “intangibles” at play in mitigation: “This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed ‘[those] compassionate or mitigating factors stemming from the diverse frailties of mankind.’”117

Although Caldwell limited the ability of prosecutors to make responsibility-dodging arguments, data from the Capital Jury Project (CJP)-- a sample of 1,198 jurors from 353 capital trials since 1995-- indicates that jurors still find ways to avoid responsibility for their verdicts. “During the jury deliberations, most jurors found ways to overcome, or avoid confronting, their sense of personal moral responsibility for the defendant's fate,” Joseph Hoffman writes of his study of jurors in Indiana. “Some turned to God, others to the bottle, and still others somehow misinterpreted the trial judge's instructions as saying that ‘the law’ dictated a particular outcome.”118 More particularly, researchers have found four main trends within CJP data: 1) that capital jurors decide on their sentences prematurely, before the penalty stage even begins; 2)

117 Id. at 330.
that capital jurors misunderstand or misuse the guidelines for deciding their decision; 3) that capital jurors deny responsibility for their sentences, using the guidelines as an excuse to shift responsibility to other actors in the criminal justice system; and finally 4) that capital jurors either do not understand, or consciously refuse to consider, mitigating evidence.\textsuperscript{119}

While better sentencing instructions to the jury would certainly help remedy this situation, information like Declarations of Life could also play a role, by adding factors to a decision-making process that has tended to frustrate the entire purpose of mitigating evidence. CJP interviews with former capital jurors have found that, even after having heard the sentencing instruction read to them three times, less than half of all jurors could provide even a partially correct definition of mitigation.\textsuperscript{120} And even those jurors who did understand the term tended to either misapply it—for example, using youth or mental illness as an aggravating factor rather than a mitigating factor, “transforming it in ways that robbed it of its life-giving effect”\textsuperscript{121}—or by evaluating mitigation as an “excuse,” and then dismissing it as insufficient.\textsuperscript{122} Many capital jurors simply have no framework for understanding mitigating evidence, no sense of what effect to give to evidence that tries to “re-establish him [the defendant] as a member of the human community.”\textsuperscript{123} However, mercy opinions and Declarations of Life, in their insistence that the


\textsuperscript{120} Haney, supra note 119, at 1449.


\textsuperscript{122} See generally Bentele and Bowers, supra note 119.
victim wants no person, not even their murderer, to be executed, may be able to help to give that framework to jurors. At minimum, Declarations of Life, in their condemnation of the death penalty as “morally wrong” are explicit in their views, an exception to a capital punishment process generally characterized by the “mechanisms of moral disengagement . . . social and cognitive processes that distance people from the moral implications of their actions.”124

Declarations of Life may also help to fulfill an even weightier task, by contributing to what is often thought to be one of the Eighth Amendment’s primary purposes— to “link the administration of capital punishment to community values.”125 In the early days of death penalty jurisprudence, the notion of the jury as the “conscience of the community”—a diverse group of individuals engaged in both reflection and moral discourse about the appropriateness of the ultimate sanction—played a central role in the Supreme Court’s rhetoric. In Witherspoon v. Illinois, for example, in which the Court ruled that jurors with “doubts or scruples”126 about the death penalty could not be automatically disqualified for cause, the Court described a representative jury as one engaged with different opinions and perspectives on the death penalty. “In a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community,” the Court declared. “Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty— such a jury can speak only for a distinct and dwindling

124 Haney, supra note 119, at 1449.
minority.”

Although the Court broadened the parameters of juror disqualification in capital trials in *Wainwright v. Witt*, seventeen years after its decision in *Witherspoon*, Justice Brennan reiterated this vision in a vigorous dissent: “One of the most important functions any jury can perform in making such a selection [of life or death] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’”

In this same vein, I would argue that even if the concept of “community conscience” does not require capital juries to physically include members with a wide range of views on capital punishment, that these juries should nonetheless hear a wide range of views on capital punishment—i.e., that they should actually exposed to society’s debates about retribution, punishment, and responsibility. While certainly this exposure must have some limits, one limited avenue for the process could be through the admission of documents such as Declarations of Life. To the extent that jury decision-making is a communicative enterprise, when we remove these sorts of articulations from the jury’s deliberative range, we hamper the jury’s ability to hear society’s debates, and then to morally reflect back on them. And at the same time, we also limit the jury’s ability to then transmit its own moral decisions back to society.

While a number of jury scholars have made this argument for juries writ large-- speaking about jury service as a kind of communicative, democratic practice--few have done so for the capital jury. However, I believe that the concept of the jury is even more important in capital trials, especially given what we know about the virtual absence of moral discourse in typical

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127 Id. at 520.

death penalty decision-making. To the extent that they can help expand the capital juror’s deliberative range, mercy opinions and Declarations of Life could act as a vital contribution to the democratic process, even if no fewer death sentences result in the end.\footnote{Adrienne Barnes relates the story of Kitty Irwin, who pled with a Virginia jury to hand down a life sentence for the murderer of her daughter. However, “[d]espite her plea that Thomas be sentenced to life in prison, the jury handed down a death sentence.” Adrienne Barnes, “Reverse Impact Testimony: A New and Improved Victim Impact Statement,” 14 CAP. DEF. J. 245, 257 (2002).}