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OKLAHOMA'S VICTIM IMPACT LEGISLATION: A NEW VOICE FOR VICTIMS AND THEIR FAMILIES: A RESPONSE TO PROFESSOR COYNE

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In his recent article "Inflicting *Payne* on Oklahoma,"[1] Professor Randall Coyne takes critical aim at Oklahoma's new legislation authorizing "victim impact" testimony during the sentencing phase of criminal trials. As the author of this legislation, I take this opportunity to respond to his criticisms. Although I lack Professor Coyne's scholarly credentials, I hope to articulate the reasons for my support of victim impact statements, and to express my strong conviction that they advance the cause of justice by helping swing the pendulum back in favor of victims.[2]

The purpose of the criminal justice system is to promote justice by balancing the interests of the state against the interests of the accused. The interests of the state are to protect the people by enforcing laws and to punish those who violate the laws in order to deter the offender and others from committing future crimes. The interest of the accused should be to receive a fair trial. In order to guarantee this right, there are many issues involved in determining whether or not a person is receiving a fair trial. These issues arise at the moment of the first accusation and subsequent issuance of a warrant, and culminate in the need to tailor the punishment to the crime once guilt has been determined.

While the rights of crime victims are a recent discovery, protection of the rights of the accused has always been a major concern in American criminal jurisprudence. This is evidenced most explicitly by those protections expressed in the first ten amendments to the U.S. Constitution. A defendant possesses freedom from compulsory self-incrimination.[3] He is protected against unreasonable searches and seizures.[4] He has the right to a fair trial by a jury of his peers.[5] He is protected

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1. Randall Coyne, *Inflicting* Payne *on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589 (1992).

2. While I hope that my argument will stand on its own merits, I will also refer to some of my own experiences with the criminal justice system. I do not believe that they necessarily "prove" anything, and I offer them by way of illustration only. However, I do think it appropriate to draw upon them, since Professor Coyne made reference to my personal experiences in his article.

3. U.S. CONST. amend. V.

4. *Id.* amend. IV.

5. *Id.* amend. VI.

against being twice put in jeopardy for the same offense.[6] These rights have been interpreted to include the right to appeal,[7] the right to competent legal counsel, and, if the defendant is indigent, the right to legal counsel at the state's expense. Moreover, from my own *Ake v. Oklahoma*,[8] the Supreme Court determined that where, in a capital case, the sanity of the defendant at the time of the crime is at issue, the state must also aid an indigent accused in preparation of his defense by providing a psychiatrist.

These are rights held dear by every citizen, and we must all work diligently to protect them. In its role as protector of the people, the state must ensure that the correct person is convicted and appropriately sentenced. Every citizen must be confident that if he is accused of a crime, these enumerated protections will be available to him.

However, over the past twenty years the courts have gone to such lengths to ensure these rights of the defendant that these protections have become a sword rather than a shield in the hands of the defendant. The courts have created a system far more responsive to the defendant rather than the laws of the state, the people of the state, the prosecutor, witnesses, or the victims themselves. The insanity defense, for example, was designed to apply to a limited number of murder cases — either those involving clinically observable mental illnesses, or those in which the defendant "loses it" and takes the life of another in a moment of moral incapacity. Yet this defense, appropriate only in the rarest of cases, is now routinely used. In fact, since *Ake*, a defendant is probably insane if he does not at least attempt to plead insanity.

As in most political arenas, a pendulum swings between the interests of the prosecution and the defense, and rarely does it appear to find its way to the middle and strike a proper balance between the two. The public becomes more outraged while the criminal justice system, which seems far more concerned with the rights of criminals than with justice, appears to spin out of control. Scarcely a day goes by without a newspaper or television report of a defendant saved from jail by a plea bargain, or acquitted due to a technical flaw in the trial. More and more frequently, we see inmates released on parole or under pre-parole supervision, serving only a small percentage of the punishment. Often, of course, parolees abuse their freedom by committing further crimes. It is difficult to explain to the victim of a crime that the person who harmed her is already back out on the streets after having previously been convicted of other crimes. It is precisely such events that erode the public's confidence in the criminal justice system — a system supposedly designed to protect them.

The victim of a crime committed by a criminal released from prison has already been betrayed by the system. Unfortunately, she will again be victimized by the

6. *Id.* amend. V.

7. Although the Constitution does not provide a convicted criminal the right to appeal a conviction, Abney v. United States, 431 U.S. 651, 656 (1977), the right is granted pursuant to federal statute. *See* 28 U.S.C. § 1291 (1988).

8. 470 U.S. 68 (1985).

system's complete indifference to her plight. Once they make their statement to the authorities, crime victims are essentially ignored, unless and until they are called upon to testify. If they are called, legal procedure limits their testimony to the specific facts concerning the events that took place during the commission of the crime. The victim impact statement is an effort to provide a voice to victims and their families, and to allow them a small role in the system.

I would note in passing that *Payne v. Tennessee*,[9] the Supreme Court decision underlying Oklahoma's victim impact legislation, has been unfairly characterized by its detractors. While *Payne* does overrule the Court's previous holding in *Booth v. Maryland*,[10] it is not a bad decision simply on that account; the doctrine of stare decisis should not be an absolute bar to the evolution of the law. The Constitution of the United States is a "living" document that changes with the ebb and flow of values in American society. It has survived for over two hundred years by being able to meet the pressures of a changing country. Our society has faced many challenges, both social and technological, that were unforeseeable by the framers yet the Constitution has been able to deal with them precisely because of its flexibility. The Supreme Court, as the final interpreter of the Constitution, has a duty not only to apply it to an ever-changing society, but also to correct its own excesses. The death penalty, for example, which after *Furman v. Georgia*[11] was in danger of judicial abolition, has now been firmly upheld in decisions that better reflect the original intent of the framers and the moral intuitions of most Americans.

We are once again at a time in history when the Court appears to be correcting its mistakes, and is beginning to see that it ventured further than society wanted to go in protecting the rights of criminals. *Payne* is not an irrational break from precedent, but a decision that addresses a fundamental unfairness in the criminal justice system. The Court must break from precedent when it neither serves the best interests of the people nor reflects their beliefs. Sometimes that break only occurs when the makeup of the Court changes — but it is surely incorrect to suggest that the break from precedent is illegitimate merely on that account.

That is what has happened recently in *Payne*. New members of the Court who reflect current values on timely issues can bring those values to the Court as they shape its decisions. Because this process moves so slowly, the Court does not change with every whim of society but reflects only major trends in changing societal values. The "victims' movement" is one such change; the result of decades during which our rights to be safe in our own homes has been eroded by expanding and enhancing rights for criminals. Many people have worked to restore balance to the system — not by reducing the rights of defendants, but by increasing rights of victims. *Payne* is a step in that direction.

Professor Coyne's thorough discussion of the decisions in *Booth* and *Payne* outlines the logical tensions between these two decisions and concludes that *Payne*

9. 111 S. Ct. 2597 (1991).
10. 482 U.S. 496, 520 (1987).
11. 408 U.S. 238 (1972).

is inconsistent with the Court's prior rulings. But another conclusion is possible — namely, that *Payne* corrects the Court's mistakes in *Booth*.

In *Booth*, victim impact statements by several members of the murder victims' family were read to the jury during the sentencing phase of the trial after Booth was convicted for murder. The evidence offered was of three types: personal characteristics of the victims, emotional impact on the family, and the opinions and characterizations of the crimes and the defendant. The Court focused its analysis on whether the victim impact evidence "suitably directed" the jury's discretion or increased the risk of an "arbitrary and capricious" decision in determining whether or not the death penalty should be imposed.[12] The majority found that the Eighth Amendment was violated by the victim impact evidence because it increased the likelihood that the jury would act in an arbitrary and capricious manner.[13] The majority opinion, written by Justice Powell, discussed a number of issues which led the Court to that conclusion.[14]

Foremost in the majority's reasoning was the concern that victim impact statements forced the jury to assign a relative social "value" to the victim when determining whether or not to impose the death penalty.[15] This was also the central concern for Professor Coyne and other critics of the *Payne* decision. However, what the critics are objecting to is an intrinsic feature of any jury trial. With or without victim impact statements, it is always possible that a jury will judge the defendant on the basis of its feelings for the victim.

Not only is the concern of victim "valuation" overstated, but it is also irrelevant to the legitimate role played by victim impact statements. The important issue in sentencing is that the jury be given a clear picture of the entire crime. Information about the victim must be seen as relevant in order to accomplish this task. That the victim is a drug dealer or has a history of causing harm to others is as important for the jury to know as if the victim were a minister.

Payne provides part of the constitutional framework for the victims' rights bills that I have authored since becoming a member of the Oklahoma Senate. Professor Coyne refers to the "innocuous" title of Senate Bill 816[16] as though the entire bill deals only with the victim impact statement. Much of Senate Bill 816 does deal with the definition and function of victim impact statements. But the bill accomplishes several other important tasks, including revisions to the statutes controlling the Victim's Compensation Fund. In addition, it requires that the Victim-Witness Coordinator for each district attorney's office keep victims informed of the status of the case.

12. *Booth*, 482 U.S. at 502 (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).

13. *Id.* at 509.

14. Some of the issues addressed by Justice Powell were: (1) whether the presence or absence of emotional distress of the victim's family was relevant; (2) whether the victim's personal characteristics are proper sentencing considerations; (3) the importance of the background and record of the accused and the particular circumstances of the crime. *Id.* at 496.

15. *Id.* at 504.

16. S.B. 816, 43d Leg., 2d Sess. (1992) (Okla.) (enacted).

Senate Bill 816 also includes a privacy provision for victims of crime which allows them to request that personal information about the victim be deleted from court records when there is a danger that such information may be used in bringing further harm to the victim. This provision is particularly relevant in rape cases. A number of instances have been reported in which suspects released on bail have simply walked down the hall of the courthouse and obtained a detailed police report containing the victim's name, address, telephone number, place of employment, and other personal information. They have then used this information to stalk and haunt the victim, either to discourage the victim from testifying, or simply to gratify a desire for revenge. While the privacy provision is a difficult procedure to implement and the suspect may acquire this information elsewhere, it was my feeling that the police and courts should not be doing the criminal's homework for him.

As for the victim impact statement portion of Senate Bill 816 and its companion, House Bill 2271,[17] we intended these provisions only to provide the jury with a complete picture of the crime committed by the defendant. In case after case, the defendant's entire family is permitted to parade across the witness stand, tearfully testifying about the defendant's basic goodness, his deprived childhood, and his victimization by circumstances. These sentiments are then echoed by the defendant's first grade teacher, Sunday school teacher, and minister.

On the other hand, the jury has no information about the victim whatsoever. In fact, Professor Coyne's recommendation that defense attorneys subpoena the family members in order to invoke the rule of sequestration is already standard practice with most defense counsel. Family members of the victim are virtually always subpoenaed by defense counsel, with no intention of calling them to testify, simply to keep them out of the sight of the jury. The jury is made up of members of the community impanelled to act as the conscience of the community. In order to do so, they must be required to hear the full extent of the crime. To keep victims and their families out of courtroom proceedings only victimizes them further and gives them the (completely justified) feeling that they have no say in the process. A victim, or member of the victim's family, should be permitted to talk of the emotional, psychological, financial, and perhaps physical impact of the crime upon the victim and family. These are the direct and proximate results of the crime committed.

If the victim impact evidence angers the jury, perhaps it should. It should be remembered that these statements are not made during the guilt or innocence phase of a trial. Guilt has already been determined. What remains is to recommend a sentence suitable to the crime. Suitability is not susceptible to dispassionate calculation because jurors, like all people, are not machines. They are in the courtroom to act as the conscience of the community. If the commission of the crime and its surrounding circumstances would outrage a normal person, they will, and should, outrage the jury. This is not to say that the jury will then act in an arbitrary and capricious manner. In fact, it is possible that a *lack* of outrage can

17. H.B. 2271, 43d Leg., 2d Sess. (1992) (Okla.) (enacted).

lead in some cases to a sentence that is arbitrary and capricious because it does not fit the crime.

As Professor Coyne points out, the victim impact evidence can work both ways. I agree that a family member of the victim who wants a lesser sentence should be allowed to testify as well, and Senate Bill 816 does not prevent such testimony. In other than a capital crime, some alternate form of retribution may be more appropriate for the crime and more desirable to the victim. That type of victim impact evidence should be heard as well.

In February 1986, when Glen Burton Ake was given two life sentences for the murders of my parents, the judge made a statement that I shall never forget. It was the only time, other than when I testified, that I was allowed in the courtroom. The judge looked at Glen Ake, after he had sentenced him, and said:

> I am now going to give you your rights. I have no problem with giving you these rights. You have the right to appeal your conviction and the sentences. You have the right to a free transcript of these proceedings if you cannot afford one. . . . I have no problem with giving you these rights. But just one time before I leave the bench, I hope that I will have the chance to look at a victim of the crime and read them one single right. It may not happen before I'm gone. I hope it does. But just one time I would like the opportunity to read a victim one right.[18]

The victims' rights movement is not merely the product of a conservative fantasy. Revictimization at the hands of the criminal justice system is real. For crime victims and their families, the trauma does not end with the commission of the crime; the criminal justice system subjects them to fresh ordeals, ranging from the petty to the tragic. In 1979, the year our parents were killed, there was no victims' rights movement, and no Victim's Compensation Fund in Oklahoma. After the crime, when I drove my sister and myself to the home of a doctor for medical attention for our wounds, our blood covered the car seats. The car was then impounded by the Oklahoma State Bureau of Investigation (OSBI) as evidence, and because there was no provision in the law at that time for reimbursement of victims, I was required to pay the $115 towing and impoundment fees myself.

Hair was pulled from every part of my body by forensics experts for comparison with that of the defendant's found in the house. I took the witness stand seven times, each time more painful than the last, to testify against Glen Ake and his codefendant, Steven Hatch. I was called upon to testify each time they were granted a new hearing or trial, and every time it took weeks of emotional preparation for me to confront the people who murdered my parents. Afterwards, it took weeks to overcome the depression and anger I felt after sitting on the stand again.

It is easy to gloss over what "victim impact" means. In our case, "impact" consisted of my sister having to deal with being raped by both defendants before

18. Transcript of Proceedings at 1720, Oklahoma v. Ake, Nos. CRF-79-302, CRF-79-303, CRF-79-304, CRF-79-305 (Okla., Canadian County Dist. Ct. Feb. 8, 1986).

they shot us and our parents. I nearly died as a result of the injuries I sustained. I had to raise myself since the time I was sixteen years of age. I put myself through college, law school, and a Master's program. Not once was I able to hear my parents tell me they were proud of me or encourage me in my endeavors. Never did I know what it was like to "go home" for the weekend or the holidays. For two years after the incident nightmares prevented me from sleeping more than one hour each night.

In 1986, I sat on a witness stand in front of twelve jurors who never heard any of this. All they saw was a twenty-two-year-old college graduate who was running a successful business and was now in law school. I appeared no worse for wear for having been shot by the defendant and watching him murder my parents. But the jurors never heard the truth. They never heard the disastrous consequences that that very trial had on my law school performance, not to mention the impact the defendant's actions had on the last seven years of my life. The sentence was life in prison, with the possibility of parole.

I authored the victim impact legislation in Oklahoma to redress a serious wrong in our criminal justice system. As a result of its passage, victims and their families have been given a voice — a voice long denied. Against the many rights of the accused, the victim now has at least one: to tell a jury the *effects* of the crime. Until recently, the victim had no right even to appear at parole hearings. Even now, the victim is allowed only five minutes to explain why she believes parole should be granted or denied.

Finally, I wish to thank Professor Coyne for pointing out some of the problems and inconsistencies in the statute. Most of his criticisms are well taken, and the ones that are technical in nature were corrected in the last legislative session. In actual practice, the primary problem with the statute is the reluctance of some judges to follow it. Some judges interpreted the language requiring victim impact evidence to be heard by the "court" to mean that victims' statements are authorized only if the trial is before a judge, and not in jury trials. Therefore, we amended the statute in the 1993 legislative session to expressly authorize victim impact statements in trials by jury. Moreover, some judges interpreted the words "family member" and "victim" to mean that only one such person may present victim impact evidence at the hearing. This language was also corrected during the last legislative session.