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The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings

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The *Payne* of Allowing Victim Impact Statements at Capital Sentencing Hearings

I. Introduction 1621
II. The Victims' Rights Movement and the Legislative Response 1623
 A. *The Rise of the Victims' Rights Movement* 1624
 B. *The Victim Impact Statement* 1627
III. Supreme Court Jurisprudence and the Admissibility of Victim Impact Evidence 1629
 A. *Background of Supreme Court Eighth Amendment Jurisprudence* 1630
 B. Booth v. Maryland: *The Court's First Look at Victim Impact Evidence in a Capital Case* 1633
 C. South Carolina v. Gathers: *The Extension of Booth to Encompass Victim Characteristics* 1637
 D. Payne v. Tennessee: *The Court's Turn-Around* ... 1639
IV. How Courts Have Interpreted *Payne* 1644
 A. *The Supreme Court After* Payne 1644
 B. *State Courts After* Payne 1647
V. A Critical Analysis of *Payne*: Why the Court Should Not Have Allowed the Admission of Victim Impact Evidence 1649
 A. *Victim Participation Does Not Further the Goals of Sentencing* 1650
 B. *The* Payne *Court Left Open the Possibility that Victims' Opinions as to Appropriate Punishment May Be Admitted During Capital Sentencing* 1656
 C. *Victim Impact Statements Will Lead to Disparate Treatment of Similarly Situated Defendants* 1658
VI. Conclusion 1660

I. Introduction

A teenage boy returns from a night out with his friends to find his home in disarray; furniture is strewn about and valuable belongings are missing. He ventures towards his parents' bedroom, unaware of the horrific scene that he soon will witness. As he enters his parents' bedroom a sudden sense of reality washes over him as he views the scene in the room: his parents are dead on their bed, in inhuman, violently con-

torted positions, with blood covering the sheets, their bodies, the floor, and the walls. The boy, in shock, reaches for the phone and calls the police.

The authorities arrest the suspected murderer of the boy's parents, put him in jail, appoint counsel, and apprise him of his legal rights. In contrast, the boy is left to deal with his pain and anguish by seeking the help of friends, extended family, and well-wishers. The boy's life is permanently altered. He is now an orphan, and the state will place him in foster care. He will have to cope with the emotional trauma that accompanies the discovery of his parents' bodies and with the void that the loss of both parents created.

The boy has no voice in pursuing the defendant's prosecution or in agreeing to a plea bargain arrangement. When the case goes to trial, the boy is left alone in the corridor so that his testimony will not be compromised by what he may have heard from other witnesses. The defendant, however, is entitled to be present at all stages of the criminal process. When the boy takes the stand, his testimony is brief; he tells the jury what he saw in his parents' bedroom upon returning home that evening, but he does not have the opportunity to tell the jury anything else. The jury finds the defendant guilty, yet the boy is unsatisfied because the criminal justice system has not taken care of him, nor satisfied his emotional needs.

Today's criminal justice system focuses on the defendant and on the criminal act against society. By doing so, authorities within the criminal justice system often ignore the victim of the crime. Not surprisingly, victims of criminal acts have expressed dissatisfaction with the criminal justice system, which they perceive as inequitably focusing on the defendant. In response to the problem, victims' advocates have lobbied state and national policymakers to initiate changes within the system that would draw greater attention to the victim of the crime. A criminal justice system that acknowledges and treats the victim's needs is not objectionable in itself; however, when it affords the victim opportunities, which advocates refer to as "rights," that directly violate the defendant's constitutional rights, the system is objectionable. Even so, sympathetic legislators, in adopting statutes involving victims' rights, are likely to accede to the demands of victims' advocates while failing to consider the ramifications to the criminal justice system. Hence, the courts, which are removed from the direct political process, are responsible for weighing the benefits of various victim assistance programs against potential violations of defendants' constitutional rights. State and federal courts should hold statutes that allow the introduction of victim impact evidence at capital sentencing proceedings unconstitutional.

Part II of this Note presents an overview of the victims' rights movement and analyzes the ensuing outgrowth of statutes allowing the admission of victim impact evidence at sentencing proceedings. Part III sets forth a history of Supreme Court death penalty jurisprudence and considers how the Court has used this line of cases in decisions determining the admissibility of victim impact evidence at capital sentencing proceedings. Part IV analyzes how the Court and various state courts have utilized and commented on *Payne v. Tennessee*,[1] the latest pronouncement by the Court on victim impact evidence. Part V of this Note sets forth a three-part critical analysis of the Court's decision in *Payne*: first, it discusses why victim impact evidence at capital sentencing plays no role in any of the legitimate theories for punishment; second, it considers how some courts have used *Payne* to admit irrelevant victim opinion evidence during capital sentencing; and, third, it explains why the admission of victim impact evidence will lead to disparate sentencing of similarly situated defendants. Finally, in Part VI, this Note sets forth conclusions concerning the future of the admissibility of victim impact evidence at capital sentencing.

II. The Victims' Rights Movement and the Legislative Response

The victims' rights movement is a viable and active political force in American society today.[2] The growth of victims' rights organizations is attributable to victims' dissatisfaction with the criminal justice system's focus on the defendant and with their perception that the system pays little attention to their needs.[3] Studies identify three common

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1. 111 S. Ct. 2597 (1991).

2. The victims' rights movement is an active lobbying force: "The National Organization for Victim Assistance (NOVA) in Washington, D.C., lists some 1,500 members and has worked to persuade legislators to improve the lot of victims." Diane Kiesel, *Crime and Punishment: Victim Rights Movement Presses Courts, Legislatures*, 70 A.B.A. J. 25, 25 (Jan. 1984). See also *Symposium: Victims' Rights*, 11 Pepperdine L. Rev. 1 (1984); *Follow-Up Issue on Victims' Rights*, 17 Pepperdine L. Rev. 1 (1989).

The victims' rights movement has some strong political allies. Vice-President Dan Quayle recently told a crowd at the Christian Coalition in Sacramento, California that "[i]t's time to put the rights of victims ahead of the rights of criminals." Jorge Casuso, *Clinton "in the Pocket" of ABA, Quayle says*, Chi. Trib. at 5 (Aug. 12, 1992).

3. For example, the Stephanie Roper Committee, which has lobbied the Maryland legislature for tough sentencing laws and victim protections laws, was formed by Vincent and Roberta Roper, their friends, and their neighbors, following a court's light sentencing of the convicted murderer of their daughter. See Maureen McLeod, *Victim Participation at Sentencing*, 22 Crim. L. Bull. 501 (1986); Melanie Howard, *Victims, Families Seek Expanded Legal Rights*, Wash. Times A21 (Nov. 10, 1991). Some commentators have echoed victims' beliefs that an imbalance exists in the criminal justice system. See Donald R. Ranish and David Shichor, *The Victim's Role in the Penal Process: Recent Developments in California*, 49 Fed. Probation 50, 50 (March 1985) (stating that "[t]he focus has for so long been on those who violate the standards of societal behavior and not on those who have suffered the consequences of criminal activity").

themes in victims' reactions to the criminal process: (1) victims generally are dissatisfied with, and thus resentful of, the criminal justice system; (2) victims are unable to shed the feelings of shame associated with being a victim; and (3) victims tend to transfer a sense of disorder, fear, and powerlessness to other spheres of their lives.[4] In response, the victims' rights movement has advocated legislation recognizing the rights of victims.[5] Victims contend that one of those rights is allowing them to participate in the sentencing phase of capital trials via victim impact evidence.[6]

A. *The Rise of the Victims' Rights Movement*

In the American criminal system, the victim is not responsible for prosecuting or carrying out the sentence against the defendant.[7] Indeed, the manner in which criminal cases are styled is evidence that the victim is not the instigator of criminal actions.[8] Hence, some victims contend that the criminal process excludes them, thereby victimizing them a second time.[9] Over the past three decades, sympathizers have sought to identify the needs of victims and to respond to them appropriately.[10]

The reasons why victims' advocates seek a meaningful role for victims in the criminal justice system are numerous.[11] But two overriding motivations exist: initially, some victims' rights advocates believe that consideration of the victim's views helps the victim regain a sense of control over her life; and, second, many victims desire retributive justice.[12] A victim often is devastated by the criminal act against her be-

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4. McLeod, 22 Crim. L. Bull. at 501.

5. Id. at 502. See also Holly Metz, *The Illusion of Victim Rights*, 17 Student Lawyer 17, 17 (March 1989) (concluding that "[o]ver the past two decades, the American crime-victims movement has steadily changed the role of victims in the criminal justice system," and that "[h]aving successfully lobbied for legislation permitting compensation for victims in most jurisdictions, victim advocates returned to state legislatures seeking the right to he involved in judicial proceedings").

6. See text accompanying notes 31-33.

7. The idea that a crime against an individual is in fact a crime against society began in England when the kings solidified their power and when the concept of "the king's peace" prevailed. See Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 Stan. L. Rev. 937, 938-40 (1985). See also Ranish and Shichor, 49 Fed. Probation at 51 (cited in note 3).

8. If Jane Doe is robbed or murdered by Mary Smith in the state of Tennessee, the criminal case is styled, "The State of Tennessee v. Mary Smith." Jane Doe or her heirs are still free to initiate a civil case. The action will then be styled, "Jane Doe v. Mary Smith."

9. Howard, Wash. Times at A21 (cited in note 3).

10. McLeod, 22 Crim. L. Bull. at 501-02.

11. Each victim probably has her own motivation for desiring to participate in or refrain from participating in the criminal justice system. These motivations vary from a need to he left alone, to a desire for.vengeance, to a sense of duty to society to take an active role in the judicial process.

12. McLeod, 22 Crim. L. Bull. at 504.

cause of her resulting feeling of vulnerability and her sense that she has lost control over her life.[13] Consequently, some critics view the victims' rights movement merely as self-therapy for victims.[14] But the primary benefit that the victims' rights movement brings to the criminal justice system is the enhanced efficiency that results from an increase in victim participation.[15]

During the 1960s, those who led efforts to aid victims concentrated on establishing compensation programs at the state level and on expanding restitution as a sentencing alternative.[16] The leaders of these efforts used objective, monetary measures to fix compensation or restitution.[17] These advocates hoped this economic approach to victims' rights would serve a restorative function and return victims to precrime conditions.[18]

Thirty-nine states and the District of Columbia have enacted victim compensation programs.[19] Some commentators, however, question whether compensation programs are helping those who most need the help—financially poor and disadvantaged victims.[20] Some advocates, who have dedicated considerable time and energy to helping victims, believe that the poor and other minority groups do not benefit from compensation programs as much as more affluent or white victims.[21] Further, in addition to seeking monetary damages through the criminal justice system, many victims look to the civil courts for restitution.[22]

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13. Howard Zehr and Mark Umbreit, *Victim-Offender Reconciliation: An Incarceration Substitute?*, 46 Fed. Probation 63, 64 (Dec. 1982).

14. Kiesel, 70 A.B.A. J. at 28 (cited in note 2) (citing David Austern who represented the family of a murder victim in a civil suit against the convicted murderer).

15. The theory is that once victims feel better about their participation in the criminal justice system, they, as future victims, or other victims who hear of the first victims' relative ease and satisfaction with the system, will participate effectively in the system in the future. McLeod, 22 Crim. L. Bull. at 506 (cited in note 3). In other words, "[b]y inviting victim participation in criminal proceedings, the criminal justice system hopes to increase victim (i.e., consumer) satisfaction, encourage future victim involvement and, thereby, enhance system efficiency." Id.

However, not everyone agrees that increased victim input enhances efficiency. In one report of a group of prosecutors and judges, 69% of the prosecutors and 64% of the judges felt that no increase in the level of victim participation was necessary to increase the efficiency of the judicial process. Jolene C. Hernon and Brian Forst, *The Criminal Justice Response to Victim Harm* 54 (National Institute of Justice, 1984).

16. McLeod, 22 Crim. L. Bull. at 501.

17. Id. Objective losses include medical bills, the replacement of stolen, damaged, or destroyed goods, and lost wages.

18. Id.

19. Kiesel, 70 A.B.A. J. at 25.

20. Metz, 17 Student Lawyer at 17 (cited in note 5) (declaring that the powerless and the underrepresented are absent from the entire victims' rights process).

21. Id. (quoting Judith Rowland, executive director of the nonprofit California Center for Victimology and director of the Crime Victims' Legal Clinic).

22. The standard of proof in a civil case, preponderance of the evidence, is lower than the standard of proof in a criminal case, beyond a reasonable doubt, thus making it easier to win a civil

However, the poor have difficulty recovering in the civil system, since they lack the funds that are necessary to initiate civil suits.[23]

During the 1970s, victims' rights advocates lobbied for the expansion of victim-witness assistance programs.[24] The victim-witness assistance programs serve the purpose of guiding the victim through the complicated maze of the criminal justice system and minimizing the administrative inconveniences associated with participation in the process.[25] Recently, victims' rights advocates have called for a system that is more responsive to the needs of the victims—one that assists rather than manages the victim.[26] Many victims claim that victim services are meaningless if victims do not have the opportunity to participate in the criminal process itself.[27] Government authorities have taken several steps in response. For instance, the United States Congress enacted the Victim and Witness Protection Act of 1982.[28] Additionally, several

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suit. Metz, 17 Student Lawyer at 20. Compare Federal Rule of Evidence 301 (Presumptions in General in Civil Actions and Proceedings) with Federal Rule of Evidence 303 (Presumptions in Criminal Cases). FRE 303 never was enacted but is reproduced in Eric D. Green and Charles R. Nesson, *Federal Rules of Evidence* at 257 (Little, Brown & Co., 1988). FRE 303 was based largely on the American Law Institute Model Penal Code § 1.12 (1962) and *United States v. Gainey*, 380 U.S. 63 (1965).

A growing number of victims also are filing suits against third-party defendants whom tbe victims allege should have exercised due care in preventing the crime. Kiesel, 70 A.B.A. J. at 27 (cited in note 2).

23. Metz, 17 Student Lawyer at 20 (quoting Frank C. Carrington, Jr., director of the Crime Victims' Litigation Project in Virginia Beach, Virginia).

24. McLeod, 22 Crim. L. Bull. at 501 (cited in note 3).

25. Advocates urged that the state should have provided child care while the parent was participating in the criminal proceeding. Additionally, advocates sought transportation aids for victims and separate victim waiting rooms. Id. at 501-02.

26. Id. See also Deborah P. Kelly, *Victims' Perception of Criminal Justice*, in *Symposium: Victims' Rights*, 11 Pepperdine L. Rev. 1, 15 (1984).

27. For example, Roberta Roper has stated that "[s]ervices are wonderful, but they don't take the place of rights. . . . Sometimes they are a Band-Aid to cover a larger injury that tbis system inflicts." Howard, Wash. Times at A21 (cited in note 3).

28. Pub. L. No. 97-291, 96 Stat. 1248, codified at 18 U.S.C. §§ 1512-1515 (1988) and 18 U.S.C. §§ 3579-3580 (1988). Congress amended Sections 3579 and 3580 and relocated them to 18 U.S.C. §§ 3663 and 3664 by Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987 (1984). The Victim and Witness Protection Act codified Congressional findings that recognized the importance of victims in the criminal justice system. Congress found (1) that the system either ignores victims or uses them to identify and punish offenders; (2) that victims suffer physical, psychological, and financial hardship as a result of the crime; (3) that the federal government should play a leadership role in ensuring that the state treats victims properly; (4) that victims do not receive adequate assistance or protection from the proper authorities; (5) that the state does not provide victims with a counterpart to the defendant's counsel; (6) that the state does not notify victims of the disposition of the case; (7) that victims have difficulty with transportation, parking, and child care when participating in the criminal process; and (8) that victims often lose valuable property to criminals and to law enforcement officials who are gathering evidence. 96 Stat. at 1248.

Further, Congress declared that the purposes of the Victim and Witness Protection Act are:

> (1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; (2) to ensure that the Federal Government does all that is possible within

states have amended their constitutions to include a "Victims' Bill of Rights,"[29] and almost all states along with the District of Columbia, have provided for the inclusion of victim impact statements in presentence reports.[30]

B. The Victim Impact Statement

By successfully lobbying for the use of victim impact statements, the victims' rights movement has ensured that victim harm is considered in determining the defendant's sentence.[31] The federal government has provided for the use of victim impact statements,[32] as has virtually every state and the District of Columbia.[33]

While almost all states allow for some form of victim input at some stage in the judicial process, the extent of that involvement varies from jurisdiction to jurisdiction. Similarly, the procedure by which the states allow the conveyance of such information also varies. For example, in

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> limits of availahle resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant, and (3) to provide a model for legislation for State and local governments.

96 Stat. at 1249.

29. For example, victims in South Carolina have a bill of rights that includes the right to make recommendations regarding pretrial release and the right to make a victim impact statement. These rights are to be "protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." S.C. Code Ann. § 16-3-1510 (Law. Co-op. 1985). See also Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 Am. Crim. L. Rev. 233, 239 (1991).

30. See Richard Lee Slowinski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 Cath. U. L. Rev. 215, 216 n.10; Phillip A. Talbert, Note, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 U.C.L.A. L. Rev. 199, 200 n.12; Hall, 28 Am. Crim. L. Rev. at 238.

31. Richard J. Murphy, Note, *The Significance of Victim Harm:* Booth v. Maryland *and the Philosophy of Punishment in the Supreme Court*, 55 U. Chi. L. Rev. 1303, 1303 (1988). See also Michael A. Johnson, Note, *The Application of Victim Impact Statements in Capital Cases in the Aftermath of* Booth v. Maryland*: An Impact No More?*, 13 Thurgood Marshall L. J. 109, 109 (1988) (asserting that "[t]he development of allowing Victim Impact Statements in criminal proceedings can arguably be seen as a direct result of the victim's rights movement").

32. See note 28 discussing the Victim and Witness Protection Act and its amendment to Rule 32(c) of the Federal Rules of Criminal Procedure.

33. For a complete list of state statutes mandating the inclusion of some form of victim impact statements at sentencing, see Slowinski, 40 Cath. U. L. Rev. at 216 n. 10. The Virgin Islands also provides for those of victim impact statements. V. I. Code Ann. tit. 34, § 205 (Supp. 1991).

The only states that do not allow some form of victim impact statements are Alabama, Hawaii, and North Dakota. In the Alabama Crime Victims' Court Attendance Act, Alabama has asserted that victims have a right to be present in the courtroom. Ala. Code § 15-14-50 (1990). Further, Hawaii has a victims' bill of rights that provides that the victim be notified regarding the disposition of the case, that the victim have a secure waiting area during court proceedings, and that the victim have stolen property returned as soon as feasible. Hawaii Rev. Stat. § 801D-4 (Supp. 1991). Finally, North Dakota has a Uniform Crime Reparations Act. N.D. Cent. Code § 65-13-01 (1991). However, none of these states explicitly allow for the admissibility of victim impact evidence.

Arizona, the presentence report lists the physical, emotional, and financial impact of the crime on the victim's family, and the victim or her immediate family has the right to appear personally or through paid counsel at any aggravation or mitigation hearing to offer victim input evidence.[34] While Arizona's laws calling for victim impact statements are broad, Arkansas is more restrictive in allowing victim input at sentencing.[35] A Delaware statute requires that courts include victim impact statements in the presentence report whenever the victim wishes,[36] while an Iowa statute allows victim statements only upon a court's order.[37] Other statutes go so far as to mandate that the sentencing judge consider the victim impact statement when making the sentencing decision.[38]

This Note focuses on all victim impact statements at capital sentencing, despite the fact that only a minimal consensus exists among the jurisdictions as to the procedural basis for authorizing such statements.[39] Furthermore, there is no uniform definition of who constitutes a victim for purposes of allowing victim impact evidence.[40] State law varies in the type of information that is permissible in a victim impact statement.[41] Additionally, states establish divergent methods for pre-

34. Ariz. Rev. Stat. Ann. § 12-253(4) (West 1992).

35. Arkansas limits victim input to cases involving DWI ("Driving While Intoxicated") prosecutions. Ark. Stat. Ann. § 5-65-102(3) (Supp. 1991).

36. Del. Code Ann. § 4331(d)-(g) (1987).

37. Iowa Code Ann. § 901.3(5) (West Supp. 1991).

38. See, for example, W. Va. Code § 61-11A-6(a)(5) (1989).

39. McLeod, 22 Crim. L. Bull. at 508-09 (cited in note 3). Some statutes mandate the use of victim impact statements at all sentencing proceedings. Other states mandate the use of victim impact statements only as an attachment to the presentence report, which the court possibly will not order. Further, in these states, the defendant can waive his or her right to the report, thereby negating tbe effect of any victim impact evidence.

40. Id. at 509. Some jurisdictions define victim as the person against whom tbe offense was committed, or who has suffered as a result of the crime. See, for example, Mass. Gen. Laws Ann. cb. 258B, § 1 (West 1988). Other jurisdictions have adopted narrower definitions of victims for purposes of allowing their participation at sentencing. See, for example, Conn. Gen. Stat. Ann. § 54-91c (West 1985), which only allows a victim to participate if the defendant has either entered a guilty plea or been found guilty of a Class A, B, or C felony.

41. McLeod, 22 Crim. L. Bull at 510-11. Connecticut, for example, limits tbe statement to highly objective and quantifiable losses. Conn. Gen. Stat. Ann. § 54-91c(b) (West 1985). In contrast, Minnesota allows the probation officer preparing the statement to include any problems that the victim has suffered due to the criminal occurrence. Minn. Stat. Ann. § 609.115(1b)(a) (West 1987).

paring a victim impact statement[42] and provide different procedures for allowing the admission of such a statement.[43]

Regardless of the particular form of victim participation, the harms associated with such participation are inherent in all schemes that allow the character of the victim to play a role in capital sentencing. These harms can be minimized or exacerbated depending on the degree and manner of participation.[44]

III. Supreme Court Jurisprudence and the Admissibility of Victim Impact Evidence

A state statute mandating victim input at the sentencing phase of a capital proceeding is only the first step in determining whether such evidence is admissible. Any state law must comport with the U.S. Constitution,[45] more particularly, the Eighth Amendment.[46] The Eighth Amendment as applied to the states via the Fourteenth Amendment[47] defines the parameters within which a state may impose capital punishment. Hence, the constitutionality of state laws mandating victim impact statements and other forms of victim characterization at capital proceedings are determined vis-à-vis the Supreme Court's Eighth Amendment jurisprudence, which delineates the procedures by which the states must conform in administering the death penalty. Thus, an understanding of the Court's Eighth Amendment jurisprudence is necessary in order to determine the constitutionality of victim input statutes.

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42. McLeod, 22 Crim. L. Bull at 511-14. The strength and validity of the victim impact statement is affected by authorship (either the victim or the probation officer), derivation (the source of the information in the statement varies depending on whether a state demands that the probation officer contact the victim when the probation officer is authoring the report), and verification. The format of the victim impact statement also may vary. Objective formats include checklists that state official prepared listing types of loss that a victim could suffer or numerical ranking systems of how strongly a victim feels about the criminal act and typically create less disparity in sentencing than do nonstructured, subjective statements. Nonstructured statements, however, give the victim more freedom to express the harm that the alleged criminal caused.

43. Id. at 514. Typically, tbe victim impact statement is attached to the presentence report, although sometimes statements are filed separately or presented orally at the sentencing procedure. Id.

44. See Part V of this Note.

45. States may afford more protection than the United States Constitution, but they must afford at least as much protection as does the United States Constitution.

46. It states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII. The language of the Eighth Amendment derives from the English bill of rights framed in 1688. See Joseph Story, *Commentaries on the Constitution of the United States* § 1006 at 710 (Carolina Academic Press, 1987).

47. The applicable portion of the Fourteentb Amendment reads: "No state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. XIV.

A. *Background of Supreme Court Eighth Amendment Jurisprudence*

Courts originally interpreted the Eighth Amendment as barring excessively painful methods of punishment,[48] and until the previous two decades, the Supreme Court simply assumed that capital punishment was constitutional.[49] However, the Court now has recognized two approaches to interpreting the Eighth Amendment. The first approach considers only punishments of torture and unnecessary cruelty as violative of the Eighth Amendment.[50] The second approach interprets the Eighth Amendment according to "evolving standards of decency."[51] Since the evolving standard of decency approach emerged in 1958, courts have used the first approach infrequently.[52]

In utilizing the evolving standard of decency approach the courts look to the objective indicia that reflect the public attitude toward a given sanction.[53] The evolving standard of decency, along with the sentencing goals of retribution, deterrence, rehabilitation and incapacitation,[54] allow courts to appraise the proportionality between the crime committed and the punishment imposed, thereby ensuring a close nexus between the two.[55] The Supreme Court has recognized that capital punishment is unique, due to its severity and its irrevocability, and thus worthy of heightened procedural safeguards.[56]

The Supreme Court provided the modern setting for the debate over the applicability of capital punishment statutes in its landmark

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48. Examples of excessively painful methods of punishment include disembowelling alive, beheading, burning alive, quartering, and crucifixion. *Furman v. Georgia*, 408 U.S. 238, 264-65 (1972) (Brennan concurring). See also *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878) (stating in dicta that execution by firing squad is constitutional); *In re Kemmler*, 136 U.S. 436 (1890) (holding that execution by electricity is constitutional). However, even as long as a century ago, some members of the Supreme Court recognized that the Eighth Amendment went further than simply barring torture. See *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field dissenting).

49. Welsh S. White, *The Death Penalty in the Nineties* 4 (Univ. of Mich. 1991). See also *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

50. Slowinski, 40 Cath. U. L. Rev. at 220 (cited in note 30). This approach is backward-looking, since it analyzes the punishment by comparing it to punishments considered cruel and unusual at the time the Eighth Amendment was adopted and ratified. See also *Weems v. United States*, 217 U.S. 349, 351 (1910).

51. Slowinsky, 40 Cath. U. L. Rev. at 220; *Trop*, 356 U.S. at 101.

52. Slowinsky, 40 Cath. U. L. Rev. at 221.

53. *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976). These objective indicia include the legislatively and judicially imposed sanctions and values as defined by the public, the judiciary, history, and morals. Id.

54. See Part V.A. of this Note.

55. Slowinsky, 40 Cath. U. L. Rev. at 222; *Enmund v. Florida*, 458 U.S. 782, 825 (1982) (O'Connor dissenting).

56. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

decision *Furman v. Georgia*.[57] In *Furman*, the Court held that a Georgia statute that gave a jury absolute and unguided discretion to impose the death penalty violated the Eighth Amendment.[58] The Court issued the holding in *Furman* by a cursory per curiam opinion; each of the five concurring justices wrote a separate opinion.[59] Justices Brennan and Marshall each concluded that capital punishment violates the Eighth Amendment.[60] Justices Douglas, Stewart, and White each concurred on much narrower grounds: they would have held that the death penalty is violative of the Eighth Amendment only when it is imposed capriciously.[61] Because the Justices wrote five separate opinions, the law became unclear as to when capital sentencing would violate the Eighth Amendment.[62]

Four years later, the Court held in *Gregg v. Georgia*[63] that the death penalty did not violate the Eighth Amendment per se. The statute at issue demanded a bifurcated trial; following the guilt phase, the court would hold a sentencing hearing to weigh aggravating and mitigating circumstances.[64] The Court affirmed the notion that capital punishment may be an appropriate punishment in extreme cases, as an expression of society's belief that some offenses are so grievous an af-

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57. 408 U.S. 238 (1972); See also Robert P. Gritton, Note, *Capital Punishment: New Weapons in the Sentencing Process*, 24 Ga. L. Rev. 423, 427 (1990).

58. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

59. Each of the dissenters also filed separate opinions.

60. *Furman*, 408 U.S. at 305 (Brennan concurring); id. at 370-71 (Marshall concurring). Justice Brennan used a four-part test to reach his conclusion:

> If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Id. at 282 (Brennan concurring). Justice Marshall focused on the last two factors. Id. at 358 (Marshall concurring).

61. Justice Stewart wrote: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." Id. at 309-10 (Stewart concurring).

Justice Douglas wrote that "the Eighth Amendment is to require legislatures to write penal laws tbat are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." Id. at 256 (Douglas concurring).

62. Clearly, leaving the decision solely to the jury with no guidance would violate the Eighth Amendment; however, the Court did not give the states much further guidance regarding how to frame constitutional capital sentencing statutes.

63. 428 U.S. 153 (1976). The Court decided *Gregg* with two companion cases: *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976).

64. *Gregg*, 428 U.S. at 163-64.

front to humanity that death is an appropriate response.[65] The Court in *Gregg*, however, reaffirmed the *Furman* Court's notion that when a sentencing body is afforded discretion on a matter so grave as the determination of whether to impose the death penalty, that discretion must be suitably directed and limited so as to minimize the risk of arbitrary and capricious action.[66]

The Court decided *Woodson v. North Carolina*[67] on the same day that it decided *Gregg*. In an attempt to conform with *Furman*, the North Carolina Legislature had revised its statutes to make capital punishment mandatory for certain offenses. These statutes were at issue in *Woodson*.[68] The Court struck down the North Carolina legislative scheme because it failed to treat the defendants as uniquely individual human beings; rather, the Court ruled that the North Carolina statutes treated defendants as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[69] Hence, the *Woodson* Court promoted individualized sentencing.[70]

The *Woodson* and *Gregg* decisions articulated two goals, which are somewhat conflicting.[71] On the one hand, the *Furman* and *Gregg* Courts instructed state legislatures to direct juries when to impose the death penalty, while on the other hand the *Woodson* Court instructed the legislatures not to dictate to juries when to impose the death penalty.[72] Through this tension a principle of "guided discretion" appeared, by which the state provided a jury with a list of aggravating and mitigating circumstances upon which it should base its sentencing decision.[73] While the Court never has resolved this tension explicitly, in *Lockett v. Ohio*[74] it indicated that promoting individualized sentencing is the more important of the two goals.[75]

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65. Id. at 184.

66. Id. at 189. See also White, *The Death Penalty in the Nineties* at 5 (cited in note 49) (stating that "although *Gregg* upheld the constitutionality of the new system of capital punishment, it seemed to require that the system operate so as to minimize the unfair and arbitrary selection of those who would die").

67. 428 U.S. 280 (1976).

68. Id. at 286 (quoting N.C. Gen. Stat. § 14-17 (Supp. 1975)).

69. Id. at 303-05. See also Kevin J. McCoy, Note, *Preserving Integrity in Capital Sentencing:* Booth v. Maryland, 22 Creighton L. Rev. 333, 340-41 (1988). The Court also held that *Furman* stood for the prohibition of any type of standardless sentencing by the jury. *Woodson*, 428 U.S. at 302-03.

70. White, *The Death Penalty in the Nineties* at 5-6 (cited in note 49).

71. Id. The two goals can be phrased as (1) evenhanded capital sentencing (neither arbitrary nor capricious), and (2) individualized capital sentencing. Id.

72. See notes 57-70 and accompanying text.

73. See Murphy, 55 U. Chi. L. Rev. at 1315 (cited in note 31).

74. 438 U.S. 586 (1978).

75. White, *The Death Penalty in the Nineties* at 6. The Court held that the sentencing

The Court further focused on the individual defendant in *Zant v. Stephens*.[76] In *Zant*, the Court held that the jury, in determining whom amongst those statutorily eligible to receive the death penalty actually should be sentenced to death, can consider nonstatutory factors as long as it bases its ultimate decision on the individual defendant's character and the particular circumstances of the crime.[77]

Recently, the Court retreated from the individualized approach to capital sentencing. In *Blystone v. Pennsylvania*,[78] the Court upheld a Pennsylvania scheme that requires the death penalty when a jury either unanimously finds at least one aggravating circumstance and no mitigating circumstances as to the commission of the crime or when the jury finds that the aggravating circumstances outweigh the mitigating circumstances.[79] The defendant in *Blystone* argued that consistent with prior Court rulings, the jury must be free of a legislative mandate to impose or not impose the death penalty.[80] In rejecting the defendant's argument, the Court simply stated, "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence."[81]

B. Booth v. Maryland: *The Court's First Look at Victim Impact Evidence in a Capital Case*

The Court first analyzed the use of victim impact statements at the sentencing stage of a capital case in *Booth v. Maryland*.[82] In *Booth*,

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authority cannot be prevented from considering, as a mitigating factor, any aspect of the defendant's character nor any of the circumstances of the crime that the defendant offers as a basis for imposing a sentence less than death. *Lockett*, 438 U.S. at 604. The Court in *Lockett* held that the sentencing authority always must consider all mitigating factors except in the rarest kind of capital case. The Court reiterated this holding in *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

The Court, in a footnote in *Lockett*, indicated that a mandatory death sentence may be appropriate "when a prisoner—or an escapee—under a life sentence is found guilty of murder." Id. at 604 n.11. However, in *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court held that to impose a mandatory death sentence for murder committed while the defendant is serving a sentence of life imprisonment without the possibility of parole is unconstitutional.

76. 462 U.S. 862 (1983). Zant challenged his death sentence after the Georgia Supreme Court held that one of the three aggravating circumstances that made him eligible for the death penalty was unconstitutional. Id. at 867. The Supreme Court upheld the sentence based on the other two aggravating factors. Id. at 890-91.

77. Id. at 878-79.

78. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

79. Id. The evidence showed that Blystone picked up a hitchhiker, robbed him, and shot him. The jury convicted Blystone of first degree murder and robbery. Blystone admitted no mitigating evidence at sentencing. The jury, consistent with the verdict, found an aggravating circumstance in tbat Blystone committed the killing while in the perpetration of a felony, and, pursuant to the Pennsylvania statute, it sentenced the defendant to death.

80. Id. at 302.

81. Id. at 307.

82. 482 U.S. 496 (1987).

John Booth and an accomplice robbed and murdered an elderly couple in their home.[83] The jury convicted Booth on two counts of first-degree murder, two counts of robbery, and conspiracy to commit robbery.[84] Upon the conviction, the prosecutor sought the death penalty and Booth elected to have a jury impose his sentence.[85] Prior to sentencing, the State Division of Parole and Probation had compiled a presentence report.[86] Maryland law required the report to include a victim impact statement describing the effect of the crime on the victim and the victim's family.[87] At sentencing, the prosecutor read the victim impact statement to the jury. The statement consisted of the victims' family's comments[88] concerning the personal characteristics of the victims,[89] the emotional problems faced by the victims' family,[90] and the family members' feelings about the defendant.[91]

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83. Id. at 498. Booth and Willis Reid broke into the home of Rose and Irvin Bronstein in May 1983 in order to steal money to finance the purchase of heroin. *Booth v. State*, 507 A.2d 1098, 1103 (Md. 1986). Booth and Reid bound and gagged the victims and stabbed each 12 times in the chest with a kitchen knife. Id.

84. *Booth*, 482 U.S. at 498.

85. Id. See Md. Code Ann. § 413(b) (1982).

86. The report included a description of Booth's background, education and employment history, and criminal record. 482 U.S. at 498.

87. Md. Code Ann. § 4-609(d) (1986). The victim impact statement, under Maryland law, was intended to:

> (i) Identify the victim of the offense; (ii) Itemize any economic loss suffered by the victim as a result of the offense; (iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence; (iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense; (v) Identify any request for psychological services initiated by the victim of the victim's family as a result of the the offense; and (vi) Contain any other information related to the impact of the offense upon the victim or the victim's family tbat the trial court requires.

Booth, 482 U.S. at 498-99 (quoting Md. Code Ann. § 4-609(c)(3)).

88. The victim impact statement was based on interviews with the victims' son, daughter, son-in-law, and granddaughter. Id. at 499. The entire victim impact statement is reproduced as an appendix to *Booth v. Maryland*. Id. at 509-15.

89. The victim impact statement included evidence of the victims' characteristics including the following: "The victims' son reports that his parents had heen married for fifty-three years and enjoyed a very close relationship, spending each day together. He states that his father had worked hard all his life and had been retired for eight years. He describes his mother as a woman who was young at heart and never seemed like an old lady." Id. at 510.

90. The victim impact statement continued: "The victims' granddaughter . . . descrihed the impact of the tragedy most eloquently when she stated that it was a completely devastating and life altering experience. . . ." The victims' son states that he suffers from a lack of sleep. He is unable to drive on the streets that pass near his parents' home." Id. at 511.

91. The victim impact statement included statements and opinions about the crime: "The victims' son feels that his parents were not killed, but were butchered like animals. He doesn't think anyone should be able to do something like that and get away with it." Id. at 512. "The victims' daughter . . . states that her parents were stabbed repeatedly with viciousness and she could never forgive anyone for killing them that way. . . . She doesn't feel that the people who could do this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this." Id. at 513.

Booth objected to the admission of the victim impact statement arguing that it was unduly inflammatory and irrelevant.[92] The trial court overruled the objection,[93] and the Maryland Court of Appeals upheld the conviction and concluded that the statement was a relatively straightforward and factual description of the effects of the murders on the members of the victims' family.[94] The Supreme Court reversed the death sentence, holding that the introduction of the victim impact statement in a capital sentencing violated the Eighth Amendment.[95]

The Court, through Justice Powell, acknowledged that it usually defers to state legislatures' determinations as to which factors are relevant in the sentencing decision.[96] The Court determined, however, that the jury must make an individualized determination based upon the individual's character and the circumstances of the crime, and that a state statute which requires a jury to consider other factors must be scrutinized to ensure that only evidence that has a bearing on the defendant's personal responsibility and moral guilt be admitted.[97] The Court characterized the information contained within the victim impact statement in two categories. First was the information that described the personal characteristics of the victims and the emotional impact of the crimes on the family.[98] Second was the information that set forth the family members' opinions and characterizations of the crime and the defendant.[99]

The Court held that allowing the statement to contain the first category of information is unconstitutional because it does not conform with the *Woodson*[100] requirement that the jury focus on the defendant as an individual.[101] The Court ruled that to allow the jury to consider such information would result in the imposition of the death sentence

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92. Id. at 500. Booth's counsel contended that the statement violated the Eighth Amendment. Id. at 500-01.

93. Id. at 501. Upon the court's ruling, Booth's counsel requested that the prosecutor read the statement, rather than allow the victims' family to testify before the jury. The prosecutor complied with this request. Id.

94. *Booth*, 507 A.2d at 1124.

95. *Booth*, 482 U.S. at 509. *Booth* was a 5-4 decision with Justice Powell writing for the majority, joined by Brennan, Marshall, Blackmun, and Stevens. Justice White filed a dissenting opinion, joined by Rehnquist, O'Connor, and Scalia. Justice Scalia filed a dissenting opinion, joined by Rehnquist, O'Connor, and White.

96. Id. at 502. The Court did note, however, that the Constitution does set limits on the state legislature's discretion. Id. (quoting *California v. Ramos*, 463 U.S. 992, 1000-01 (1983)).

97. Id.

98. Id.

99. Id.

100. See notes 67-70 and accompanying text.

101. *Booth*, 482 U.S. at 504. The Court found that the first type of information was "wholly unrelated to the blameworthiness of a particular defendant." Id.

based on factors of which the defendant was unaware and which were irrelevant to the defendant's decision to commit the crime.[102]

The Court also held that the second type of information found in the victim impact statement, the victim's family's characterization of the defendant and the crime, is inadmissible because its only purpose is to inflame the jury and divert it from deciding a sentence based upon the relevant evidence concerning the crime and the defendant.[103] Hence, the Court ruled that the admission of emotionally-charged victim impact evidence is inconsistent with the reasoned decisionmaking that the Constitution demands in capital cases.[104]

The Court articulated three concerns that influenced its decision to bar victim impact statements.[105] The first concern was that one victim's family may be more articulate than another victim's family thereby resulting in arbitrary decisions as to whether to impose the death penalty.[106] The second concern was that a jury should not make a capital decision based on other people's perception of the victim's character.[107] Third, the Court was concerned that the defendant could not rebut victim impact statements because any attempted rebuttal by the defendant would result in a mini-trial that would distract the jury from its appointed duty of determining the appropriate sentence that it should impose.[108]

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102. Id. at 505.

103. Id. at 508. The Court stated that "any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'" Id. (quoting *Gardner v. Florida*, 430 U.S. at 358 (1977)).

104. 482 U.S. at 508-09.

105. Id. at 505-07. See also Regina A. Jones, Comment, Booth v. Maryland, *107 S. Ct. 2529 (1987)*, 19 Rutgers L. J. 1159, 1163 (1988).

106. 482 U.S. at 505. The Court also noted that some victims may not leave behind any family. Id.

107. Id. at 506 (stating that "[t]his type of information does not provide a 'principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not") (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

108. *Booth*, 482 U.S. at 506-07. The Court questioned whether a defendant could effectively cross-examine victim impact evidence. Could a defendant show that a victim's family member exaggerated grief or anguish, or lied about the number of his sleepless nights? More importantly, though, the Court noted that allowing such testimony would open the doors for defendants to place into evidence testimony that the victim was "of dubious moral character, was unpopular, or was ostracized from his family." Id. at 507. The unfavorable characteristics of the victim are irrelevant to the sentencing decision.

In dissent, Justices White, Scalia, and O'Connor argued that the harm to the victim's family caused by the crime is relevant to the defendant's personal responsibility. Justice White argued that according to the language in *Gregg v. Georgia*, 428 U.S. 153 (1976), the death penalty is a proper sanction when society decides that the crime is such an affront to humanity that death is the only adequate response and that the affront to humanity extends beyond the murder victims themselves to the family and to the rest of society. *Booth*, 482 U.S. at 515 (White dissenting). He also argued that a state could include as a sentencing condition the particularized harm that an individual's murder causes to the victim's family. Id. at 517 (White dissenting). Finally, he con-

C. South Carolina v. Gathers: *The Extension of Booth to Encompass Victim Characteristics*

Following the Court's decision in *Booth*, the lower courts seemed confused about the scope of its holding.[109] For instance, in *People v. Ghent*,[110] the Supreme Court of California upheld the imposition of a death sentence, notwithstanding the prosecutor's reference to the impact of the victim's death on the victim's family during the sentencing phase of the trial.[111] Other states however, read the *Booth* decision for the broad proposition that any injection of the characteristics of the victim into the determination of capital sentencing violates the Eighth Amendment.[112]

Two years after *Booth*, the Supreme Court clarified its holding in *South Carolina v. Gathers*,[113] squarely addressing the admissibility of victim-related information at capital sentencing. A jury had convicted Gathers of murder and sentenced him to death.[114] The victim was a self-proclaimed minister who generally carried several bags containing religious items.[115] During the guilt phase of the trial, the prosecution entered these religious items into evidence without objection.[116] At sentencing, the prosecution offered no new evidence, but included a characterization of the victim as a religious person and, based on a voting

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tended that the ability of the family to articulate its harm is analogous to the differing ability of prosecutors or witnesses to communicate facts and that "there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator." Id. at 518 (White dissenting).

109. *South Carolina v. Gathers*, 490 U.S. 805, 813 (1989) (O'Connor dissenting).

110. 739 P.2d 1250 (Cal. 1987).

111. The California Supreme Court noted that the prosecutor's reference to the loss for the family was brief and mild, and dissimilar from the facts in *Booth*. The court concluded that the comments caused minimal, if any, prejudicial effect. Id. at 1271. Other state courts also read *Booth* narrowly, holding that it did not prohibit prosecutors from making arguments concerning the personal characteristics of the victim. See, for example, *Daniels v. State*, 528 N.E.2d 775 (Ind. 1988), and *Moon v. State*, 375 S.E.2d 442 (Ga. 1988).

112. For example, see *State v. Gathers*, 369 S.E.2d 140 (S.C. 1988), aff'd, 490 U.S. 805 (1990).

113. 490 U.S. 805 (1990). *Gathers* was a 5-4 decision, with Justice Brennan delivering the opinion for the majority, joined by Justices White, Marshall, Blackmun and Stevens. Justice White filed a brief concurring opinion. Justice White's opinion, in its entirety, reads: "Unless *Booth v. Maryland*, 482 U.S. 496 (1987), is to be overruled, the judgment below must be affirmed. Hence, I join Justice Brennan's opinion for the Court." Id. at 812 (White concurring). Justice O'Connor filed a dissenting opinion in which Justices Rehnquist and Kennedy joined. Justice Scalia also filed a dissenting opinion.

114. *Gathers*, 490 U.S. at 806. Gathers and three others attacked Richard Haynes in a public park and beat him severely after Haynes refused to speak to Gathers. Gathers then rummaged through the victim's belongings. Gathers departed but later returned and stabbed Haynes to death. Id. at 815 (O'Connor dissenting).

115. Id. at 807. Haynes carried Bibles, rosary beads, plastic statues, and olive oil. On the evening he was murdered he also was carrying a religious tract entitled "The Game Guy's Prayer."

116. Id. All the evidence at the guilt phase was subsequently readmitted into evidence at the sentencing phase, again with no objection. Id. at 808.

registration card in the victim's possession on the night of the murder, as a citizen who believed in the community.[117]

The Court in *Gathers* refused to distinguish between the admissibility of evidence of the victim's characteristics as offered by the victim's family or by the prosecutor.[118] The Court reiterated that in considering whether to impose the death penalty the jury must tailor the punishment to the defendant's personal responsibility and moral guilt[119] in a manner proportionate to the defendant's blameworthiness.[120] Further, the Court noted that *Booth* left open the issue of whether a court may admit victim impact statements or victim-related information if they are directly related to the circumstances of the crime.[121] In *Gathers*, the voting registration card and the religious items themselves were relevant to the circumstances of the crime;[122] however, the contents of the card and of the religious items were not relevant.[123] Hence, because the victim-related information in *Gathers* was sufficiently similar to that in *Booth*, the Court found the evidence to be inadmissible at sentencing.[124]

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117. Id. at 808-10. A substantial portion of the prosecutor's remarks are reproduced in *Gathers*, including the reading of the "Game Guy's Prayer."

118. Id. at 811.

119. Id. at 810 (quoting *Enmund*, 458 U.S. at 801).

120. Id. (quoting *Enmund*, 458 U.S. at 825 (O'Connor dissenting)); *Tison v. Arizona*, 482 U.S. 137, 149 (1987)).

121. Id. at 811 (quoting *Booth*, 482 U.S. at 507 n.10).

122. Id. The items were scattered about and thus, arguably, were evidence of the defendant's utter disregard for another human being's integrity and privacy.

123. Id. The Court stated that no evidence existed to show that the defendant had read the cards. The Court argued that the content of the cards was "purely fortuitous and cannot provide any information relevant to the defendant's moral culpability." Id. at 811-12.

124. Id. at 810-12. Justice O'Connor, in her dissent, stated that she was willing to overturn *Booth*. But she also argued that overturning *Booth* was not necessary in order to uphold Gathers' death sentence. Id. at 813-14 (O'Connor dissenting). O'Connor argued for the adoption of a narrow reading of *Booth*, one that would allow a jury to consider information about the victim in determining the sentence. Id. at 814 (O'Connor dissenting). Justice O'Connor favored this view because she believed that the Eighth Amendment required that a sentence be proportional to the harm caused and to the defendant's blameworthiness. Id. (O'Connor dissenting). She criticized the Court for mandating that juries consider all relevant information concerning the defendant yet limiting the information it may consider concerning the victim:

> More fundamentally, this case illustrates the one-sided nature of the moral judgment tbat the Court's broad reading of *Booth* would require of the capital sentencer. This Court has consistently required that a jury at the penalty phase be allowed to consider a wide range of information concerning the background of the defendant.

Id. at 817 (O'Connor dissenting).

Justice O'Connor also argued that retribution is one concept that society utilizes in determining punishments. Id. at 818 (O'Connor dissenting) (stating that "[i]ndeed, we have expressly noted that while 'retribution is an element of all punishments society imposes,' it 'clearly plays a more prominent role in a capital case' ") (quoting *Spaiziano v. Florida*, 468 U.S. 447, 462 (1984)). She contended that the moral culpability of the defendant is at the heart of the retribution theory and that the harm the defendant caused is an essential factor in determining the defendant's culpabil-

D. Payne v. Tennessee: *The Court's Turn-Around*

Because of the strong dissents delivered in *Booth* and *Gathers* and the new appointments to the Supreme Court, commentators foresaw the demise of the two decisions.[125] The face of the Supreme Court has changed considerably since *Booth*,[126] and this change allowed the dissenters in *Gathers* to accomplish their goal of overruling *Booth*.[127]

In *Payne*, a jury convicted Pervis Tyrone Payne on two counts of first-degree murder and on one count of assault. The jury sentenced him to death on each of the murders and to thirty years imprisonment on the assault.[128] Payne spent the morning of the murders drinking beer and injecting himself with cocaine.[129] Later that day, Payne entered the victims' apartment and made sexual advances toward one of his eventual victims, Charisse Christopher.[130] Christopher rebuffed Payne, and he responded by stabbing her and her two young children repeatedly.[131] Police confronted Payne upon his departure from the

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ity. Id. (O'Connor dissenting). Justice O'Connor concluded that "in determining the proper punishment, nothing in the Eighth Amendment prevents the community from considering its loss nor requires that the victim remain a faceless stranger at the sentencing phase of a capital trial." Id. at 821 (O'Connor dissenting).

Justice Scalia, in his separate dissent, argued that the Court should overrule *Booth*. Id. at 823 (Scalia dissenting). Justice Scalia boldly argued for overturning a decision handed down only two years prior, declaring tbat the Court should overrule *Booth* before it becomes entrenched in society's laws. Id. at 824-25 (Scalia dissenting).

125. See, for example, Susan Annience Jump, Note, Booth v. Maryland: *Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 Ga. L. Rev. 1191, 1213 n. 126 (1987); Charlton T. Howard, III, Note, Booth v. Maryland—*Death Knell for the Victim Impact Statement?*, 47 Md. L. Rev. 701, 731 n. 163 (1988).

126. Justice Powell, who wrote for tbe majority in *Booth*, retired in 1987 and Anthony Kennedy replaced him. Justice Brennan, who joined the *Booth* decision and authored the *Gathers* decision, retired in 1990, and David Souter replaced him. Most recently, Justice Marsball, who joined in the *Booth* and *Gathers* majorities, retired in 1991, and Clarence Thomas replaced him. The appointment of Justice Thomas did not affect *Payne v. Tennessee*, because Justice Marshall's dissent in that case was his last opinion from the bench.

127. See *Payne v. Tennessee*, 111 S. Ct. 2597 (1991). Chief Justice Rehnquist delivered the opinion for the Court, joined by Justices White, O'Connor, Scalia, Kennedy, and Souter. Justice White joined the *Payne* majority because there were enough votes to overturn *Booth*. See note 113. Justice O'Connor filed a concurring opinion, joined by Justices White and Kennedy. Justice Scalia filed a concurring opinion, joined in part by Justices O'Connor and Kennedy. Justice Souter filed a concurring opinion, joined by Justice Kennedy. Justice Marshall dissented, joined by Justice Blackmun, as did Justice Stevens, also joined by Justice Blackmun.

128. *State v. Payne*, 791 S.W.2d 10, 11 (Tenn. 1990). The jury convicted Payne of murdering 28-year-old Charisse Christopher and her two-year-old daughter Lacie. The jury also convicted Payne of assaulting Charisse's three-year-old son, Nicholas.

129. *Payne*, 111 S. Ct. at 2601.

130. Id.

131. Id. at 2601-02. Payne stabbed the victims with a butcher knife. Charisse sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. Payne stabbed Lacie, one of the children, in the chest, abdomen, back, and head. Nicholas, the other child, survived, despite several knife wounds that completely penetrated his body.

scene, but he escaped at that time.[132] Police apprehended him later that same day.[133]

Despite the overwhelming physical evidence against him,[134] Payne testified that he had heard moans coming from the victims' apartment, had attempted to help the victims, had fled at the sound of the sirens, and had not hurt any of the victims.[135] But the jury convicted Payne on all counts.[136] At sentencing Payne presented the testimony of four witnesses,[137] one of whom testified that Payne was a caring and devoted person who did not drink or use drugs, and that his character would not allow him to commit the crimes for which he was convicted.[138] A clinical psychologist testified that Payne was mentally handicapped,[139] yet he was the most polite prisoner that he had ever met.[140]

One of the two witnesses that the state presented at sentencing was Charisse Christopher's mother, Mary Zvolanek.[141] In response to a question on how the murders affected her grandson, Nicholas, Ms. Zvolanek responded:

> He 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.[142]

In arguing for the death penalty, the prosecutor referred to Nicholas's consciousness during and after the attack and told the jury: "There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas."[143] The prosecutor also told the jury that Payne's attorney wanted the jury to think about the defendant's positive characteristics and did not want them to consider the people who loved the victims (implying that they should consider the

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132. Id. at 2601.

133. Id. at 2602.

134. Id. Payne's baseball cap was snapped on Lacie's arm. The police found three cans of malt liquor with Payne's fingerprints near the bodies. When apprehended, Payne had blood on his body and clothes that matched the victims' blood types. Id.

135. Id.

136. Id.

137. His mother and father, a friend named Bobbie Thomas, and Dr. John T. Huston, a clinical psychologist with a specialty in criminal court evaluation work, testified on Payne's behalf. Id.

138. Id. (testimony of Bobbie Thomas).

139. Id. (testimony of Dr. John T. Huston). He based this testimony on Payne's low score on an IQ test. Id.

140. Id. (testimony of Dr. John T. Huston).

141. *State v. Payne*, 791 S.W.2d at 17.

142. *Payne*, 111 S. Ct. at 2603.

143. Id.

victims' family). He further emphasized the loss that Nicholas felt.[144] The jury imposed the death penalty.[145]

The Supreme Court of Tennessee affirmed the conviction and sentence, characterizing Ms. Zvolanek's testimony as technically irrelevant and finding that it did not create an unacceptable risk of an arbitrary imposition of the death penalty.[146] In order to reconsider *Booth* and *Gathers*, the U.S. Supreme Court granted certiorari.[147]

In *Payne*, the Court found that *Booth* and *Gathers* were based upon two premises: first, that evidence relating to the harm a capital defendant caused to the victim's family does not reflect upon the defendant's blameworthiness, and second, that only evidence relating to blameworthiness is relevant to the capital sentencing decision.[148] The Court took issue with these premises, arguing that the harm a defendant caused is an important concern in criminal law.[149] Further, the *Payne* Court took issue with the *Booth* Court's reading of previous Supreme Court cases which held that courts could not prevent defendants from offering any relevant mitigating evidence at sentencing,[150] and held that courts should view capital defendants as unique human beings at sentencing.[151] The Court interpreted the Supreme Court jurisprudence as proscribing a class of evidence that a court must receive, mitigating evidence, not as describing a class of evidence which it could not receive, victim impact evidence.[152] The *Payne* Court argued that the *Booth* Court's reading of precedent unfairly weighted the scales in a capital trial in favor of the defendant.[153]

The *Payne* Court rejected the *Booth* Court's argument that courts should disallow evidence of the victim's character because defendants would have difficulty in rebutting such evidence.[154] The Court argued that tactical considerations do not affect the admissibility of the evidence and that the factfinder should determine the relevant weight of such evidence.[155] The Court also rejected the argument that victim im-

144. Id. at 2603.

145. Id.

146. Id. at 2603-04.

147. Id. at 2604. The Court found that although the prosecution did not offer the evidence at question in *Payne* in conjunction with a victim impact statement, "its purpose and effect was much the same as if it had been." Id. at 2606.

148. Id. at 2605.

149. Id. The Court looked to Biblical writings ("[a]n eye for an eye, a tooth for a tooth," Exodus 21:22-23), English law, and the Federal Sentencing Guidelines as examples in which sentences depend on the harm caused. Id. at 2605-06.

150. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). See also *Skipper v. South Carolina*, 476 U.S. 1 (1986).

151. *Woodson*, 428 U.S. at 304.

152. *Payne*, 111 S. Ct. at 2607.

153. Id.

154. Id.

155. Id. (quoting *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983)).

pact evidence will encourage comparative judgments between types of victims.[156] The Court found that victim impact statements do not lead to arbitrary decisions to impose the death penalty and that the state has the prerogative to allow victim impact evidence at capital sentencing hearings.[157]

The *Payne* Court further argued that if any such evidence was unfairly prejudicial, the due process clause provided a mechanism for relief.[158] Hence, the Court held that *Booth* deprives the state of "the full moral force" of its evidence and prevents the jury from considering all the facts necessary to sentence the defendant appropriately.[159] The Court added that the Eighth Amendment erects no per se bar to the admission of victim impact evidence and prosecutorial argument on that subject during capital sentencing.[160]

Justice Souter concurred with the Court's opinion to the extent that it excluded the following two categories of evidence, which *Booth* and *Gathers* also had excluded: evidence regarding the individuality of the victim and evidence concerning the impact of the crime on the victim's family.[161] Justice Souter, however, in contrast to the Court, did not rest his decision to overrule *Booth* and *Gathers* solely on constitutional grounds.[162] He argued that the *Booth* standard was unworkable and that it would produce arbitrary results and uncertain application.[163] He reached this conclusion by analyzing the interaction of three facts: first, *Booth*'s restriction of admissible evidence stretched beyond the

156. Id. The Court argued that such testimony was not designed to compare between types of victims, but rather to inform the jury that the victim was a unique human being.

157. Id. at 2608.

158. Id. See also *Darden v. Wainwright*, 477 U.S. 168, 179-83 (1986).

159. 111 S. Ct. at 2608.

160. Id. at 2609. The Court limited its holding to the holdings of *Booth* and *Gathers*, that is, that evidence relating to the victim and the impact of the crime on the victim's family are inadmissible at a capital sentencing proceeding. The Court did not address the admissibility of evidence of a victim's family members' characterization of the crime or defendant, or an opinion on the sentence to be imposed. Id. at 2611 n.2.

Addressing the question of stare decisis, the Court argued that while stare decisis is preferred, it is not an inexorable command and should be abandoned when precedent is unworkable or is poorly reasoned. Id. at 2609. The Court stated that both *Booth* and *Gathers* were decided by narrow margins and over spirited dissents that questioned the basic premises of those decisions. The Court also contended that members of tbe Court have questioned *Booth* and *Gathers* and that state courts have inconsistently applied these decisions. Id. at 2610-11.

161. Id. at 2614 (Souter concurring).

162. Id. at 2616 (Souter concurring). If the Court desired to overrule *Booth* and *Gathers*, it should have done so on narrower grounds, as Justice Souter suggested, and it should have avoided the constitutional question if possible. Mark W. Cannon and David M. O'Brien, *Views from the Bench: The Judiciary and Constitutional Politics* 123 (Chatham House, 1985) (quoting Justice Felix Frankfuter's statement that "[t]his Court reaches constitutional issues last, not first"). See also *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341-56 (1936) (Brandeis concurring).

163. *Payne*, 111 S. Ct. at 2616 (Souter concurring).

prepared victim impact statement to any victim impact evidence, however derived; second, details of which the defendant was unaware likely will be admitted at the guilt stage of trial;[164] and third, the same jury that determines guilt usually will determine or recommend the sentence.[165] Thus, Justice Souter concluded that *Booth* raises a practical dilemma: if its standard applies at the guilt phase of the trial, capital trials would be incomprehensible, because facts necessary for a jury's understanding of the crime would be omitted simply because those facts were also indicative of the victim's characteristics. But, if *Booth* does not apply at the guilt phase, it does not meet its stated objective because the jury would hear evidence of the victim's characteristics.[166] Souter concluded that the Court should overrule *Booth* since the standard was unworkable.

Justice Stevens was concerned with the majority's trivialization of the doctrine of stare decisis, and he also argued that even if *Booth* and *Gathers* had not been decided that the Court incorrectly decided *Payne*.[167] He reiterated the *Booth* majority's arguments[168] and took issue with the *Payne* majority's argument that the scales of the criminal system must be balanced.[169] Justice Stevens noted that the Constitution grants rights to the defendant and, in order to protect individuals, places limits on the disproportionately powerful State.[170] He further argued that harm to the victim may justify enhanced punishment only if the defendant could have foreseen such harm, but that victim impact statements offer evidence of unforeseeable harm.[171]

Justice Marshall opened his dissent by contending that "[p]ower, not reason, is the new currency of this Court's decisionmaking."[172] Justice Marshall argued that since the *Booth* and *Gathers* decisions, neither the law nor the facts underlying the decisions had changed; only the members of the Court had changed.[173] Justice Marshall added that the *Booth* and *Gathers* decisions answered every argument that the

164. For example, if a victim's family witnessed a murder without the defendant's knowledge, then the family members' testimony at the guilt stage of trial will introduce a detail of the crime of which the defendant was unaware—the existence of the victim's family at the scene of the crime.

165. Id. (Souter concurring).

166. Id. at 2617 (Souter concurring).

167. Id. at 2625 (Stevens dissenting).

168. Id. at 2626-27 (Stevens dissenting). See text accompanying notes 96-108.

169. Id. at 2627 (Stevens dissenting) (declaring that "[t]he premise that a criminal prosecution requires an even-handed balance between the State and the defendant is also incorrect").

170. Id. (Stevens dissenting).

171. Id. at 2628 (Stevens dissenting).

172. Id. at 2619 (Marshall dissenting).

173. Id. (Marshall dissenting).

Payne majority offered.[174] He admitted that stare decisis is not an inexorable command but stressed that the Court previously had departed from precedent only (1) upon a showing of a "special justification,"[175] including subsequent changes in the law,[176] (2) upon showing that a precedent was incoherent or inconsistent,[177] or (3) if new circumstances or facts created a need to change precedent.[178] Justice Marshall contended that the majority did not even attempt to show a special justification,[179] and he found their opinion especially disturbing because it offered no standard by which it would overturn cases in the future.[180]

IV. How Courts Have Interpreted *Payne*

Although the Court decided *Payne* only last year, federal and state courts already have cited it numerous times. The Supreme Court has not reconsidered its decision in *Payne*, but it has addressed similar issues in subsequent rulings.[181] Many state courts have validated state laws that allow the admission of victim impact evidence at capital sentencing hearings.[182] However, at least one state court has refused to allow the admission of victim impact evidence at capital sentencing hearings, despite the Court's holding in *Payne*.[183]

A. The Supreme Court After Payne

The Supreme Court twice has commented on *Payne*. The Court first commented on *Payne* in summarily denying an appeal by an inmate on death row who sought to introduce the testimony of family

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174. Id. at 2620 (Marshall dissenting).

175. Id. at 2621 (Marshall dissenting) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

176. Id. (Marshall dissenting) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)).

177. Id. at 2622 (Marshall dissenting) (quoting *Patterson*, 491 U.S. at 173).

178. Id. at 2621-22 (Marshall dissenting) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis dissenting)).

179. Id. at 2622 (Marshall dissenting) (stating that "[t]he majority cannot seriously claim that *any* of these traditional bases for overruling a precedent applies to *Booth* or *Gathers*").

180. Id. at 2625 (Marshall dissenting). Marshall concluded his opinion:

> Today's decision charts an unmistakable course. If the majority's radical reconstruction of the rules for overturning this Court's decisions is to be taken at face value—and the majority offers us no reason why it should not—then the overruling of *Booth* and *Gathers* is but a preview of an even broader and more far-reaching assault upon this Court's precedents. Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's "spirited dissents" will squander the authority and legitimacy of this Court as a protector of the powerless.

Id. (Marshall dissenting).

181. See notes 184-98 and accompanying text.

182. See note 199 and accompanying text.

183. See notes 202-06 and accompanying text.

members of his victim concerning the family's view on the appropriate sentence to be imposed.[184] In that case, a jury had convicted Olan Robison of a triple murder and had sentenced him to death.[185] At sentencing, Robison had attempted to introduce testimony of a sister of one of the victims. Robison claims the sister would have testified that he should not receive the death penalty.[186]

The Supreme Court refused to hear Robison's post-*Payne* appeal. At first glance, the Court appears to have applied a double standard in allowing victim impact evidence offered by the prosecution but not that offered by the defendant.[187] While this denial of appeal appears to be another blow to the rights of defendants, after further examination the Court's decision in *Robison* may signal the Court's willingness to bar a specific type of victim impact evidence. The type of evidence the courts barred in *Robison* was the type not considered in *Payne*: the victim's family's characterizations and opinions about the crime, the defendant, and the appropriate sentence.[188]

In deciding *Robison*, the federal appellate court would not allow the defendant to admit opinion testimony because a consequence would be to allow the prosecution to offer testimony that the court should impose the death penalty, thereby reducing the sentencing hearing to a "contest of irrelevant opinions."[189] The Tenth Circuit found that this type of opinion testimony did not apply to either the character or record of the defendant, nor to any of the circumstances of the crime.[190] It further held that such testimony would confuse the jury and divert its

184. *Robison v. Maynard*, 112 S. Ct. 445 (1991). See also Linda Greenhouse, *Justices Won't Hear Inmates Plea to Let Relative of Victim Testify*, N.Y. Times at B11 (Nov. 19, 1991).

185. *Robison v. Maynard*, 829 F.2d 1501, 1503 (10th Cir. 1987).

186. Greenhouse, N.Y. Times at B11 (cited in note 184). Robison contended, through counsel, that he intended to call relatives of the victims who had expressed a "desire to ask the jury not to impose the death penalty in this case." *Robison*, 829 F.2d at 1504.

187. The Court offered no rationale in denying Robison's appeal. Moreover, this decision by the Court may be in conflict with the holdings in previous capital cases requiring the admission of all mitigating evidence. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). See also text accompanying note 81. The defendant argued before the Tenth Circuit that the victim's family's testimony would present proper mitigating factors that the jury need consider. *Robison*, 829 F.2d at 1504. Furthermore, the Tenth Circuit, in hearing Robison's appeal after *Payne* was handed down, found that while *Payne* gave the prosecutors the ability to use victim impact evidence, it gave no such corresponding right to the defendants. See Greenhouse, N.Y. Times at B11. The Tenth Circuit ruled that the testimony of the victim's sister "in no way constitutes relevant evidence because it does not relate to the harm caused by the defendant." Id.

Interestingly, the Oklahoma Attorney General's office urged the Supreme Court not to hear the appeal because "[t]he retributive function of the criminal law exists on behalf of society as embodied in the state, not on behalf of the victim's family." Id.

188. *Payne*, 111 S. Ct. at 2611 n.2. The Court held this type of evidence to be violative of the Eighth Amendment in *Booth*, 482 U.S. at 508-09.

189. *Robison*, 829 F.2d at 1504.

190. Id. at 1504-05.

attention from its most important task: the decision whether to impose the death penalty.[191] The Tenth Circuit contended that opinion testimony concerning the appropriate sentence also would interfere with the jury's ability to perform its duty to act as the conscience of the community.[192] Hence, in *Robison*, the Supreme Court had the opportunity to clarify the *Payne* decision and uphold that part of *Booth* which barred the admission of such evidence; however, it failed to do so.

The Court also had opportunity to comment on *Payne* when it overturned the death sentence of a prison escapee whom a jury had convicted of murder.[193] In *Dawson v. Delaware*, the Court found that the prosecution violated the defendant's First Amendment rights by informing the jury at sentencing that the defendant was a member of a white racist prison gang called the Aryan Brotherhood.[194] The defendant had presented mitigating evidence through the testimony of the defendant's family members at sentencing by introducing the fact that the defendant earned good time credits in prison and had enrolled in several drug and alcohol rehabilitation programs.[195]

The Court narrowly tailored its holding in *Dawson* to fit the specific facts of the case, i.e., where the evidence offered by the state only concerned abstract beliefs. The Court also held that as the defendant has the right to present all relevant mitigating evidence, the prosecution is entitled to rebut that evidence with its own evidence.[196] Thus, the prosecutor argued that because Dawson offered evidence concerning his good character, the prosecution should allow it to introduce evidence of his bad character.[197] The Court agreed with this general argu-

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191. Id. at 1505 (declaring that "[s]uch testimony, at best, would be a go samer veil which would blur the jury's focus on the issue it must decide").

192. Id.

193. *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). See Linda Greenhouse, *Unusual Use of First Amendment Overturns a Killer's Death Sentence*, N.Y. Times at A14 (March 10, 1992).

194. The Supreme Court has held that an individual has the right to join groups and associate with others who share similar beliefs. See *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The Court also has held that a jury cannot consider, as an aggravating circumstance, and draw negative inferences from, this constitutionally protected activity. See *Zant v. Stevens*, 462 U.S. 862, 885 (1983). The Court in *Dawson* found that "the receipt into evidence of the stipulation regarding his membership in the Aryan Brotherhood was constitutional error" because it "proved nothing more than Dawson's abstract beliefs." *Dawson v. Delaware*, 112 S. Ct. 1093, 1097-98 (1992). The prosecution initially intended to introduce into evidence expert testimony concerning the nature of the Aryan Brotherhood, that Dawson had the words "Aryan Brotherhood" tattooed on the back of his hand, and that Dawson had multiple swastika tattoos on his back and a picture of a swastika painted in his jail cell. Id. at 1095-96. The prosecution and defendant later agreed to a stipulation which simply stated that Dawson belonged to the Aryan Brotherhood, a racist prison gang. Id. at 1096.

195. 112 S. Ct. at 1096.

196. Id. at 1098-99.

197. Id. at 1099.

ment, but found fault in the specific evidence that the prosecution offered because it was not relevant in its own right.[198] As a result, while the Court reversed Dawson's death sentence, it seemingly expanded the holding in *Payne*. The Court stated in dicta that *Payne* stood for more than the proposition that the state could offer victim impact evidence to counteract the defendant's mitigating evidence. The Court also carved out a new area of evidence that is admissible by the state at capital sentencing hearings: evidence of the defendant's bad character.

B. *State Courts After* Payne

Many state courts also have had the opportunity to apply *Payne* in analyzing the admissibility of victim impact evidence. Almost every state court that has had this opportunity has invoked *Payne* to uphold the admission of victim impact evidence.[199] Most state courts simply have held that because *Payne* overruled *Booth* and *Gathers*, defendants' arguments against admitting victim impact evidence were invalid.[200] Moreover, at least one state court has taken the analysis one step further and found that the admission of victim impact evidence not only is admissible under *Payne*, but also is admissible under their state constitution.[201]

On the other hand, despite the Court's decision in *Payne*, New Jersey courts have found that their state constitution's principles of due process, reasonable punishments, and independent precepts of fundamental fairness forbid victim impact evidence at capital sentencing proceedings.[202] Following *Booth*, the Supreme Court of New Jersey had

198. The Court reasoned that it was not relevant because the evidence only concerned abstract beliefs, which are protected by the First Amendment. Id. at 1098-99.

199. At least 13 states have allowed victim impact evidence at capital sentencing since *Payne*. See *Smith v. State*, 588 So.2d 561, 572 (Ala. Crim. App. 1991); *People v. Edwards*, 819 P.2d 436 (Cal. 1991); *In re Petition of the State of Delaware for a Writ of Mandamus*, 597 A.2d 1, 1 (Del. 1991) (issuing a writ directing a Delaware Superior Court in the case of *State v. Harris*, 1991 Del. Super. LEXIS *331, to accept victim impact evidence); *Hodges v. State*, 595 S.2d 929, 933 (Fla. 1992); *Todd v. State*, 410 S.E.2d 725, 729-30 (Ga. 1991); *Idaho v. Card*, 825 P.2d 1081, 1089 (Idaho 1991); *People v. Howard*, 147 Ill.2d 103, 588 N.E.2d 1044, 1066-67 (1991); *Benirschke v. State*, 577 N.E.2d 576, 578 (Ind. 1991); *Wiggins v. State*, 324 Md. 551, 597 A.2d 1359, 1373 (Md. 1991) (in dicta); *State v. Williams*, 480 N.W.2d 390, 390 (Neb. 1992); *Homick v. Nevada*, 825 P.2d 600, 605-06 (Nev. 1992); *State v. Chinn*, 1991 Ohio App. LEXIS 6497, *47-48; *State v. Johnson*, 410 S.E.2d. 547, 555 (S.C. 1991).

200. See, for example, *People v. Pinholster*, 824 P.2d 571, 620 (Cal. 1992); *Todd v. State*, 410 S.E.2d at 729-30.

201. *People v. Howard*, 508 N.E.2d 1044, 1067 (Ill. 1991) (holding that "[w]hile we do not intend to suggest the victim impact evidence will be relevant at the guilt-innocence phase of a capital trial, we do not believe that anything in the Illinois Constitution automatically forbids its introduction at a capital sentencing hearing").

202. *State v. Erazo*, 594 A.2d 232, 258 (N.J. 1991) (Handler concurring in part, dissenting in part) Judge Handler dissented by arguing that capital punishment is unconstitutional altogether.

applied a strict standard to the determination of the admissibility of victim impact evidence.[203] The New Jersey Supreme Court had found that even though state law allowed for victim impact statements in capital trials, the state constitution required that juries consider whether to impose the death penalty only if they had not been unnecessarily exposed to prejudicial or inflammatory commentary.[204] Subsequently, New Jersey courts relied on this precedent rather than on *Booth* and *Gathers*,[205] since the New Jersey Supreme Court had held that the state constitution afforded greater protections against the admissibility of victim impact evidence than does the U.S. Constitution.[206]

In contrast, one state court has gone beyond the holding in *Payne* and found that the admission of victim impact evidence pertaining to the family member's view on the appropriate sentence is not error.[207] In *Idaho v. Card*,[208] a presentence investigator, pursuant to state law, prepared a presentence report prior to sentencing.[209] Part of that report included interviews with members of the victim's family.[210] One statement by a family member professed that it "was the consensus of the family that Card should be sentenced to death for his crime."[211] Card challenged the admissibility of this statement, arguing that allowing such testimony violated *Booth*. The Idaho Supreme Court stated that while *Payne* overruled part of *Booth*, it did not consider the issue of the admission of the family members' opinions concerning the sentence.[212]

203. *State v. Williams*, 550 A.2d 1172, 1202-06 (N.J. 1988).

204. *Erazo*, 594 A.2d at 258.

205. See, for example, *State v. Harvey*, 581 A.2d 483, 491-92 (N.J. 1990); *State v. Clausell*, 580 A.2d 221, 243-44 (N.J. 1990).

206. *Erazo*, 594 A.2d at 259 (Handler concurring in part, dissenting in part). The New Jersey Supreme Court pointed out that, as mandated by *Booth*, New Jersey prohibited the introduction of victim impact evidence at the guilt phase of capital trials as well as at the sentencing phase. See *Williams*, 550 A.2d at 1203.

207. *Idaho v. Card*, 825 P.2d 1081, 1089 (Idaho 1991) (holding that "the victim impact statements contained in the presentence report, including the comments contained in the report as to an appropriate sentence, are not error and do not require that the case be remanded for resentencing").

208. Id.

209. See Idaho Crim. Rule 33.1 (providing for the preparation of a presentence report to be used in sentencing).

210. *Card*, 825 P.2d at 1087-88.

211. Id. The report also contained the family's description of their family as "very closely knit," and the family's claim that the victims "were poor but they would give whatever they had to help others." Further, the report stated that the family's opinion was that if Card "could shoot to death two total strangers with no provocation whatsoever, he could do it again just as easily." Id. at 1087 n.7.

212. The Idaho Supreme Court used *Card* to hold that *Payne* overruled a line of Idaho cases which held that victim impact statements were barred due to *Booth*. Id. at 1088 (overruling *State v. Pizzuto*, 810 P.2d 680 (Idaho 1991); *State v. Paz*, 798 P.2d 1 (Idaho 1990); and *State v. Charboneau*, 774 P.2d 299 (Idaho 1989)).

The Idaho Supreme Court then determined that the sentencing judge did not rely on the family members' opinion in making the sentencing decision; therefore, it allowed the evidence.[213] Hence, the Idaho Supreme Court found that admitting evidence which violated that portion of the holding in *Booth* which *Payne* did not overturn was not an error. This case very easily could be the instrument by which the U.S. Supreme Court will clarify its holding in *Payne* regarding how much of *Booth* is overruled and how much, if any, of *Booth* still is good law.[214]

V. A Critical Analysis of *Payne*: Why the Court Should Not Have Allowed the Admission of Victim Impact Evidence

The rise of the victims' rights movement underscores the movement in America toward refusing to acknowledge the social causes of crime and placing the responsibility for crime control on the courts.[215] This movement toward securing rights for victims, however, is oxymoronic. The use of the term rights[216] connotes oppression and the deprivation of entitlements, power, equality, or liberty.[217] But to give victims an undefined and irreducible right is to trump the rights of defendants.[218] In so doing, courts neglect the traditional concern of the criminal justice system, protecting those individual rights that restrain the state from acting against an individual.[219]

The *Payne* Court approved the use of evidence that will not further the societal goals of sentencing. It opened the door for the admission of victim opinion testimony concerning the appropriate sentence to be imposed on defendants. The Court also stepped backward from the idea of ensuring like sentences for similarly situated defendants.[220]

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213. The Idaho Supreme Court said, "We have carefully reviewed the entire record and are satisfied beyond a reasonable doubt that the sentencing judge imposed the death penalty in this case based on the evidence and without regard to the opinions of the Morey family and the statements contained in the presentence investigation report regarding the nature of the sentence." *Card*, 825 P.2d at 1089.

214. The Idaho Supreme Court decision in *Card* has been appealed to the U.S. Supreme Court. Petition for certiorari was filed on May 28, 1992.

215. See Henderson, 37 Stan. L. Rev. at 946-47 (cited in note 7).

216. Examples include civil rights, gay rights, women's rights, right to choose, or right to life.

217. See Henderson, 37 Stan. L. Rev. at 952.

218. Id. The movement toward the abolition of the exclusionary rule from Fourth Amendment jurisprudence is an example where victims' rights are being used to justify the abolition of defendants' rights. Id. at 982-86.

219. Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 Am. Crim. L. Rev. 391, 395 (1989).

220. The Court bluntly and unapologetically overturned recent precedent thereby opening the dam for a flood of overrulings which appears to be on the horizon. A critical analysis of *Payne* would be incomplete without mention of the Court's glaring failure to adhere to the doctrine of stare decisis. This Note could not, and will not, address this totally distinct jurisprudential question fully or completely.

A. *Victim Participation Does Not Further the Goals of Sentencing*

What goals does society seek in imposing sentencing? If victim participation in sentencing does not further societal goals, and if another justification is not offered, then the legal system should bar such participation. Thus, analyzing sentencing goals in death cases is especially important.[221]

The justifications for the punishment of criminals fall into four categories: retribution, deterrence, incapacitation, and rehabilitation.[222]

Stare decisis is the doctrine under which "decisions made today become the guide and precedent by which future similar cases will be governed." Robert H. Jackson, *The Struggle for Judicial Supremacy* at 295 (Octagon Books, 1979). Stare decisis also is the doctrine by which the present Court adheres to the decisions previously handed down. Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L. J. 1029, 1032 (1990). At common law, stare decisis ensures the stability of and maintains the rule of law. Note, *Constitutional Stare Decisis*, 103 Harv. L. Rev. 1344, 1345 (1990). Further, stare decisis is embodied in constitutional law by the respect of precedent and adherence to past decisions. Id.

Stare decisis is the preferred path for the Court, because the Court, as a legal institution, is a unique political actor that should make its decisions through the application of reasoned legal principles, not through an adherence to partisan politics. Christopher E. Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 Ky. L. J. 317, 319-20 (1990-91). Without stare decisis, case decisions would be arbitrary and unpredictable. Stare decisis therfore is necessary for the judiciary to retain its legitimacy within the American constitutional, political system.

While stare decisis is not an inexorable command, the Court "has never departed from precedent without 'special justification.'" *Payne*, 111 S. Ct. at 2621 (Marshall dissenting) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). The Court has defined three special justifications: (1) the need to resolve conflicting precedents; (2) the finding that the conditions upon which the first decision were premised have changed; and (3) the finding that a previous decision has proved unworkable. See Note, 103 Harv. L. Rev. at 1346. The *Payne* majority did not suggest that the precedents were in conflict, nor that the conditions upon which *Booth* and *Gathers* had been decided had changed in the few years since they were decided. *Payne*, 111 S. Ct. at 2622 (Marshall dissenting). The majority feebly attempted to argue that the precedents were unworkable by identifying dissents in prior decisions and one state court decision, *State v. Huertas*. See notes 271-76 and accompanying text. In short, the *Payne* majority could not offer a special justification for failing to adhere to stare decisis. The only circumstance that had changed since *Booth* and *Gathers* was the composition of the Court.

The Court attempted to justify its failure to adhere to precedent by arguing that stare decisis is only necessary in cases involving reliance interests and property and contract rights. *Payne*, 111 S. Ct. at 2610. But by such emphasis, the Court has "[sent] a clear signal that essentially *all* decisions implementing the personal liberties protected by the Bill of Rigbts and the Fourteenth Amendment are open to reexamination." Id. at 2623.

221. *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (stating that "death is a punishment different from all other sanctions in kind rather than degree").

222. See Henderson, 37 Stan. L. Rev. at 987-99 (cited in note 7); Talbert, 36 U.C.L.A. L. Rev. at 211-19 (cited in note 30). Some commentors divide the justifications into two categories: retributive goals and utilitarian goals. Murphy, 55 U. Chi. L. Rev. at 1306 (cited in note 31). These commentators place deterrence, incapacitation, and rehabilitation in the utilitarian category because they all serve to increase the total happiness of society. Id. at 1309-14.

However, rehabilitation and incapacitation also can be subunits of deterrence because the object of incapacitation is to prevent the offender from offending again, and the object of rehabilitation is to deter crime by modifying the offender's behavior so the offender will not offend again.

These goals do not apply equally in all cases, nor does any one always take precedence over the others. Rather, each goal serves a different role, in a differing magnitude, at each sentencing decision.[223]

The basic premise driving retribution is the belief that a judge or jury should impose punishment according to moral blameworthiness.[224] One can view retribution from the perspective of society or from the perspective of the individual. From society's perspective, the goal of retribution is to inflict punishment on the defendant for his disregard of society's rules. From the victim's perspective, the purpose of retribution is vengeance.[225] In contrast to the other goals of sentencing, societal retribution focuses on the defendant, and not on society's needs.[226] The goal of proportionate sentencing is at the center of retribution.[227] Originally, commentators perceived proportionate sentencing as a principle of equality: one who murders violates a fundamental societal rule, and death is equal punishment.[228] In practice today, the retribution theory demands that a just punishment be proportionate to the harm the criminal intended.[229] The death penalty represents the ultimate society could seek as retribution.

Since retribution is a goal to be met in imposing an appropriate sentence, the sentencing agent must evaluate the defendant's moral blameworthiness. In so doing, the sentencing agent must evaluate the morality of the defendant's activity against some baseline. The sentencing agent should compare the defendant's blameworthiness against soci-

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The overlap between the utilitarian category and the retributive category is enough to blur the distinction. Therefore, this Note will use the four categories of deterrence, rehabilitation, incapacitation, and retribution. Congress also identified these as the four classic purposes of sentencing in the Sentencing Reform Act of 1984. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984), codified at 18 U.S.C. § 3553(a)(2) (Supp. 1991).

223. Henderson, 37 Stan. L. Rev. at 987 (cited in note 7).

224. See id. at 990-99; Murphy, 55 U. Chi. L. Rev. at 1306-09. Immanuel Kant first proposed the moral basis of retribution and opposed treating an individual as a means towards achieving a social end. See Immanuel Kant, *The Philosophy of Law* (W. Hastie translation, 1887), reprinted in Sanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and Its Processes* at 137-38 (Little, Brown, 5th. ed. 1989).

225. Those who argue that two theories of punishment exist place vengeance in the utilitarian class because vengeance refers to punishment based on consequences; therefore, they argue that any consideration of the victim would be irrelevant to the retribution sentencing calculus. Murphy, 55 U. Chi. L. Rev. at 1308 (cited in note 31).

226. Id. at 1306-07. Some, however, find that vengeance also is part of the retributive theory and that society has a right to retaliate against those who fail to follow society's rules. See Henderson, 37 Stan. L. Rev. at 991.

227. Murphy, 55 U. Chi. L. Rev. at 1307. For a discussion on how victim participation at sentencing is adverse to proportional sentencing see Part V.C.

228. Murphy, 55 U. Chi. L. Rev. at 1307. However, "[t]here are obvious problems with this definition. Few would suggest, for example, that rape is the appropriate punishment for rape." Id.

229. Henderson, 37 Stan. L. Rev. at 990-92. The proportionality principle is "a correspondence between the wickedness of the act and the suffering to be inflicted upon the actor." Id.

ety's blameworthiness,[230] not against the victim's blameworthiness, since the criminal acted against society and since society accuses, tries, and punishes the defendant.[231] If the criminal justice system allows the victim to have a voice at sentencing or allows the admission of the victim's characteristics, it invites the sentencing agent to question the victim's relative blameworthiness, thereby shifting the focus away from the individual defendant and away from the crime against society.[232]

Victim participation at sentencing is adverse to the victim's interests under a retribution model. A victim would be offended if her moral standing were at issue as a defense for the crime or as a factor to consider in imposing a lenient sentence. For example, in Texas, before imposing a sentence upon a man convicted of murdering two men, one judge considered the characteristics of the victims and refused to impose a life sentence.[233] The judge's reason for refusing to impose a stiff sentence was that the victims were homosexuals.[234] However, the judge did not restrict his disdain to homosexuals; he also stated that he would not sentence a murderer to life imprisonment for killing a prostitute.[235] Moreover, any focus on the victim's characteristics or moral standing at the sentencing stage would frustrate the goal of the victims' rights movement in helping the victim or her family regain the self-control lost through victimization. If the sentencing agent scrutinized or criticized the victim's moral standing then the victim's family would feel victimized again on the witness stand.[236]

Despite its popularity among victims' rights proponents, the second form of retribution, vengeance,[237] has received little support from social

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230. The sentencing agent should compare society's goodness with the defendant's badness. Talbert, 36 U.C.L.A. L. Rev. at 212 (cited in note 30).

231. A criminal action is different than a civil action in which a victim brings suit on her own behalf. The theory of the criminal action is that the defendant's act was damaging to society, and society should punish the defendant. The theory of a civil action is that one individual has harmed another individual, to whom he should pay restitution.

232. Henderson, 37 Stan. L. Rev. at 991-92 (cited in note 7). At times, the criminal justice system does shift the blame for a crime to the victim. For example, when a defendant asserts self-defense, the actions of the victim are considered. Id.

233. Lisa Belkin, *Texas Judge Eases Sentence for Killer of Two Homosexuals*, N.Y. Times A8 (Dec. 17, 1988).

234. Id. Judge Hampton said: "Those two gays that got killed wouldn't have been killed if they hadn't been cruising the streets picking up teen-age boys. I don't much care for queers cruising the streets picking up teen-age boys. I've got a teen-age boy." *Judge is Censured Over Remark on Homosexuals*, N.Y. Times at A28 (Nov. 29, 1989).

235. See Belkin, N.Y. Times at A8. Judge Hampton declared: "I put prostitutes and gays at about the same level and I'd be hard put to give somebody life for killing a prostitute." Id.

236. Talbert, 36 U.C.L.A. L. Rev. at 213. The experience would be similar to that which a rape victim undergoes when defense attorneys raise her prior sexual history as a defense for the defendant's actions. See generally Peter M. Hazelton, Note, *Rape Shield Laws: Limits on Zealous Advocacy*, 19 Am. J. Crim. L. 35 (1991).

237. Those who use vengeance as justification for victim participation at sentencing do so by

scientists or philosophers.[238] Vengeance and anger are intertwined, and while victims' anger at the criminal who victimized them is justifiable, vengeance as a manifestation of that anger has a questionable psychological value to the victim.[239] The victim's desire for vengeance also conflicts with the goal of equal and proportionate sentencing.[240] Vengeance is a dangerous rationale for allowing victim participation at sentencing since such testimony often is emotional, uncontrollable by the prosecutor or judge, and extremely prejudicial. A recent sentencing hearing that received enormous attention highlights this point. At the sentencing of convicted serial murderer Jeffrey Dahmer, the sister of one victim exclaimed toward Dahmer, "You are the devil that walked on the streets and was loose." The brother of another victim told Dahmer, "I hope you go to hell."[241] But another victim's sister produced the most emotional reaction when she called Dahmer "Satan" and shouted, "I hate you," along with other obscenities. Deputies had to restrain her as she moved toward the defendant.[242]

The second goal in sentencing is deterrence.[243] Deterrence can be classified as general deterrence and specific deterrence.[244] General deterrence deters potential lawbreakers by punishing specific actions and giving warning to potential wrongdoers that such actions will be punished.[245] Specific deterrence deters the criminal himself from further

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arguing that victim participation "prevents mob violence, channels society's outrage, and preserves the legitimacy of the criminal justice system by paying heed to the community's sense of justice." None of these rationales support retaliation from a utilitarian perspective because the likelihood of mob violence is remote at best, crime does not provoke strangers to retaliate against defendants, and victim participation is not an appropriate channel for society's outrage. Henderson, 37 Stan. L. Rev. at 995 (cited in note 7). Victim participation actually may be counterproductive to evoking society's outrage because the sentencing agent will hear the vicim's outrage, and not that of society. One of the prosecutor's jobs is to communicate effectively society's outrage. See Karyn Ellen Polito, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 New England J. on Crim. and Civil Confinement 241, 252 (1990).

238. Henderson, 37 Stan. L. Rev. at 994 (cited in note 7).

239. Id. at 996. "Emphasizing individual vengeance and blame can undermine, rather than facilitate, recovery from a violent crime . . . [and] even a harsh sentence does not end the matter for the victim." Id. at 998.

240. Id. at 996. Disproportionate sentencing is discussed further in Part V.C.

241. See Rogers Worthington, *Dahmer Says He's Sorry, Gets 15 Life Terms*, Chi. Trib. 3 (Feb. 18, 1992).

242. Id. While Dahmer was not in jeopardy of receiving a death sentence, these types of outbursts could easily occur at capital sentencing hearings.

243. Jeremy Bentham probably is the best known proponent of the theory that punishment is an evil in and of itself and only is justifiable if it serves the greater social good of preventing a greater evil. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in Jeremy Bentham and John Stuart Mill, eds., *The Utilitarians* at 162, 166 (Dolphin Books, 1961) reprinted in Kadish and Schulhofer, *Criminal Law* at 139-40 (cited in note 224).

244. Henderson, 37 Stan. L. Rev. at 987.

245. Id. at 987-89.

wrongdoing.[246] The deterrence theory is central to the death penalty debate. Those in favor of the death penalty most often use the theory of deterrence as support, while opponents of the death penalty argue that the death penalty is not an effective deterrent.[247]

The deterrence theory does not justify victim participation in capital proceedings. The general deterrence theory rests on the notion that the legal system will prevent future crime if severe and certain sentences are imposed on criminals.[248] While victim participation may have an effect on the severity of a sentence, it will have an adverse effect on the certainty of sentences.[249] Commentators also question the impact of victim impact statements on the severity of sentences.[250] They argue that victim input evidence does little more than repeat information already known to the court and jury and already accounted for in the indictment and trial.[251] Moreover, deterrence is effective only when the party being deterred is aware of the factors that the sentencing agent will consider.[252] Allowing the admission into evidence of the victim's characteristics, of which the defendant was unaware, will do little to deter future criminals.[253] Furthermore, proponents of the death penalty have not proved that it is an effective deterrent of capital crimes.[254]

Specific deterrence also is not a valid justification for victim participation at sentencing, especially in capital cases. It is difficult to see

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246. Id. "General deterrence seeks to educate others; specific deterrence seeks to educate the individual offender." Id. at 988.

247. See Kadish and Schulhofer, *Criminal Law* at 548-52 (cited in note 224).

248. Id.

249. See Part V.C. Moreover, criminals who know that the moral blameworthiness of the victim may be fair game at sentencing may not be deterred from victimizing those citizens who have questionable moral backgrounds. A gay basher in Texas will not be deterred from criminal activity if Judge Hampton considers the victim's characteristics at sentencing. See text accompanying notes 233-35.

250. See Hall, 28 Am. Crim. L. Rev. at 246-47 (cited in note 29).

251. Id. at 247. A survey of judges showed that they believed that the least useful type of information conveyed in the victim impact statement was the victim's opinion as to the sentence that should be imposed. Id. at 246.

252. If a potential criminal has no idea that robbing a bank is a bad act and punishable, then the stiffest penalties for past bank robbers will do little to deter the potential bank robber.

253. Even if all potential murderers knew that if they killed a religious man who carried a Bible and a voting registration card they would recieve the death penalty, that fact would not deter them unless they knew that their potential victim shared those characteristics.

254. "Anyone who carefully examines the . . . data is bound to arrive at the conclusion that the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent. If it has a utilitarian value, it must rest in some other attribute than its power to influence the future conduct of people." Thorsten Sellin, *The Death Penalty: A Report for the Model Penal Code Project of the American Law Institute* at 63 (1959), reprinted in Kadish and Schulhofer, *Criminal Law* at 549. See also Richard O. Lempert, *Deterrence and Desert: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 Mich. L. Rev. 1177 (1981).

how sentencing a defendant based upon factors of which he was unaware during the commission of the first crime would deter him from committing a second crime. A person cannot be deterred by unknown factors. Secondly, a defendant who is on death row awaiting the death penalty will have little incentive not to commit murder while in prison, since he is facing the ultimate penalty already.[255]

Another goal of sentencing is incapacitation, removing individuals from society so that they are unable to commit future offenses. The goal of incapacitation as a form of punishment is justified by reasoning that a particular defendant is a threat to society and must be separated from law-abiding citizens. Under this reasoning, the only determination necessary is the future dangerousness of the defendant, and neither the characteristics of the victim nor the testimony of the victim are relevant to that determination.[256] Admittedly, the manner in which a crime takes place[257] is an important factor in determining the amount of incapacitation that is necessary to protect society from a defendant; however, victim participation is not the only means available to convey the manner in which the crime occurred. The death penalty is the ultimate incapacitation because once inflicted the defendant no longer can commit crimes. However, life imprisonment without parole[258] can be as effective as is capital punishment.[259]

The final goal for punishment, rehabilitation, has not received widespread support.[260] However, rehabilitation must be a factor that is considered in sentencing unless all defendants are to be incapacitated

255. An opposing analysis also could be offered as follows: the specific deterrent is effective because once the sentence is carried out, the individual defendant forever will he prevented from committing a crime. See Robert Bartels, *Capital Punishment: The Unexamined Issue of Special Deterrence*, 68 Iowa L. Rev. 601 (1983). However, this view actually is one of incapacitation, not deterrence, because deterrence assumes tbat tbe individual is capable of acting and yet is deterred by some inward force. See Dwight L. Greene, Foreward, *Drug Decriminalization: A Chorus in Need of Masterrap's Voice*, 18 Hofstra L. Rev. 457, 462 n.9 (1990) (stating that deterrence theories assume the existence of rational decisionmakers). See generally Kenneth G. Daw Scbmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 Duke L. J. 1.

256. Henderson, 37 Stan. L. Rev. at 989-90 (cited in note 7).

257. The heinousness or viciousness of a crime certainly is a factor to be considered in determining the amount of incapacitation, as is a showing that the defendant demonstrated a complete disregard for human life. See *People v. Benkowski*, 575 N.E.2d 587, 590 (Ill. Ct. App. 1991); *State v. Walton*, 769 P.2d 1017, 1032-34 (Ariz. 1989).

258. See Julian H. Wright, Jr., *Life Without Parole: The View from Death Row*, 27 Crim. L. Bull. 334 (1991).

259. If the sentencing agent determines that a defendant may be a threat in prison as well as while free in society, then the prison officials should be free to separate that defendant from the rest of the prison population. The death penalty is not the appropriate response to a failed prison system; rather the prison system should be improved.

260. Henderson, 37 Stan. L. Rev. at 990. Congress stated in the Sentencing Reform Act of 1984 that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a) (1984).

for life or put to death.[261] Rehabilitation, like incapacitation, is defendant-based. In other words, the defendant's sentence depends on the likelihood of society's success in rehabilitating him. Rehabilitation also is defendant-oriented, not victim-oriented, because in determining how to rehabilitate the defendant, any matters concerning the victim are irrelevant.[262] But rehabilitation is impossible once the death penalty has been carried out; therefore rehabilitation cannot be a goal in capital sentencing.

Of the four goals of sentencing in criminal law, only retribution and deterrence can be used to justify the death penalty. Yet neither victim participation at sentencing nor the admission of evidence concerning the characteristics of the victim further these goals, as the level of harm that a victim's family suffers is irrelevant to the capital sentencing decision.[263]

B. The Payne *Court Left Open the Possibility that Victims' Opinions as to Appropriate Punishment May Be Admitted During Capital Sentencing*

The decision of the Idaho Supreme Court in *Idaho v. Card*[264] highlights the *Payne* Court's omission of failing to explicitly reaffirm those portions of *Booth* that were not at issue in *Payne*.[265] The *Payne* Court provided state courts with the opportunity to allow the introduction

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261. If society does not believe that criminals can be rehabilitated, society will have to imprison all criminals for life or put all criminals to death in order to protect itself from the criminals' future actions.

One reason that the goal of rehabilitation generally has been overlooked is that some view rehabilitation as a part of deterrence that focuses on the individual criminal. For instance, if the threat of a one month jail term is sufficient to deter a shoplifter from ever shoplifting again, then that sentence has effectively rehabilitated the criminal through deterrence. However, some criminals, such as sex offenders, can be rehabilitated only through counselling, and the longest prison terms will not deter them from future sex crimes. See Leonore H. Tavill, Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 Clev. St. L. Rev. 613, 638 (1988).

262. The only time a victim statement may be helpful in considering a defendant's rehabilitation is when the victim has specific information that concerns the defendant's likelihood for rehabilitation. Henderson, 37 Stan. L. Rev. at 990 (cited in note 7). However, even if the victim has such knowledge, some other source probably could provide such information to the sentencing agent. Id.

263. "In a criminal case, particularly in a capital criminal case, the harm to family members and community is not relevant in determining the punishment." Jump, 21 Ga. L. Rev. at 1210 (cited in note 125).

264. 825 P.2d 1081 (Idaho 1991). See text accompanying notes 207-14 (discussion of *Idaho v. Card*).

265. The victim impact evidence in *Payne* related only to the characteristics of the victim and to the impact of the victim's death on the family. The admission of the family members' opinions concerning the crime or the appropriate sentence to be imposed were not at issue. *Payne*, 111 S. Ct. at 2611 n.2.

into evidence of the victim's family members' opinions of the sentence that the sentencing agent should impose. Such evidence should not be allowed at any sentencing hearing, especially not at a capital sentencing hearing.[266]

From a legal standpoint, victim opinion testimony is the weakest form of victim impact evidence, and its connection to the effects of a crime is tenuous at best.[267] According to Supreme Court jurisprudence, a decision to impose the death penalty must be, and must appear to be, based on reason rather than caprice or emotion.[268] In *Card*, the Idaho Supreme Court failed to adhere to the *Booth* Court's admonition that the decision must be clean of any taint or the appearance of such. Although the Idaho Supreme Court thoroughly examined the record before determining that the sentencing judge imposed the sentence based on evidence distinct from the victim's family members' opinions,[269] it failed to address the issue that the admission of the evidence itself created an appearance that the sentencing agent imposed the death penalty based upon emotion or caprice.

In a case decided prior to *Payne*, the Supreme Court of Ohio held that admitting into evidence the opinion of a witness as to the appropriateness of a particular sentence is unconstitutional.[270] A jury had convicted the defendant of killing a friend, and it sentenced him to death.[271] Pursuant to Ohio law, the defendant had requested a presentence report prior to sentencing.[272] The report had included a statement by the victim's father expressing the opinion that the de-

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266. One commentator has noted: "Victim participation statutes calling for the victim's opinion or recommendation as to the case disposition are ill-conceived measures triggering far more harmful consequences than their meager benefits." Hall, 28 Am. Crim. L. Rev. at 266 (cited in note 29). For examples of state laws allowing such evidence, see Ky. Rev. Ann. Stat. § 421.520 (1992); N.Y. Exec. Law § 647(1) (West Supp. 1992). See also Bruce J. Schulte, *Victim Sentences Her Attacker: Judge Lets 65-Year-Old Pick Rapist's Punishment*, 75 A.B.A. J. 28 (April 1989).

267. Charlton T. Howard III, Note, Booth v. Maryland: *Death Knell for the Victim Impact Statement?*, 47 Md. L. Rev. 701, 720 (1988).

268. 482 U.S. at 508 (quoting *Gardner*, 430 U.S. at 358). The Court in *Booth* commented:

> One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors are generally aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.

Booth, 482 U.S. at 508.

269. See text accompanying note 207-14.

270. *State v. Huertas*, 553 N.E.2d 1058 (Ohio 1990), cert. granted, 111 S. Ct. 39 (1990). See also Jeffrey D. Monzo, Note, State v. Huertas *The Final Indignity: The Reluctance of Courts to Allow Victim Impact Statements in Death Penalty Cases*, 17 Ohio N. U. L. Rev. 211 (1990).

271. *Huertas*, 553 N.E. 2d at 1062. The jury convicted Huertas on one count of aggravated murder with prior calculation and design, one count of aggravated murder in the course of committing aggravated burglary, and one count of aggravated burglary. Id.

272. See Ohio Rev. Code Ann. § 2929.03(D)(1) (Baldwin 1992).

fendant should be sentenced to death.[273] Further, the victim's father had testified to that effect at the sentencing hearing.[274] The Ohio Supreme Court held that the admission of the father's opinion concerning the appropriateness of a sentence in a capital case is unconstitutional.[275] Indeed, as the Oklahoma Attorney General's office argued to the U.S. Supreme Court in urging the Court to deny to hear the appeal of Olan Robison,[276] the criminal justice system exists on behalf of the state, not on behalf of the victim nor the victim's family. Sentencing decisions should be based on the crime committed by the defendant, not on the testimony of the victim's family.

C. *Victim Impact Statements Will Lead to Disparate Treatment of Similarly Situated Defendants*

Victim participation at sentencing is unconstitutional because it leads to disparate treatment of similarly situated defendants. While identical sentences for different defendants convicted of the same crime are not constitutionally compelled,[277] the Court consistently has held that courts cannot mete out capital sentences arbitrarily or capriciously.[278] Indeed, the Court has taken extraordinary precautions to ensure that sentencing agents make the capital sentencing decision without whim, passion, prejudice, or mistake.[279] The use of victim impact statements and the admission of victim characteristics shifts the focus of the sentencing agent away from the defendant as a unique, individual human being.[280] In allowing such testimony, the *Payne* Court blurred the distinction between capital and noncapital sentencing that the Court previously had strived to maintain.[281] The Court no longer requires sentencing agents to treat capital defendants as unique, indi-

273. *Huertas*, 553 N.E. 2d at 1062.

274. Id.

275. Id. at 1065. The Ohio Supreme Court found that the testimony violated the defendant's right to have the sentencing decision made by the judge and jury. Id.

276. See note 187.

277. See *Solem v. Helm*, 463 U.S. 277, 303 (1983) (Burger dissenting).

278. See text accompanying note 66.

279. *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor concurring).

280. *Booth*, 482 U.S. at 504 (plurality opinion of Stewart, Powell, and Stevens) (quoting *Woodson*, 428 U.S. at 304).

281. Some commentators have noted that the Court's rationale in *Booth* and *Gathers* also blurred the distinction between capital and noncapital cases. Although the Court in *Booth* and *Gathers*

> was careful not to articulate its decisions in terms that would encompass non-capital cases, the rationale of both cases would seem to apply equally convincingly to a non-capital case: arbitrary sentencing practices, based upon the unpredictable 'victim participation' factor, are objectionable in both capital and non-capital cases. There is no principle basis upon which an 'arbitrary and objectionable-arbitrary but acceptable' line can be drawn.

Hall, 28 Am. Crim. L. Rev. at 254 (cited in note 29).

vidual human beings. Thus, the Court permits the sentencing agent to consider factors that will lead to disparate sentences for similarly situated defendants.

Admittedly, sentencing agents never can impose sentences in such a manner as to eliminate all disparities between like defendants.[282] Nonetheless, our justice system should seek to minimize disparate sentencing of similarly situated defendants.[283] The use of victim impact evidence and the admissibility of victim characteristics potentially will lead to disparate treatment of defendants based on such factors as the wealth of the victim's family,[284] the ability of the victim's family to articulate its feelings,[285] and the jury's view of the victim's moral character. Some states allow paid representatives to present victim impact evidence on behalf of the victim's family.[286] As a consequence, the family of a wealthy victim may be able to purchase the services of a more eloquent attorney to present their statement while a family of lesser means could afford only a lesser attorney, or no attorney at all.[287] The victim's wealth should play no role in the sentencing decision of the defendant.[288]

Further, even in cases in which the victim's family themselves deliver the victim impact statement, different families have different levels of ability to articulate the harm caused by the crime.[289] Also, some victims do not have a family to make a statement. A defendant's level of culpability should not depend on such fortuitous circumstances as the composition of his victim's family, but rather on those circumstances over which he had control.[290]

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282. See *Booth*, 482 U.S. at 517-518 (White dissenting). See also Hall, 28 Am. Crim. L. Rev. at 258 (stating that "[p]rosecutors, defense lawyers, witnesses and others vary in ability and persuasiveness such that juries and sentencing authorities will respond accordingly, resulting in differing decisions for similar defendants").

283. Hall, 28 Am. Crim. L. Rev. at 258.

284. See id. at 259.

285. See *Booth*, 482 U.S. at 505.

286. See, for example, S.C. Code Ann. § 16-31530(f) (Law Co-op, 1985).

287. Admittedly, wealthy defendants can hire private attorneys to best represent their interests, but tbis situation is a necessary evil of the criminal justice system. See Hall, 28 Am. Crim. L. Rev. at 259 n.138. The criminal justice system is designed to protect the defendant's rights, and allowing the defendant to choose his own counsel is one of those rights. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

288. The evidence of the defendant's wealth may be admissible as a circumstance of the crime. For instance, if the victim were killed pursuant to a robbery, the items stolen could be entered into evidence and thus the jury may surmise the relative wealth of the victim.

289. The families of victims vary as to educational background, and more importantly, as to proficiency in expression in English. Recent immigrants to America may have less command of the language than more established families. The victim's family sometimes can testify at the guilt phase of the trial, but the disparity is magnified when the family has free reign to testify as to their grief and pain and is not directed by attorney questioning.

290. *People v. Levitt*, 156 Cal. App. 3d 500, 516 (1984). See *Booth*, 482 U.S. at 505 (stating

Perhaps the most egregious factor that sentencing agents may be tempted to use in determining a sentence is the morality of the victim as compared to the morality of the defendant. For example, when a judge determines that the murderer of a homosexual deserves a more lenient sentence than the murderer of a heterosexual, the sentence is imposed based upon characteristics of the victims and justice is offended.[291] The life or death of a defendant should not depend on the sexuality[292] of the victim, nor on any other characteristic of the victim. Such distinctions highlight the danger of allowing victim participation in any form at capital sentencing.[293]

VI. Conclusion

Victims cannot be faulted for their feelings concerning the criminal justice system or about the defendant. However, the proper response to their feelings of frustration, pain, and dissatisfaction is not to give them the opportunity to testify at the defendant's sentencing hearing. Rather, the proper response is to adopt laws and procedures that will assist victims in rebuilding their lives, coming to terms with the crime, and healing emotionally. Hawaii has adopted a basic bill of rights for victims that addresses the concerns of the victim while protecting the constitutional rights of defendants.[294] Hawaii informs the victim of the major developments of the case, notifies her of delays, notifies her when the defendant is released from custody, and consults and advises her concerning plea bargaining by the state prosecutor.[295] A victim counselor also informs the victim about financial assistance and other social services that are available.[296] Further, the state provides victims with secure waiting areas, away from the defendant, the defendant's family, and the defendant's friends,[297] and the state expeditiously returns any property that the victim lost.[298]

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that "[t]he fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information").

291. See text accompanying notes 233-35.

292. It should also not depend on any other value judgement that the sentencing agent may make depending on the victim input.

293. It is also true that distinctions should not be based upon the victim's standing in the community, dealings with drugs or criminals, or other "moral" or value-laden characteristics of the victim. See *Booth*, 482 U.S. at 506 (stating that "[n]or is there any justification for permitting such a decision [to impose the death penalty] to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character").

294. See Hawaii Rev. Stat. § 801D-4 (Supp. 1991).

295. Id. § 801D-4(1).

296. Id. § 801D-4(4).

297. Id. § 801D-4(5).

298. Id. § 801D-4(6).

While this Note argues that the Court wrongly decided *Payne v. Tennessee*, the Court probably will not reverse that case in the foreseeable future. Consequently, more states should follow Hawaii's example and provide for the needs of victims without resorting to statutes that allow the admission of victim impact statements at sentencing hearings. However, the force of the powerful victims' rights movement, which lobbied for the admission of victim impact evidence, will impede progress toward removing such statutes. After all, the movement was successful in pushing forth such legislation and maintaining the status quo in democratic politics always is easier than instigating change.

If state legislatures refuse to repeal laws mandating victim impact evidence, they at least should narrow the scope of current laws in order to bar victim impact evidence at capital sentencing hearings. Even if the democratic branches of government accede to the demands of the victims' rights movement, to the detriment of the defendant's constitutional rights, the courts must act as a countermajoritarian influence and apply rational legal thought to the debate surrounding victim impact evidence. State courts should follow the lead of the New Jersey Supreme Court, and, notwithstanding *Payne*, find that their state's constitution bars victim impact evidence from capital sentencing proceedings.

At the very least, the Supreme Court should clarify its holding in *Payne* and instruct courts that the admission of victim opinion evidence in sentence determination is unconstitutional per se, inadmissible, and reversible error. The Court should interpret narrowly its decision in *Payne* and allow the admission of victim impact evidence only in the least inflammatory manner, through the reading of the victim impact statement by the prosecutor rather than through live testimony. The Court should bar the admission of evidence of the defendant's bad character merely as a retort to evidence of his good character. Also, the Court should ban the introduction of evidence of the victim's good character used to counteract the evidence of the defendant's good character, because allowing such evidence forces the jury to consider and balance irrelevant, misleading, and confusing evidence.

This Note does not argue that victims should be relegated to a position outside the criminal justice system. Rather, this Note argues that the victim's role within the system should not encroach upon the constitutional rights of the defendant. States should provide greater resources to assist victims so as to alleviate the psychological need to present victim impact evidence. Victim impact evidence does not further the goals of sentencing; it injects arbitrary and inflammatory evidence into the sentencing decision, and it leads to disparate treatment

of similarly situated defendants. The courts and legislatures should take steps toward diminishing the harm caused by victim impact evidence and eventually should eliminate its use.

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