Loyola University Chicago Law Journal

Volume 23
Issue 3 *Spring 1992 Illinois Judicial Conference Symposium*

Article 9

1992

Victim Impact Evidence, Arbitrariness, and the Death Penalty: The Supreme Court Flipflops in *Payne v. Tennessee*

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Victim Impact Evidence, Arbitrariness, and the Death Penalty: The Supreme Court Flipflops in *Payne v. Tennessee*

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[1]

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I. INTRODUCTION

The penalty of death is the ultimate punishment society can impose—its purpose, effectiveness, and appropriateness in the American system of justice continue to be hotly debated.[2] In 1972, the

1. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

2. *See, e.g.*, HUGO A. BEDAU, THE DEATH PENALTY IN AMERICA (3d ed. 1982) (including essays on both sides of the debate); Robert Robertson et al., Project, *The*

Supreme Court, in *Furman v. Georgia*,[3] declared unconstitutional those death penalty statutes that provided the jury complete discretion in choosing between life and death for a particular defendant. Four years later, in *Gregg v. Georgia*[4] and its four companion cases,[5] the Court ruled that death penalty statutes guiding jury discretion or requiring specific jury findings as a predicate to the imposition of death were constitutionally permissible.

Central to the Court's review of the death penalty statutes was its recognition that death is "unique in its severity and irrevocability."[6] The Court was concerned that the death penalty not be "imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[7] This concern led to the Court's mandate that death penalty statutes focus on the defendant as an individual and on the circumstances of the crime to allow for individualized sentencing determinations.[8]

Concurrent with the development of greater substantive and procedural safeguards for capital defendants was a growing awareness that the needs of crime victims were not being met.[9] Societal recognition of the financial and emotional burdens carried by crime victims led to legislative initiatives designed to ameliorate these effects.[10]

In 1982, Congress passed the Victim and Witness Protection Act ("VWPA")[11] to "enhance and protect the necessary role of crime

Death Penalty: Personal Perspectives, 22 LOY. U. CHI. L.J. 1 (1990) (interviewing prosecutors, defense attorneys, judges, and prisoners).

3. 408 U.S. 238, 239-40 (1972) (per curiam).

4. 428 U.S. 153 (1976).

5. Jurek v. Texas, 428 U.S. 262 (1976) (upholding the mandatory imposition of the death penalty in only five specific situations, if the jury finds beyond a reasonable doubt that three separate conditions are met); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding guided discretionary systems); Roberts v. Louisiana, 428 U.S. 325 (1976) (striking down mandatory systems); Woodson v. North Carolina, 428 U.S. 280 (1976) (same).

6. *Gregg*, 428 U.S. at 187 (citations omitted). *See generally* BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 29-37 (1987) (tracing the "death is different" doctrine through subsequent Supreme Court decisions).

7. *Gregg*, 428 U.S. at 188.

8. Zant v. Stephens, 462 U.S. 862, 879 (1983) ("What is important at the selection stage [of a capital trial] is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." (citations omitted)).

9. Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 501-02, 507 (1986) [hereinafter McLeod, *Victim Participation*].

10. *See id.* at 501. The reforms focused, in part, on state compensation programs and the use of restitution as a sentencing alternative. *Id.* Additionally, legislation provided for increased protection of, and assistance to, the crime victim. *Id.*

11. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C. §§ 1512-1515 (1988) and 18 U.S.C. §§ 3579-3580 (1982)). Sections

victims and witnesses in the criminal justice process."[12] The VWPA amends Rule 32 of the *Federal Rules of Criminal Procedure* to require the use of victim impact statements ("VIS") in federal presentence reports.[13] Recognizing that most traditional crimes fall within state jurisdiction, the VWPA was intended to serve as a model to the states.[14] Following Congress's lead, at least forty-eight states passed legislation authorizing the use of victim impact statements at sentencing.[15]

Commentators have been divided over whether recognition of victim impact evidence conflicts with the constitutional rights of capital defendants.[16] The United States Supreme Court, however, recently resolved this dilemma. In *Payne v. Tennessee*,[17] the Court expressly overruled its prior decisions in *Booth v. Maryland*[18] and *South Carolina v. Gathers*[19] and held that the Eighth Amendment does not prohibit a jury from considering victim impact evidence. The *Payne* Court found that evidence of the victim's personal character or of the emotional impact of the crime on the victim's family is germane to the jury's determination of whether the death penalty should be imposed.[20] The Court further held that the Eighth Amendment does not proscribe the use of such evidence in the prosecutor's arguments at the sentencing hearing.[21]

This Note analyzes *Payne v. Tennessee* and its impact on sentencing in capital cases. It begins by reviewing the Court's deci-

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3579-80 were amended and codified at 18 U.S.C. §§ 3663-64 by Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987, 2010 (1984).

12. VWPA § 2(b)(1); 18 U.S.C. § 1512 notes.

13. FED. R. CRIM. P. 32(c)(2)(D).

14. Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 393 (1989) (citing VWPA § 2(b)(3)).

15. *Id.* at 399.

16. *See, e.g.*, Susan A. Jump, Booth v. Maryland: *Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 GA. L. REV. 1191, 1209-13 (1987) (arguing that victim impact statements result in the violation of the constitutional requirement that the death penalty not be imposed in an arbitrary and unpredictable fashion); Jackson R. Sharman III, *Constitutional Law: Victim Impact Statements and the Eighth Amendment*—Booth v. Maryland, 11 HARV. J.L. & PUB. POL'Y 583, 589-93 (1988) (stating that reference of the impact on the victim used only in determining the degree of punishment after a finding of guilt, poses no constitutional problems); Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 231-32 (1988) (positing that victim information that diverts the sentencing judge's or jury's attention from the defendant is unconstitutional regardless of whether the sentencing hearing is capital or non-capital).

17. 111 S. Ct. 2597 (1991).

18. 482 U.S. 496 (1987).

19. 490 U.S. 805 (1989).

20. *Payne*, 111 S. Ct. at 2608.

21. *Id.* at 2609.

sions in *Furman v. Georgia* and *Gregg v. Georgia* to assess the rationale behind these capital sentencing decisions.[22] It then briefly examines the legislative response to the *Furman* decision, by reviewing current death penalty statutes,[23] and to the "victims rights" movement, by reviewing the admissibility of victim impact statements.[24] The Court's decisions in *Booth* and *Gathers* on the admissibility of victim impact statements will then be examined.[25] Finally, this Note analyzes *Payne v. Tennessee* and concludes that the Court committed a grave error in overruling its previous decisions.[26]

II. BACKGROUND

The Supreme Court's decision in *Payne v. Tennessee* articulates the friction inherent in a system that protects the defendant on the one hand and that has become increasingly sensitive to the needs of the victim on the other. This section provides the background to that conflict by first examining the Supreme Court's Eighth Amendment death penalty cases. Next, it will survey legislation that defines the rights of both the criminal and the victim. Finally, it will analyze the precedent overruled by *Payne*.

A. The Eighth Amendment Death Penalty Cases

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[27] While no majority of the Supreme Court has held that the death penalty itself violates the Cruel and Unusual Punishment Clause of the Eighth Amendment,[28] the Court has held that certain applications of the death penalty can violate that Clause.

Before 1972, most death penalty statutes provided the jury with unbridled discretion to decide whether to impose the death penalty once it convicted a defendant of a capital crime.[29] In making its decision, however, the jury was not privy to information specific to

22. *See infra* part II.A.
23. *See infra* part II.B.1.
24. *See infra* part II.B.2.
25. *See infra* part II.C.
26. *See infra* parts III-V.
27. U.S. CONST. amend. VIII.
28. *See infra* note 41.
29. WELSH S. WHITE, LIFE IN THE BALANCE, PROCEDURAL SAFEGUARDS IN CAPITAL CASES 2 (1984); *see also infra* notes 77-80 (listing the Illinois 1971 death penalty provisions).

the background and character of the accused other than the evidence presented at trial to determine the accused's innocence or guilt.[30] The capital penalty statutes enumerated no specific legal guidelines relevant to the sentencing decision.[31] Thus, the issue in *Furman v. Georgia*[32] was whether the imposition and execution of the death penalty under these circumstances constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[33] That question failed to generate a unified response. In total, nine separate opinions added to the Court's *per curiam* disposition of the case. Five supported the decision to invalidate the death penalty statutes, while each of the four dissenting Justices wrote his own opinion against this result.[34]

In *Furman*, several Justices examined the origins and judicial history of both the Eighth Amendment guarantee against the infliction of cruel and unusual punishment and of capital punishment specifically.[35] Against this analytical framework, a majority of the Court refused to find that capital punishment is *per se* unconstitutional.[36] However, because "Death is . . . an unusually severe punishment, unusual in its pain, in its finality, and in its enormity,"[37] the Court agreed that it may only be levied consistently, untainted by impermissible influences.

The majority's ultimate decision was influenced by several studies on the death penalty.[38] Two striking facts surfaced from this research, namely, that the death penalty was imposed infre-

30. JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW, CASES AND MATERIALS 424 (1986) ("[T]he jury [did not] have the benefit of any special information about the defendant's background, character, or previous criminal record.").

31. *See id.* at 422-23.

32. 408 U.S. 238 (1972) (per curiam).

33. *Id.* at 239 (per curiam). At issue in the cases consolidated in *Furman* were the death penalty statutes of Georgia and Texas. As late as 1971, the unguided discretion system was upheld as constitutional under the Fourteenth Amendment. McGautha v. California, 402 U.S. 183, 196 (1971).

34. Justices Brennan, Marshall, Douglas, Stewart, and White concurred in the result. *Furman*, 408 U.S. at 241. Chief Justice Burger and Justices Rehnquist, Blackmun, and Powell dissented. *Id.* at 240.

35. *See id.* at 242-44, 258-69, 316-28, 376-89, 421-27 (concurring opinions of Justice Douglas, Justice Brennan, and Justice Marshall, and dissenting opinions of Chief Justice Burger and Justice Powell, respectively).

36. *Id.* at 240, 306, 310, 375, 405, 414, 465 (concurring opinions of Justice Douglas, Justice Stewart, and Justice White, and dissenting opinions of Chief Justice Burger, Justice Blackmun, Justice Powell, and Justice Rehnquist, respectively).

37. *Id.* at 287 (Brennan, J., concurring). This theme echoes throughout *Furman*. *See supra* text accompanying note 1.

38. *See id.* at 250-51 nn.15-17 (Douglas, J., concurring) (citing, *e.g.*, HUGO A. BEDAU, THE DEATH PENALTY IN AMERICA 474 (rev. ed. 1967)).

quently[39] and that when it was imposed, it disproportionately affected blacks, the "poor, [the] young, and [the] ignorant."[40] The only consensus reached by the majority[41] was that this information led to the inescapable conclusion that the death penalty was arbitrarily imposed and, as such, violated the Eighth Amendment's guarantee against cruel and unusual punishment.[42]

The *Furman* decision had an immediate and far-reaching impact on state death penalty laws. On the same day that it decided *Furman*, the Supreme Court also invalidated the capital punishment statutes of over forty other states and issued a series of *per curiam* orders vacating the death sentences of some six hundred death row inmates.[43] This action, however, did not foreclose the

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39. "The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime." *Id.* at 291 (Brennan, J., concurring).

40. *Id.* at 250 & nn.15-17 (Douglas, J., concurring). One writer commented: " 'Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor.' " *Id.* at 251 (Douglas, J., concurring) (quoting LEWIS E. LAWES, LIFE AND DEATH IN SING SING 155-60 (1928)). Additionally, Douglas provided:

> "[W]here a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty. . . . The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty."

Id. (Douglas, J., concurring) (quoting Rupert C. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132, 141 (1969)).

41. Only Justices Brennan and Marshall concluded that the death penalty is inherently unconstitutional. *Id.* at 305, 360 (Brennan, J., concurring and Marshall, J., concurring, respectively). Justices Douglas, Stewart, and White found the death penalty unconstitutional as applied. *Id.* at 256-57, 309-10, 310-13 (Douglas, J., concurring, Stewart, J., concurring, and White, J. concurring, respectively).

42. *See id.* at 309-10 (Stewart, J., concurring). Justice Stewart stated:

> These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. (Stewart, J., concurring). Similarly, Justice Brennan wrote:

> When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. . . . [O]ur procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.

Id. at 293-95 (Brennan, J., concurring). In addition, Brennan stated that "the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." *Id.* at 274 (Brennan, J., concurring).

43. *See, e.g.*, Alvarez v. Nebraska, 408 U.S. 937 (1972) (per curiam); Davis v. Connecticut, 408 U.S. 935 (1972) (per curiam); Duisen v. Missouri, 408 U.S. 935 (1972) (per curiam); Eaton v. Ohio, 408 U.S. 935 (1972) (per curiam); Fuller v. South Carolina, 408

potential validity of statutes that provided the jury with specific guidelines for its decision.

After *Furman*, new capital punishment statutes were passed in thirty-five states.[44] This new legislation attempted to overcome the constitutional deficiencies identified in *Furman* either by providing for a mandatory death sentence upon conviction for a capital offense or by providing for a balancing of statutorily defined aggravating and mitigating circumstances.[45] Additionally, many states adopted the bifurcated trial procedure in capital cases.[46]

In 1976, in *Gregg v. Georgia*[47] and its four companion cases,[48] the Court reviewed the constitutionality of five amended state statutes even though no person had been executed since *Furman*.[49] The Court did not focus on the constitutionality of the death penalty itself but on the procedures instituted by the states to impose the punishment.[50] The Court upheld those statutes providing guided discretion and struck down those imposing mandatory penalties.[51]

U.S. 937 (1972) (per curiam); Hamby v. North Carolina, 408 U.S. 937 (1972) (per curiam); Herron v. Tennessee, 408 U.S. 937 (1972) (per curiam); Kelbach v. Utah, 408 U.S. 935 (1972) (per curiam); Marks v. Louisiana, 408 U.S. 933 (1972) (per curiam); McCants v. Alabama, 408 U.S. 933 (1972) (per curiam); Miller v. Maryland, 408 U.S. 934 (1972) (per curiam); Moore v. Illinois, 408 U.S. 786 (1972) (per curiam); Scoleri v. Pennsylvania, 408 U.S. 934 (1972) (per curiam); Seeney v. Delaware, 408 U.S. 939 (1972) (per curiam); Sims v. Eyman, 408 U.S. 934 (1972) (per curiam) (striking the Arizona death penalty statute); Smith v. Washington, 408 U.S. 934 (1972) (per curiam); Stewart v. Massachusetts, 408 U.S. 845 (1972) (per curiam); Thomas v. Florida, 408 U.S. 935 (1972) (per curiam); Walker v. Nevada, 408 U.S. 935 (1972) (per curiam); Williams v. Kentucky, 408 U.S. 938 (1972) (per curiam).

44. *See* WHITE, *supra* note 29, at 2.

45. *Id.* at 2-3; *see* NAKELL & HARDY, *supra* note 6, at 26-27.

46. Under this system, guilt is determined in one phase followed by a separate hearing to determine punishment if the defendant is convicted. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 23 (1990) [hereinafter BALDUS ET AL., EQUAL JUSTICE].

47. 428 U.S. 153 (1976).

48. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

49. NAKELL & HARDY, *supra* note 6, at 28.

50. In *Gregg*, the Court rejected the argument of petitioners in all five cases that the death penalty under all circumstances constitutes cruel and unusual punishment. *Gregg*, 428 U.S. at 169, 226-27; *see Roberts*, 428 U.S. at 350-56 (White, J., dissenting). Justices Marshall and Brennan, based on their opinions in *Furman*, continued to adhere to the view that the death penalty itself is unconstitutional. *See Gregg*, 428 U.S. at 227-41 (Brennan, J., dissenting).

51. *See supra* note 5. In each of the five cases, the plurality opinions were comprised of Justices Stewart, Powell, and Stevens. Chief Justices Burger and Justices Rehnquist, Blackmun, and White concurred in the judgments upholding the guided discretionary systems. Justices Brennan and Marshall wrote separate dissenting opinions in *Gregg*,

Central to each decision was the plurality's interpretation of *Furman* that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[52] The guided discretionary systems under review defined statutory aggravating and mitigating factors.[53] Under those statutes, juries were required to find the existence of at least one aggravating factor and to consider any mitigating factors before the death penalty could be imposed.[54] Because each statute "require[d] the sentencing authority to focus on the particularized nature of the crime,"[55] the Court reasoned that death would not be "wantonly" or "freakishly" imposed.[56] The Court therefore held that the statutes' individualized focus on the crime and on its perpetrator met the Eighth Amendment guarantee against cruel and unusual punishment.[57]

In contrast with the guided discretionary systems, some state legislatures sought to eliminate the arbitrariness associated with fully discretionary systems by removing all sentencing discretion from the jury. These capital punishment statutes automatically imposed the death penalty when a defendant was convicted of first-

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both reiterating their positions in *Furman* that the death penalty itself violates the Eighth and Fourteenth Amendments.

52. *Gregg*, 428 U.S. at 188 (opinion of Stewart, Powell, and Stevens, JJ.).

53. GA. CODE ANN. § 27-2503 (Michie Supp. 1975); FLA. STAT. ANN. § 921.141(5) (West Supp. 1976-77).

54. *Gregg*, 428 U.S. at 164-65 (opinion of Stewart, Powell, and Stevens, JJ.); Proffitt v. Florida, 428 U.S. at 248 (opinion of Stewart, Powell, and Stevens, JJ.). Although Texas had not formally adopted a list of statutory aggravating circumstances, the Court found that its action in narrowly defining the classes of murder eligible for death served much the same purpose. *Proffitt*, 428 U.S. at 270 (opinion of Stewart, Powell, and Stevens, JJ.). Texas specified five classes of murder as eligible for the death penalty. *Id.* (opinion of Stewart, Powell, and Stevens, JJ.) ("For example, the Texas statute requires the jury at the guilt-determining stage to consider whether the crime was committed in the course of a particular felony, whether it was committed for hire . . . .").

The Texas death penalty scheme today remains different from most other states' statutes by not providing a statutory list of aggravating and mitigating factors. *See* TEX. PENAL CODE ANN. § 19.03 (West 1989); TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (West 1989 and Supp. 1992); Mary Kay Sicola & Richard R. Shreves, *Jury Consideration of Mitigating Evidence: A Renewed Challenge to the Constitutionality of the Texas Death Penalty Statute*, 15 AM. J. CRIM. L. 55, 64-66 (1988).

55. Jurek v. Texas, 428 U.S. 262, 271 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

56. *Id.* at 276 (opinion of Stewart, Powell, and Stevens, JJ.). Additionally, the Georgia statute (1) provided for a separate hearing to determine the appropriate punishment for a convicted defendant; (2) expedited review by the state supreme court; and (3) required a determination of whether the death sentence was excessive or disproportionate to the penalty imposed in comparable cases. *See Gregg*, 428 U.S. at 163-67 (opinion of Stewart, Powell, and Stevens, JJ.).

57. *See, e.g.*, *Jurek*, 428 U.S. at 274-76 (opinion of Stewart, Powell, and Stevens, JJ.).

degree murder.[58]

The Court identified two major deficiencies in the mandatory capital punishment schemes and held that they violated the Eighth and Fourteenth Amendments.[59] First, the Court found that the mandatory schemes were deficient because they made no allowances for consideration of the defendant's character or of the particular circumstances of the offense.[60] The view that death is qualitatively different than any other punishment[61] led to the Court's conclusion that it could not condone a system that "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[62] Instead, the Court maintained that the respect for humanity underlying the Eighth Amendment requires that the particular characteristics of the defendant and the specific nature of the crime be considered before the death penalty may be constitutionally imposed.[63]

The Court found a second major infirmity in the mandatory capital punishment statutes. Central to the decision in *Furman* was the Court's view that standardless jury discretion results in the arbitrary imposition of death.[64] The *Gregg* plurality found that mandatory sentencing does not eliminate the arbitrariness fostered by the pre-*Furman* system but rather results in similar "*de facto* sentencing discretion."[65] The Court noted that juries persistently refused to convict persons charged with first-degree murder under mandatory death penalty statutes.[66] This reluctance led the Court to conclude that the mandatory systems perpetuated the arbitrariness and capriciousness of capital sentences.[67] Thus, the Court ac-

58. *See* Woodson v. North Carolina, 428 U.S. 280, 285-86 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *see also* Roberts v. Louisiana, 428 U.S. 325, 329, 331 (opinion of Stewart, Powell, and Stevens, JJ.) (noting that the Louisiana statute also provided for the mandatory death penalty for aggravated rape, aggravated kidnapping, and treason).

59. *Woodson*, 428 U.S. at 305 (opinion of Stewart, Powell, and Stevens, JJ.).

60. *Id.* at 292-301 (opinion of Stewart, Powell, and Stevens, JJ.).

61. *Id.* at 303-04 (opinion of Stewart, Powell, and Stevens, JJ.).

62. *Id.* at 304 (opinion of Stewart, Powell, and Stevens, JJ.); *see Roberts*, 428 U.S. at 333 (opinion of Stewart, Powell, and Stevens, JJ.).

63. *Woodson*, 428 U.S. at 304 (opinion of Stewart, Powell, and Stevens, JJ.).

64. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

65. *Roberts*, 428 U.S. at 335 (opinion of Stewart, Powell, and Stevens, JJ.); *see Woodson*, 428 U.S. at 302-03 (opinion of Stewart, Powell, and Stevens, JJ.).

66. *Woodson*, 428 U.S. at 301-02 (opinion of Stewart, Powell, and Stevens, JJ.) (observing that studies showed juries were frequently deterred "from rendering guilty verdicts of first-degree murder because of the enormity of the sentence automatically imposed").

67. *Id.* at 302 (opinion of Stewart, Powell, and Stevens, JJ.).

cused the states of simply "paper[ing] over the problem of unguided and unchecked jury discretion."[68]

The decisions in these 1976 cases did not reject all jury discretion. Instead, they approved capital punishment systems granting jury discretion directed to the individual defendant and the specific circumstances of the crime. In particular, by limiting the classes of crimes rendering a defendant death-eligible, while at the same time permitting leniency when justified by mitigating circumstances, the Court reasoned that death penalty decisions could be fair and consistent.[69] As long as the focus remained on the defendant, the Court found that the Eighth and Fourteenth Amendment guarantees were satisfied.[70]

B. Legislative Responses

1. The Illinois Death Penalty

After *Furman*, most states revised their capital sentencing procedures. The procedures that survived Supreme Court scrutiny (1) limit imposition of the death penalty to those situations when specified aggravating circumstances are present;[71] (2) direct the jury to consider all relevant mitigating circumstances, not merely those defined by statute;[72] (3) provide for bifurcated trials;[73] and (4) often require appellate review to ensure that the death penalty is imposed consistently in comparable circumstances.[74] Due to its simi-

68. *Id.* (opinion of Stewart, Powell, and Stevens, JJ.).

69. *But cf. Roberts*, 428 U.S. at 331-36 (opinion of Stewart, Powell, and Stevens, JJ.) (holding that removal of all jury discretion is unconstitutional).

70. *But see* BALDUS ET AL., EQUAL JUSTICE, *supra* note 46, at 24 ("[A]llowing the sentencing judge or jury sufficient discretion to ensure that each defendant receives individualized consideration creates a risk that basically similar defendants will receive different sentences or that some defendants will be treated more or less harshly for unconstitutional or inappropriate reasons.").

71. *But see* Zant v. Stephens, 462 U.S. 862, 878-80 & n.17 (1983). The Constitution does not prohibit the jury from considering non-statutory aggravating circumstances as long as the sentence is "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Id.* at 879 (citations omitted).

72. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (holding that a statute that limits the jury's consideration to a specific list of mitigating factors violates the Eighth Amendment); *see also* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (holding on the basis of *Lockett* that capital defendants must be permitted to introduce all relevant mitigating evidence).

73. *See* BALDUS ET AL., EQUAL JUSTICE, *supra* note 46, at 23 ("The purpose of this procedural change is to prevent otherwise inadmissible information from affecting the decision on guilt, while ensuring that the jury makes the sentencing decision on the basis of all the relevant evidence.").

74. *See, e.g.*, GA. CODE ANN. § 17-10-35(c)(3) (Michie 1990) (The Georgia Supreme

larity to other death penalty laws,[75] this section will examine the Illinois death penalty statute.[76]

Prior to *Furman*, Illinois authorized the death penalty for both murder[77] and aggravated kidnapping for ransom.[78] However, the statute provided no guidelines to assist the jury in its sentencing determination.[79] Although the statute permitted the court to override the jury's recommendation, the statute did not delineate appropriate circumstances for ignoring the jury's death sentence.[80] This statute was among those held unconstitutional as a result of the Supreme Court's decision in *Furman*.[81]

The current Illinois capital punishment statute, enacted in 1977,[82] provides for the death penalty when a defendant who is eighteen or older has been convicted of first-degree murder. Like

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Court shall determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.").

75. *See infra* note 84.

76. ILL. REV. STAT. ch. 38, para. 9-1 (1989).

77. ILL. REV. STAT. ch. 38, para. 9-1 (1971).

78. *Id.* para. 10-2 (1971).

79. Section 9-1(b) governed imposition of the death penalty for murder and provided:

> A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7(c)(1) of this Code.

Id. para. 9-1(b). Section 10-2(b)(1) addressed aggravated kidnapping:

> A person convicted of aggravated kidnapping for ransom shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 2 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed unless the jury's verdict so provides in accordance with Section 1-7(c)(1) of this Code.

Id. para. 10-2(b)(1). Section 1-7(c)(1) set forth the trial procedures in a death penalty case:

> Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, the jury may return a verdict of death. Where such verdict is returned by the jury, the court may sentence the offender to death or to imprisonment. Where such verdict is not returned by the jury, the court shall sentence the offender to imprisonment.

Id. para. 1-7(c)(1).

80. *Id.* para. 1-7(c).

81. Moore v. Illinois, 408 U.S. 786 (1972) (holding that under *Furman*, death penalty statutory schemes such as ILL. REV. STAT. ch. 38, paras. 1-7, 9-1, 10-2 (1971), violate the Eighth and Fourteenth Amendments).

82. ILL. REV. STAT. ch. 38, para. 9-1 (1989). The first Illinois post-*Furman* death penalty statute, enacted in 1973, was held unconstitutional by the Illinois Supreme Court in People *ex rel.* Rice v. Cunningham, 336 N.E.2d 1 (Ill. 1975). For a discussion of the early attacks on the constitutionality of the current Illinois statute, see J. Steven Beckett, *The 1977 Illinois Death Penalty: Individualized Focus under the Eighth and Fourteenth Amendments*, 62 CHI. B. REC. 284 (1981).

the *Model Penal Code*[83] and the statutes of most other states allowing for capital punishment,[84] the Illinois statute provides for a bifurcated trial[85] to determine the existence of aggravating circumstances warranting the imposition of the death penalty.[86] The statute also enumerates a non-exclusive list of mitigating factors that the sentencing authority must consider when making its determination.[87] In addition, any sentence of death is subject to automatic

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83. MODEL PENAL CODE § 210.6 (1980).

84. *See, e.g.*, ALA. CODE §§ 13A-5-45 to -52 (1982); COLO. REV. STAT. ANN. § 16-11-103 (West 1990). Only Oregon and Texas do not provide the jury with a list of statutory aggravating and mitigating factors. *See* OR. REV. STAT. § 163.150 (1990); TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (West 1989 and Supp. 1992). For a criticism of the Texas approach to capital sentencing, see Sicola & Shreves, *supra* note 54, at 55.

Illinois differs from several other states by suspending the rules of evidence and allowing ordinarily inadmissible hearsay during the penalty phase. For a full critique of this procedure, see Mark Silverstein, *Confrontation at Capital Sentencing Hearings: Illinois Violates the Federal Constitution by Permitting Juries to Sentence Defendants to Death on the Basis of Ordinarily Inadmissible Hearsay*, 22 LOY. U. CHI. L.J. 65 (1990).

85. *See* ILL. REV. STAT. ch. 38, para. 9-1(d) (1989) (allowing for a separate hearing at the request of the State).

86. The Illinois statute enumerates the following aggravating circumstances:

> (1) the murdered individual was a peace officer or fireman killed in the course of performing his official duties . . . or
>
> (2) the murdered individual was an employee of an institution or facility of the Department of Corrections . . . or the murdered individual was an inmate at such institution . . . or
>
> (3) the defendant has been convicted of murdering two or more individuals . . . or
>
> (4) the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus . . . or
>
> (5) the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return . . . or
>
> (6) the murdered individual was killed in the course of another felony . . . or
>
> (7) the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or
>
> (8) the defendant committed the murder with intent to prevent the murdered individual from testifying in any criminal prosecution . . . or
>
> (9) the defendant, while committing an offense punishable under . . . the Illinois Controlled Substances Act, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded . . . the intentional killing of the murdered individual; or
>
> (10) the defendant was incarcerated in an institution or facility of the Department of Corrections at the time of the murder, and while committing an offense punishable as a felony under Illinois law, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled . . . or caused the intentional killing of the murdered individual; or
>
> (11) the murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design . . . .

ILL. REV. STAT. ch. 38, para. 9-1(b) (1989) (amended by P.A. 87-525, effective Jan. 1, 1992).

87. Section 9-1(c) directs:

review by the Illinois Supreme Court.[88]

Although the jury still has wide latitude to impose capital punishment, the current Illinois statute provides guidelines where none existed previously. By requiring a finding of at least one aggravating factor, the statute narrows the class of death-eligible defendants.[89] Furthermore, the defendant is statutorily empowered to put on any mitigating evidence that might compel the jury to show mercy.[90] These changes, at least in theory, comport with the *Furman* and *Gregg* dictates that the death penalty should be assessed only when the sentencer considers the character of the defendant and the nature of the crime.[91] To date, the changes in the Illinois death penalty statute have enabled it to survive constitutional challenges in the Illinois Supreme Court.[92]

> The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth [*supra* note 86]. Mitigating factors may include but need not be limited to the following:
> (1) the defendant has no significant history of prior criminal activity;
> (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;
> (3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;
> (4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;
> (5) the defendant was not personally present during commission of the act or acts causing death.

ILL. REV. STAT. ch. 38, para. 9-1(c) (1989).

88. *Id.* para. 9-1(i).

89. *Id.* para. 9-1(b) (amended by P.A. 87-525, effective Jan. 1, 1992); *see* Lawrence J. Essig & Verlin Meinz, *Death Eligibility: Statutory Aggravation Under the Illinois Death Penalty Act*, 74 ILL. B.J. 532, 534 (1986).

90. ILL. REV. STAT. ch. 38, para. 9-1(b) (1989) (amended by P.A. 87-525, effective Jan. 1, 1992).

91. The Illinois death penalty procedure is not without its critics. *See, e.g.*, Patricia Hartmann, *Factors in Aggravation and Mitigation: A Trap for the Sentencing Judge?*, 33 DEPAUL L. REV. 357, 369 (1984); Silverstein, *supra* note 84, at 80-83; Joel H. Swift, *The Two-Murder Rule in Illinois; A Potential Return to Arbitrary Imposition of the Death Penalty*, 32 DEPAUL L. REV. 789, 810 (1983).

92. *See, e.g.*, People v. Eyler, 549 N.E.2d 268, 291 (Ill. 1989) (holding that the Illinois statute does not unconstitutionally place on the defendant the burden of persuasion on the question of whether sufficient mitigating circumstances exist to preclude the death penalty); People v. Stewart, 520 N.E.2d 348, 357 (Ill. 1988) (holding that a survey relating to practices of Illinois prosecutors in seeking the death penalty did not support the conclusion that the death penalty had been arbitrarily and capriciously imposed); People v. Montgomery, 494 N.E.2d 475, 482 (Ill. 1986) (holding that the Illinois statute is not unconstitutional by virtue of the fact that the death penalty is mandatory when no mitigating factors exist, because that finding is synonymous with a finding that death is the appropriate punishment).

2. Victim Impact Statements

The United States Supreme Court 1970s death penalty decisions and the ensuing reactions of the state legislatures stemmed from the recognition that capital defendants deserve stringent safeguards against arbitrary sentencing decisions. Concurrently, state legislatures realized that the criminal justice system often leaves the crime victim feeling dissatisfied, powerless, and resentful.[93] Reacting to the growing victims' rights movement and to the need to increase system efficiency, state statutes were enacted to enhance victim participation in the criminal justice system.[94] This section will focus on the Illinois statutory provisions regarding victims' rights.[95]

In 1984, Illinois enacted the Bill of Rights for Victims and Witnesses of Violent Crime Act.[96] Its stated purpose recognizes both the necessity of showing compassion to the victims of violent crime and the role victims play in the administration of justice.[97] It defines "victim" as any person who suffers physical injury or property loss as a result of a violent crime.[98] The statute enumerates twenty-four specific victim's rights.[99] Additionally, victims may

93. *See* McLeod, *Victim Participation*, *supra* note 9, at 501-03; *see also supra* notes 9-15 and accompanying text.

94. McLeod, *Victim Participation*, *supra* note 9, at 501-03. McLeod notes that the primary benefit of increased victim involvement is greater system efficiency and effectiveness. *Id.* at 505.

95. *See* Hellerstein, *supra* note 14, at 391-409 (discussing the VWPA and surveying the states' treatment of victim impact statements).

96. ILL. REV. STAT. ch. 38, paras. 1401-1408 (1989).

97. Section 1402 provides:

> The purpose of this Act is to ensure the fair and compassionate treatment of victims and witnesses of violent crime and to increase the effectiveness of the criminal justice system by affording certain basic rights and consideration to the victims and witness of violent crime who are essential to prosecution.

Id. para. 1402.

98. *Id.* para. 1403(a). Section 1403(c) gives a broad definition of violent crime: "any felony in which force or threat of force was used against the victim or any misdemeanor which results in death or great bodily harm to the victim or any [involuntary manslaughter or reckless homicide]." *Id.*

99. To summarize, § 1404 provides the following victim rights:

> (1) to be informed of the status of the investigation of the victim's case;
> (2) to be informed of the return of an indictment;
> (3) to be informed of the release of the defendant on bail;
> (4) to have the details of any plea or verdict;
> (5) to be notified of any hearings in the case whether or not the victim's presence is required, and be afforded the right to make a victim impact statement at any sentencing hearing;
> (6) to be notified before the State's Attorney makes any plea bargain offer or enters into any negotiation with the defendant concerning a possible plea bargain;

present oral, prepared victim impact statements at the defendant's sentencing hearing and the court is directed to consider these statements when making the sentencing determination.[100] Of the forty-eight states authorizing victim impact statements at sentencing, twenty-nine grant the right to an oral presentation.[101]

The permissible contents of the victim impact statement are not directly defined by the Illinois statute. However, a comprehensive study of nation-wide victim impact statements shows that the ma-

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(7) to be notified of the ultimate disposition of the cases arising from an indictment;
(8) to be informed of any appeals;
(9) to be notified of any petition for post-conviction review and the time of any hearings;
(10) to be notified of the prisoner's final discharge from custody or any furlough;
(11) to be informed of the defendant's release from custody where the defendant had been committed to the Department of Mental Health;
(12) to be informed of victim advocate personnel of social services and financial assistance available;
(13) to have stolen or other personal property held for evidentiary purposes returned as expeditiously as possible;
(14) to be provided with employer intercession services to ensure that employers will cooperate with the system in order to minimize the victim's loss of pay;
(15) to be provided with a secure waiting area during court proceeding that does not require the victim to be in close proximity to the defendant;
(16) to be provided with a translator if necessary;
(17) to be notified if the defendant escapes from custody;
(18) to be notified of parole hearings and be permitted to submit any information for consideration by the Prisoner Review Board and be notified when the prisoner has been granted parole;
(19) if the victim was killed by the defendant, the victim's family has the right to be informed of the date of the defendant's trial;
(20) to be informed of their rights under the Act;
(21) to retain an attorney, at the victim's expense, who will receive all notices, etc. as if the victim were a named party;
(22) to be informed at the sentencing hearing of the minimum amount of time the defendant may actually be imprisoned;
(23) to have any victim impact statements forwarded to the Prisoner Review Board for consideration;
(24) to be informed of any discharge entered by the Board if a victim impact statement has been submitted.

Id. para. 1404. Rights (1), (3), (4), (6)-(11), and (23) are conferred only at the specific request of the victim.

100. Section 1406 provides:

> [T]he victim upon his or her request shall have the right to address the court regarding the impact which the defendant's criminal conduct . . . has had upon the victim. If the victim chooses to exercise this right, the impact statement must have been prepared in writing in conjunction with the Office of the State's Attorney prior to the initial hearing or sentencing, before it can be presented orally at the sentencing hearing.

Id. para. 1406.

101. *See* Hellerstein, *supra* note 14, at 399.

jority of the states require objective information such as the economic,[102] physical,[103] and psychological[104] consequences of the crime. Additionally, a majority of the states allow, but do not require, subjective commentary. This subjective commentary may include the victim's or the family's: (1) summary of the offense;[105] (2) opinion of the offender;[106] (3) fear of revictimization;[107] (4) opinion on the recommended sentence;[108] and (5) own sentence recommendation.[109] While the objective information may help a court to determine restitution,[110] it is not clear what weight a sentencing authority should give to the subjective statements.[111]

C. *Victim Impact Statements in Capital Penalty Hearings*

In 1987, only four states restricted victim input to non-capital cases.[112] The constitutionality of the use of victim impact statements during the sentencing phase of a capital trial was first considered by the Supreme Court in *Booth v. Maryland*.[113]

1. *Booth v. Maryland*

In *Booth*, the defendant was convicted and sentenced to death for robbing and murdering an elderly couple.[114] Before the sentencing phase of the trial, the Division of Parole and Probation compiled a presentence report on Booth's background, education,

102. Sixty-five percent of the states surveyed require information regarding medical expenses incurred and the value of lost or stolen property and forty-five percent require lost earnings data. Maureen McLeod, *An Examination of the Victim's Role at Sentencing: Results of a Survey of Probation Administrators*, 71 JUDICATURE 162, 166 (1987).

103. Over sixty percent of the states require information relating to the seriousness and permanence of physical injury. *Id.*

104. Fifty-three percent require information regarding psychological or emotional injury. *Id.* McLeod notes that claims of this type are "resistant to verification and rebuttal." *Id.* at 165.

105. *Id.* at 166 (68% of the states surveyed).

106. *Id.* (72% of the states surveyed).

107. *Id.* (71% of the states surveyed).

108. *Id.* (68% of the states surveyed).

109. *Id.* (62% of the states surveyed).

110. *See* McLeod, *Victim Participation*, *supra* note 9, at 501.

111. *See* Hellerstein, *supra* note 14, at 398. Questions regarding the victim's opinion of the defendant and the appropriate penalty justify the characterization of victim involvement at sentencing as an emphasis on the retributive and retaliatory aspects of punishment and as stressing personal vengeance. *Id.*

112. *See* GA. CODE ANN. § 17-10-1.1 (Michie 1987); LA. CODE CRIM. PROC. ANN. art. 875(A)-(B) (West 1987); OKLA. STAT. ANN. tit. 22, § 982 (West 1986); S.C. CODE ANN. § 16-3-1550(A) (Law. Co-op. 1987).

113. 482 U.S. 496 (1987).

114. *Id.* at 498.

employment history, and criminal record.[115] Pursuant to Maryland law, the report also included a victim impact statement describing the effect of the crime on the victims' family.[116] The VIS included moving testimony emphasizing the victims' personal qualities, the profound emotional effect of the murders on the victims' family, and the family's opinions and characterizations of the crime.[117] The prosecutor read these statements to the jury after Booth's counsel successfully argued that the use of live witnesses would increase the inflammatory effect of the information.[118]

The Supreme Court granted certiorari[119] to decide whether the Eighth Amendment bars the presentation of victim impact evidence to a capital sentencing jury.[120] Maryland argued that the evidence presented in the VIS should be considered part of the circumstances of the crime because it presented the jury with the direct, foreseeable consequences of the defendant's act.[121] In essence, the State contended that such evidence did not interject arbitrary factors into the jury's decision.[122]

The Supreme Court rejected the State's position.[123] The Court distinguished the peculiar nature of a capital sentencing hearing from other criminal and civil contexts in which all foreseeable consequences of a defendant's acts may be relevant.[124]

The Court first noted that the Eighth Amendment requires the jury to focus on the defendant as a uniquely individual human being.[125] Information presented in the VIS, however, focuses on the character of the victim and the consequences of the crime to the victim's family.[126] The Court reasoned that because murderers generally do not choose their victims on the basis of the specific

115. *Id.*

116. *Id.*

117. *Id.* at 499. For example, the VIS expressed the continuing anger, depression, and fear experienced by the victims' family. *Id.* at 500. It also expressed their opinion that the murderer could not be rehabilitated. *Id.* at 508. The full text of the victim impact statement submitted to the Maryland trial court is appended to the Supreme Court opinion. *Id.* at 510-15.

118. *Id.* at 501.

119. Booth v. State, 507 A.2d 1098 (Md.), *cert. granted*, 479 U.S. 882 (1986).

120. *Booth*, 482 U.S. at 501-02. Justice Powell delivered the opinion of the Court, in which Justices Brennan, Marshall, Blackmun, and Stevens joined. *Id.* at 487. Chief Justice Rehnquist and Justices Scalia and O'Connor each wrote dissenting opinions.

121. *Id.* at 503-04.

122. *Id.* at 503.

123. *Id.* at 509.

124. *Id.* at 504.

125. *Id.* (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

126. *Id.* at 504-05.

effect the murder will have on the victim's family, a sentence influenced by such evidence may result in the imposition of death based on factors that were unknown to the defendant and irrelevant to the defendant's decision to kill.[127] According to the Court, allowing introduction of the VIS risked diverting the jury's attention away from the defendant and the crime and focusing it instead on information unrelated to the defendant's blameworthiness and moral culpability.[128]

Further, the Court found that case-by-case variations in the quality of the information contained in the VIS raised several serious issues.[129] In particular, the Court was concerned that juries could be unduly and arbitrarily influenced by the varying degrees in which a victim's family articulated the impact of the crime.[130] The Court also found that the use of the VIS offended due process considerations because the information was not easily susceptible to rebuttal.[131] Additionally, the focus on the victim insinuates that defendants whose victims were perceived to be "assets to their community" deserve a greater punishment than defendants whose victims were perceived to be less important.[132] Moreover, the Court reaffirmed that the Eighth Amendment requires a principled

127. *Id.* at 505.

128. *Id.* The Court acknowledged that in some cases the information found in the VIS would be known by the defendant prior to the crime. *Id.* It further acknowledged that its decision in Tison v. Arizona, 481 U.S. 137 (1987), held that the defendant's moral culpability encompasses his or her degree of knowledge regarding the probable consequences of the act. *Booth*, 482 U.S. at 505. The *Booth* Court nevertheless found that much of the victim impact evidence is unforeseeable and that the nature of the information creates the risk that the death sentence will be imposed arbitrarily. *Id.*

129. *Booth*, 482 U.S. at 505-06.

130. *Id.* at 506. In the *Booth* VIS, the victims' family was compelling in its expression of its grief, sense of loss, and desire for retribution. *See id.* at 510-15.

131. *Id.* at 506-07. The Court cited its opinion in Gardner v. Florida, 430 U.S. 349 (1977), which held that due process requires that a defendant be given the opportunity to rebut a presentence report. *Booth*, 482 U.S. at 506. Additionally, the *Booth* Court explained:

> A threshold problem is that victim impact information is not easily susceptible to rebuttal. Presumably the defendant would have the right to cross-examine the declarants, but he rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression or emotional trauma suffered. . . . Putting aside the strategic risks of attacking the victim's character before the jury, in appropriate cases the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character . . . . The prospect of a "mini-trial" on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused . . . .

Id. at 506-07.

132. *Id.* at 506 n.8.

way to differentiate the rationale behind the cases in which the death penalty is imposed from those in which it is not.[133]

The *Booth* Court also addressed the admissibility of the opinions and characterizations of the crime expressed by the family within the VIS.[134] Reasoning that the only conceivable function served by offering this type of information is to inflame the jury and distract it from considering relevant evidence, the Court held that this part of the VIS, too, was inadmissible.[135] The Court reiterated its mandate that "any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.' "[136]

Guided by the tenet that death is a "punishment different from all other sanctions,"[137] the *Booth* Court concluded that the use of the VIS at the penalty phase of a capital trial injects an impermissible factor of arbitrariness into the proceedings.[138] The Court held, therefore, that the introduction of the VIS violated the Eighth Amendment.[139] As a result, the Court invalidated the Maryland statute insofar as it mandated the use of a VIS, and vacated Booth's death sentence.[140]

Justice White dissented in *Booth*,[141] and disagreed that the Eighth Amendment erected a *per se* bar to the use of victim impact statements in capital cases.[142] Noting that punishment in non-capital cases may be enhanced based on the extent of the harm caused, and not on the harm necessarily intended, Justice White found nothing irregular in permitting a similar assessment by the jury in a capital case.[143] White reasoned that victim impact statements are, in fact, particularly pertinent in capital cases because the state has a legitimate interest in neutralizing the effect of mitigating evi-

133. *Id.* at 506 (citing Godfrey v. Georgia, 446 U.S. 420, 433 (1980)); Skipper v. South Carolina, 476 U.S. 1, 14-15 (1986) (Powell, J., concurring in judgment).

134. *Booth*, 482 U.S. at 508.

135. *Id.*

136. *Id.* (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

137. *Id.* at 509 n.12 (quoting Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

138. *Id.* at 505.

139. *Id.* at 509. The holdings of *Booth*, 482 U.S. at 509 n.12, and South Carolina v. Gathers, 490 U.S. 805, 811-12 (1989), apply only to capital cases. The *Booth* Court gave no opinion as to whether a VIS may be permissible in the context of a non-capital case. *Booth*, 482 U.S. at 509 n.12.

140. *Booth*, 482 U.S. at 509.

141. Justice White wrote a dissenting opinion, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. *Id.* at 515. Justice Scalia also dissented and was joined by Chief Justice Rehnquist and Justices White and O'Connor. *Id.* at 519.

142. *Id.* at 518-19 (White J., dissenting).

143. *Id.* at 516-17 (White, J., dissenting).

dence offered by the defense.[144]

Addressing the majority's concern that the death penalty may be imposed on the basis of the victim's "worth," Justice White admitted that consideration of factors such as race is impermissible.[145] He maintained, however, that the majority failed to show that the jury in *Booth* actually based its decision on impermissible factors and would not assume such misconduct on the part of the jury.[146]

Justice White also dismissed the majority's concern that the differing abilities of victims' families to articulate their grief interjected an element of arbitrariness into the sentencing result.[147] Calling this a "makeweight consideration," White argued that no two prosecutors possess the same ability to present arguments and no two witnesses possess the same ability to present the facts.[148] He was similarly unimpressed by the majority's assertion that the victim impact evidence was unrebuttable, stating that the arguments were speculative and unconnected to the facts before the Court.[149]

Justice Scalia's dissent focused on consideration of the "defendant's culpability," which the Court previously had defined as "the defendant's personal responsibility and moral guilt."[150] He argued that the amount of harm caused by a defendant bears "upon the extent of his 'personal responsibility.' "[151] Justice Scalia further argued that the majority failed to recognize that "moral guilt" had

144. *Id.* at 517 (White, J., dissenting).
145. *Id.* (White, J., dissenting).
146. *Id.* (White, J., dissenting).
147. *Id.* at 517-18 (White, J., dissenting).
148. *Id.* at 518 (White, J., dissenting).
149. *Id.* (White, J., dissenting).
150. *Id.* at 519 (Scalia, J., dissenting) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)). In Enmund v. Florida, the defendant was sentenced to death for his participation in a robbery that resulted in the death of the victims. *Enmund*, 458 U.S. at 785. The Florida Supreme Court affirmed the sentence under its felony-murder rule although the State presented no evidence to show that the defendant had murdered, attempted to murder, or intended to murder. *Id.* at 786. After considering statutes and statistics relevant to felony-murder death penalties, the United States Supreme Court reversed, finding that the sentence violated the Eighth Amendment proportionality requirement. *Id.* at 801. The *Enmund* Court held:

> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.

Id.

151. *Booth*, 482 U.S. at 519 (Scalia, J., dissenting) (quoting *Enmund*, 458 U.S. at 801).

never been the sole foundation for the determination of punishment.[152] He contended that the particular harm caused to a victim's family is a foreseeable consequence of a defendant's crime.[153] Since it is foreseeable, Scalia found that victim impact evidence forms a proper basis for assessing the defendant's personal responsibility and thus his culpability.[154]

In summary, the disagreement in *Booth* focused on whether consideration of victim impact evidence enhances the jury's understanding of the circumstances of the crime and whether it relates to the defendant's blameworthiness. The Justices further disagreed on whether the potential inconsistencies in victim impact statements violate the Court's dictate that the death penalty not be imposed in an arbitrary and capricious manner. Due to the unforeseeability of the information contained in the victim impact statement, the *Booth* majority found the VIS not only irrelevant to the determination of the defendant's culpability, but also potentially inflammatory.[155]

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152. *Id.* at 519-20 (Scalia, J., dissenting). Justice Scalia argued that defendants may be held accountable for fortuitous events: "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Id.* at 519 (Scalia, J., dissenting). He also used the Court's decision in Tison v. Arizona, 481 U.S. 137 (1987), to support his argument. In *Tison*, two brothers planned and assisted in their father's escape from prison. *Tison*, 481 U.S. at 139. In the course of subsequent events, the father murdered four people. *Id.* at 141. The Court upheld the death penalty levied against the brothers, although they had not participated directly in the killings. *Id.* at 158. In fact, they testified to an agreement they had reached with their father, prior to the prison escape, that no one would be hurt. *Id.* at 166 (Brennan, J., dissenting). Despite the factual similarity between *Tison* and *Enmund*, the *Tison* Court used *Enmund* to justify its contrary holding:

> *Enmund* held that when "intent to kill" results in its logical though not inevitable consequences—the taking of human life—the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state . . . .

Tison, 481 U.S. at 157.

153. *Booth*, 482 U.S. at 520 (Scalia, J., dissenting).

154. *Id.* at 519-20 (Scalia, J., dissenting).

155. *Id.* at 508. Arguing against this reasoning, hypotheticals were provided in both dissenting opinions purporting to show that defendants may be found culpable for the unintended, yet foreseeable, consequences of their acts. *Id.* at 516, 519 (White, J., dissenting and Scalia, J., dissenting, respectively). Justice White's hypothetical defendant unintentionally killed a pedestrian while driving recklessly. *Id.* at 516 (White, J., dissenting). Justice Scalia's defendant shot a guard during a bank robbery. *Id.* at 519 (Scalia, J., dissenting). However, in both situations, the harm caused by the defendant was not only a foreseeable result of the intended act, but a result traditionally punished by the criminal justice system. *See supra* note 152.

2. *South Carolina v. Gathers*

Two years later, the Supreme Court extended the rationale of *Booth* in *South Carolina v. Gathers*.[156] In *Gathers*, the defendant was sentenced to death for the brutal murder and first-degree sexual assault of a mentally impaired thirty-one-year-old man.[157] The victim, who considered himself a preacher, had been carrying a booklet entitled *The Game Guy's Prayer* ("*Prayer*") when he was murdered.[158] During the penalty phase of the trial, the prosecutor read the entire *Prayer* to the jury and centered his closing arguments on the personal characteristics of the victim.[159]

Unlike the statements presented to the jury in *Booth*, the statements in *Gathers* focused solely on the character of the victim and not on the emotional harm caused to the victim's family or on the family's opinion of the crime and of the defendant.[160] Moreover, in *Gathers*, the prosecutor, and not the victim's family, was responsible for painting the portrait of the victim.[161]

The Supreme Court did not find these differences compelling.[162] The State argued that the evidence showing that the victim's papers had been scattered around his body during the crime[163] depicted the circumstances of the crime and, therefore, was information not foreclosed by *Booth*.[164] The Court, however, observed that no evidence showed that the defendant had read any of these papers during the commission of the crime or that their con-

156. 490 U.S. 805 (1989). Justice Brennan wrote the opinion of the Court, in which Justices White, Marshall, Blackmun, and Stevens joined. *Id.* at 806. Justice White also filed a concurring opinion. *Id.* at 812. Justice O'Connor filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Kennedy joined. *Id.* Justice Scalia wrote a separate dissenting opinion. *Id.* at 823.

157. *Id.* at 806-07.

158. *Id.* at 807. The *Prayer* was among several papers and religious items found scattered at the scene of the murder. *Id.* The *Prayer* analogized life to a sports event and emphasized the virtues of good sportsmanship. *Id.* at 808-09.

159. *Id.* at 808-10. Rather than presenting new evidence at the sentencing phase, the State readmitted the evidence presented at the guilt phase. *Id.* at 808. The prosecutor's closing arguments, which included the contents of the *Prayer*, characterized the victim as a defenseless, religious man. *Id.* at 808-10. The prosecutor also focused on the fact that the victim was carrying his voter's registration card. *Id.* at 809.

160. *Id.* at 808-10.

161. *Id.*

162. *Id.* at 811 ("As in *Booth*, '[a]llowing the jury to rely on [this information] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.' " (quoting Booth v. Maryland, 482 U.S. 496, 505 (1987))).

163. *Id.*

164. *Id.*

tents influenced his decision to commit the crime.[165] The Court found, therefore, that the contents of the victim's papers were irrelevant to determining both the circumstances of the crime and the defendant's moral culpability.[166] Thus, following *Booth*, the prosecutor's comments during closing argument were in error.[167]

Gathers commanded a majority only because Justice White joined the Court in an equivocal concurrence.[168] Justices O'Connor and Scalia wrote separate dissenting opinions primarily expanding on the reasoning set forth by Justice Scalia in his *Booth* dissent.[169]

Although O'Connor asserted that she stood ready to overrule *Booth*, her dissent stated that such action was not necessary for a proper disposition of the *Gathers* case.[170] Justice O'Connor maintained that allowing the jury to consider the victim's personal characteristics was not foreclosed by the Court's previous Eighth Amendment holdings.[171] She contended that such a consideration was relevant to the proportionality requirement of *Enmund v. Florida*[172] and that permitting the information predictably followed from the Court's ruling in *Tison v. Arizona*.[173] O'Connor criticized a result that would not give the sentencer a " 'glimpse of the life' a defendant 'chose to extinguish' "[174] and argued that a system focusing entirely on the uniquely individual characteristics of the de-

165. *Id.* at 811-12.

166. *Id.* at 812.

167. *Id.*

168. Justice White stated that "[u]nless *Booth* is to be overruled, the judgment below must be affirmed." *Id.* (White, J., concurring). He authored one of the two dissenting opinions in *Booth*. *See supra* notes 141-49 and accompanying text.

169. Justice Scalia's dissent, which focused primarily on a discussion of *stare decisis*, strongly advanced his opinion that *Booth* was wrongly decided and should be overruled. *Gathers*, 490 U.S. at 823-25 (Scalia, J., dissenting). Based on his interpretation of the role of *stare decisis*, Scalia argued that *Booth* should be overruled sooner rather than later in order to prevent legislators from codifying a rule not expressive of the moral judgment of the people. *Id.* (Scalia, J., dissenting).

170. *Id.* at 813-14 (O'Connor, J., dissenting). Justice O'Connor perceived the main issue to be whether *Booth* established a "rigid Eighth Amendment rule eliminating virtually all consideration of the victim at the penalty phase," or whether the jury could properly hear "information about the victim and the extent of the harm caused in arriving at its moral judgment concerning the appropriate punishment." *Id.* at 814 (O'Connor, J., dissenting). Justice O'Connor favored a narrower, less rigid, reading of *Booth*. *Id.* (O'Connor, J., dissenting).

171. *Id.* at 813 (O'Connor, J., dissenting).

172. *Id.* at 814 (O'Connor, J., dissenting) (citing Enmund v. Florida, 458 U.S. 782, 823 (1982)); *see supra* note 150.

173. *Gathers*, 490 U.S. at 818-19 (O'Connor, J., dissenting); *see supra* note 152.

174. *Gathers*, 490 U.S. at 816 (O'Connor, J., dissenting) (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

fendant is unnecessarily one-sided.[175]

Thus, the focus of the debate in *Booth* and *Gathers* was on defining the defendant's culpability. In both decisions, the Court reasoned that the specific harm to the victims' families and the identities of the victims were neither factors foreseeable by the defendant, nor necessarily intended when the defendant chose to act.[176] Based on its interpretation of precedent, the Court reasoned that victim impact evidence generally does not relate to the defendant's blameworthiness and asserted that only evidence directly relating to the defendant and to the circumstances of the crime is relevant to the sentencing decision.[177] Accordingly, victim impact evidence that can distract the jury from its proper task is impermissible under the Eighth Amendment.[178]

The dissents in both *Booth* and *Gathers*, however, focused on cause and effect. The dissenting Justices argued that society demands retribution for the direct harm and consequences of a defendant's act.[179] Since the impact of a crime on the victim's family is a direct consequence of the defendant's act, it is relevant to the sentencing decision.[180] Each dissent buttressed its arguments with the Court's holding in *Tison v. Arizona* that reckless indifference to human life is as morally reprehensible as an "intent to kill."[181]

III. *PAYNE V. TENNESSEE*

A. The Facts

In *Payne v. Tennessee*,[182] Pervis Tyrone Payne was convicted of first-degree murder and assault with intent to commit murder in the stabbing deaths of his female acquaintance and her daughter and of the attempted murder of her young son.[183] During the pen-

175. *Id.* at 820-21 (O'Connor, J., dissenting) (stating that "information about [Gather's] equally unique victim was relevant to the jury's assessment of the harm he had caused and the appropriate penalty").

176. Booth v. Maryland, 482 U.S. 496, 504 (1987); *Gathers*, 490 U.S. at 810.

177. *Booth*, 482 U.S. at 508-09; *Gathers*, 490 U.S. at 811.

178. *Booth*, 482 U.S. at 509; *Gathers*, 490 U.S. at 811-12.

179. *Booth*, 482 U.S. at 516, 519-20 (dissenting opinions of Justice White and Justice Scalia, respectively); *Gathers*, 490 U.S. at 818, 823 (dissenting opinions of Justice O'Connor and Justice Scalia, respectively).

180. *Booth*, 482 U.S. at 518, 520 (dissenting opinions of Justice White and Justice Scalia, respectively); *Gathers*, 490 U.S. at 810, 823 (dissenting opinions of Justice O'Connor and Justice Scalia, respectively).

181. Tison v. Arizona, 481 U.S. 137, 154 (1987); *see* relevant text of *Tison* quoted *supra* note 152.

182. 111 S. Ct. 2597 (1991).

183. *Id.* at 2601. The daughter was two years old and the son was three years old. *Id.*

alty phase of the trial, Payne called four witnesses to testify on his behalf.[184] The State called the victim's mother who testified regarding the continuing effect of the murders on her grandson.[185] While asking for the death penalty during closing arguments, the prosecutor gave a moving account of the permanent loss suffered by the boy and by the rest of the victims' surviving family.[186] The jury sentenced Payne to death.[187]

The Tennessee Supreme Court affirmed the conviction and the sentence, rejecting Payne's argument that the grandmother's testimony and the prosecutor's statements violated his Eighth Amendment rights under *Booth* and *Gathers*.[188] The court concluded that the statements were relevant to Payne's personal responsibility and moral guilt and that any violation under *Booth* and *Gathers* was harmless beyond a reasonable doubt.[189] The United States Supreme Court granted certiorari[190] "to *reconsider* [its] holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family."[191]

B. The United States Supreme Court Decision

In a six-to-three decision,[192] the Court held that victim impact evidence is not prohibited by the Eighth Amendment and over-

184. *Id.* at 2602. The witnesses included his parents, his girlfriend, and a psychologist who specialized in criminal evaluations. *Id.* They all testified generally that Payne was a polite, caring, and affectionate person. *Id.* at 2602-03. The psychologist also stated that Payne was mentally handicapped. *Id.* at 2602.

185. *Id.* at 2603.

186. *Id.* The prosecutor stated:

> [Petitioner's attorney] wants you to think about a good reputation, people who love the defendant . . . . He doesn't want you to think about the people who love [the victim], her mother and daddy who loved her. . . . The brother who mourns for [his sister] every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that child will carry forever.

Id.

187. *Id.*

188. State v. Payne, 791 S.W.2d 10, 18 (Tenn. 1990).

189. *Payne*, 791 S.W.2d at 19.

190. State v. Payne, 791 S.W.2d 10 (Tenn. 1990), *cert. granted*, 111 S. Ct. 1031 (1991).

191. *Payne*, 111 S. Ct. at 2604 (emphasis added).

192. Chief Justice Rehnquist delivered the opinion of the Court. *Id.* at 2601. Justices O'Connor, Scalia, and Souter each filed a concurring opinion. *Id.* at 2611, 2613, 2614, respectively. Justices Marshall and Stevens each filed dissenting opinions, both of which were joined by Justice Blackmun. *Id.* at 2619, 2625, respectively.

ruled both *Booth* and *Gathers*.[193] Writing for the majority in *Payne*, Chief Justice Rehnquist accused the *Booth* and *Gathers* Courts of misreading precedent and of unfairly stacking the scales in a capital trial.[194] Rehnquist acknowledged that *Woodson v. North Carolina* and *Gregg v. Georgia* required that the defendant be considered individually[195] and that the defendant be provided the opportunity to offer any mitigating evidence supporting a lesser sentence.[196] However, Rehnquist argued that those decisions did not foreclose the State from offering evidence relating to the consequences of the crime.[197] Instead, Rehnquist, echoing Justice O'Connor in *Gathers*, maintained that to deny the state either " 'a glimpse of the life' which a defendant 'chose to extinguish' " or consideration of the harm caused to society and to the victim's family was neither necessitated by precedent nor justified by the general tenets of criminal law.[198]

The *Payne* Court reiterated the dissenting arguments in *Booth* and *Gathers* that the criminal responsibility of a defendant is partially measured by the foreseeable, though not necessarily intended, consequences of his acts.[199] It then restated the hypotheticals presented in those dissents purporting to show how equally blameworthy defendants constitutionally could be assessed differing penalties on the basis of the harm caused.[200]

The Court also addressed the *Booth* Court's concern that victim impact evidence might be unconstitutionally prejudicial to a defendant whose victim is deemed to be a greater asset to society than

193. *Id.* at 2611.

194. *Id.* at 2607.

195. *Id.* at 2606-08 (citing Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (opinion of Stewart, Powell and Stevens, JJ.), and Woodson v. North Carolina, 428 U.S. 280, 304 (1976)) (opinion of Stewart, Powell and Stevens, JJ.).

196. *Id.* at 2606 (citing Eddings v. Oklahoma, 455 U.S. 104, 114 (1982)).

197. *Id.* at 2607.

198. *Id.* at 2605-07 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). To support this conclusion, the Court further quoted the Bible, "An eye for an eye, a tooth for a tooth," and the 18th century criminologist Cesare Beccaria, "we have seen that the true measure of crimes is the injury done to society." *Id.* at 2605 (quoting *Exodus* 21:22-23 and Cesare Beccaria, *reprinted in* J. FARRER, CRIMES AND PUNISHMENTS 199 (London 1880)).

In his concurring opinion, Justice Souter also maintained that evidence of a crime's effect on the victim traditionally has played a role in determining the culpability of a particular defendant. *Id.* at 2614 (Souter, J., concurring).

199. *Id.* at 2605.

200. *Id.* at 2605; *see supra* notes 152, 155. The Court again cited *Tison* as authority for this proposition. *Payne*, 111 S. Ct. at 2605 (citing Tison v. Arizona, 481 U.S. 137, 148 (1987)).

one whose victim is deemed to be less "worthy."[201] The *Payne* Court stated that the information was "not offered to *encourage* comparative judgments of this kind,"[202] but was offered instead to show the uniqueness of the victim.[203] The Court concluded that victim impact evidence is merely one way to inform the jury of the "specific harm caused by the crime."[204] It also reiterated the reasoning expressed in the *Booth* dissent that the State has a legitimate interest in counteracting the mitigating evidence offered by the defendant.[205] If the information is, in fact, unduly prejudicial, the Court reasoned that the Fourteenth Amendment's Due Process Clause provides a mechanism for relief.[206]

In summary, the Court rejected the contention that the presentation of victim impact evidence violated Payne's Eighth Amendment rights.[207] It held that victim impact statements and arguments relating to the victim and the impact of the crime on the victim's family are permissible during the sentencing of a capital defendant and overruled *Booth*.[208] On the same basis, the Court also overruled the *Gathers* holding that prevented the prosecutor from describing the "human cost of the crime of which the defendant stands convicted."[209]

The Court rationalized its action in overruling the two decisions by embarking on an analysis of *stare decisis*. It conceded the value of the doctrine, but asserted that *stare decisis* is more important in cases involving property and contract rights than in those involv-

201. *Payne*, 111 S. Ct. at 2607 (citing Booth v. Maryland, 482 U.S. 496, 506 (1987)).

202. *Id.* (emphasis added).

203. *Id.*

204. *Id.* at 2608.

205. *Id.* ("*Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.").

206. *Id.* Justice O'Connor also addressed this issue in her concurring opinion:

> The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. . . . If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

Id. at 2612 (O'Connor, J., concurring).

207. *Id.* at 2609.

208. *Id.* at 2611. However, since *Payne* did not concern evidence relating to the characterization and opinions of the victim's family about the crime, the criminal, and the appropriate punishment, that part of the *Booth* decision was not overruled by the Court. *Id.* at 2611 n.2.

209. *Id.* at 2609. The *Payne* Court quoted Justice Cardozo: " '[J]ustice, though due to the accused, is due to the accuser also.' " *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)).

ing procedural and evidentiary rules.[210] Noting that thirty-three previous constitutional decisions had been overruled in whole or in part during the last twenty terms, the Court justified its action by stressing that "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions."[211] Consequently, the doctrine of *stare decisis* posed no barrier to the Court's decision in *Payne*.

C. *Justice Souter's Concurrence*[212]

Justice Souter rejected the premise underlying the *Booth* Court's contention that victim impact evidence is irrelevant to the defendant's blameworthiness.[213] He recognized the obligation to consider the defendant's individuality but did not believe that such an obligation forecloses a consideration of the foreseeable consequences of the defendant's acts.[214] Justice Souter posited that mentally competent defendants know that their victims are unique and probably have "survivors" who will suffer from the victim's death.[215] He found the defendant's knowledge of these foreseeable consequences relevant to the defendant's blameworthiness and, therefore, relevant to the sentencing decision.[216]

Justice Souter also considered the *Booth* rule unworkable.[217] Since most sentencing decisions are made by the same jury that determines the defendant's guilt, much of the evidence restricted

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210. *Id.* at 2609-10. Chief Justice Rehnquist announced:

> *Stare decisis* is not an inexorable command: rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." . . . Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . the opposite is true in cases such as the present one involving procedural and evidentiary rules.

Id. (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)) (citations omitted).

211. *Id.* at 2610-11. Justice Scalia's concurring opinion focused on the issue of *stare decisis*, defending the *Payne* holding against the opinion voiced by the dissent: "If there was ever a case that defied reason, it was *Booth v. Maryland*, imposing a constitutional rule that had absolutely no basis in constitutional text, in historical practice, or in logic." *Id.* at 2613 (Scalia, J., concurring) (citation omitted).

212. Justice Kennedy joined in Justice Souter's concurring opinion. *Id.* at 2614.

213. *Id.* (Souter, J., concurring).

214. *Id.* (Souter, J., concurring).

215. *Id.* at 2615 (Souter, J., concurring). Justice Souter argued:

> Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents.

Id. (Souter, J., concurring).

216. *Id.* at 2616 (Souter, J., concurring).

217. *Id.* (Souter, J., concurring).

under *Booth* was already before the jury.[218] Therefore, either the evidentiary rules at the trial would have to be changed, denying the jury important contextual evidence about the crime, or a separate jury would have to be empaneled for the sentencing phase, imposing a severe burden on the states.[219]

D. The Dissents

In his dissenting opinion, Justice Stevens[220] accused the majority of falling prey to the political appeal of the victims' rights movement.[221] Stevens noted that neither the Constitution nor the common law requires even-handed treatment of the defendant and his or her victim.[222] Although the State must prove the defendant's guilt beyond a reasonable doubt, because the victim is not on trial, the victim's character cannot constitute either an aggravating or a mitigating circumstance.[223]

Justice Stevens identified two flaws in the use of victim impact evidence. First, those facets of a victim's character that are not foreseeable at the time the crime was committed are irrelevant to the defendant's " 'personal responsibility and moral guilt' " and, therefore, are irrelevant to death penalty considerations.[224] Second, because the quantity and quality of victim impact evidence sufficient to justify a death sentence is not known until after the crime is committed, the use of such evidence conflicts with the

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218. *Id.* (Souter, J., concurring).

219. *Id.* at 2617 (Souter, J., concurring).

220. *Id.* at 2625 (Stevens, J., dissenting). Justice Blackmun joined this dissent. *Id.*

221. *Id.* at 2627 (Stevens, J., dissenting) ("Today's majority has obviously been moved by an argument that has a strong political appeal but no proper place in a reasoned judicial opinion."). Further, Justice Stevens concluded:

> Given the current popularity of capital punishment in a crime-ridden society, the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the "victim's rights" movement, I recognize that today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens. The great tragedy of the decision, however, is the danger that the "hydraulic pressure of public opinion that Justice Holmes once described—and that properly influences the deliberations of democratic legislatures—has played a role not only in the Court's decision to hear this case, and in its decision to reach the constitutional question without pausing to consider affirming on the basis of the Tennessee Supreme Court's rationale, but even in its resolution of the constitutional issue involved. Today is a sad day for a great institution.

Id. at 2631 (Stevens, J., dissenting).

222. *Id.* at 2627 (Stevens, J., dissenting).

223. *Id.* (Stevens, J., dissenting).

224. *Id.* at 2628 (Stevens, J., dissenting) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

mandate that sentencing discretion be minimized in order to avoid the danger of wholly arbitrary and capricious action.[225]

Justice Stevens also found flaws in the majority's contention that the harm to a victim's family is foreseeable and therefore indicative of the defendant's moral culpability.[226] Although he found the examples cited by the majority[227] fully consistent with Eighth Amendment jurisprudence, he considered them inapposite to the majority's conclusion.[228] Justice Stevens reasoned that the admission of victim impact evidence may result in the execution of certain defendants because of irrelevant and arbitrary factors.[229] Stevens concluded: "Today is a sad day for a great institution."[230]

In addition, Justice Marshall wrote a separate dissent[231] focusing on the "ominous" willingness of the Court to overrule its precedents.[232] Marshall maintained that, historically, the Court never had departed from its precedent without special justification—justification including a showing that the precedent was a detriment to coherence and consistency in the law.[233] In Marshall's view, the majority did not meet this burden. In fact, Marshall found in the majority's opinion the "radical assertion that it need not even try."[234] Noting the failure of the majority to justify its decision on grounds other than those voiced by the dissenters in *Booth* and *Gathers*, Justice Marshall maintained that the motivation behind the Court's departure from precedent was the change in the Court's own personnel rather than any change in legal reasoning or development.[235] Marshall warned that the majority's decision in *Payne* was an indication of the current Court's attitude toward the rights of the under represented members of our society.[236]

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225. *Id.* (Stevens, J., dissenting) (citing Gregg v. Georgia, 428 U.S. 153, 189 (1976)).

226. *Id.* (Stevens, J., dissenting).

227. *See supra* notes 152, 155, 200.

228. *Payne*, 111 S. Ct. at 2629 (Stevens, J., dissenting).

229. *Id.* at 2630 (Stevens, J., dissenting).

230. *Id.* at 2631 (Stevens, J., dissenting).

231. *Id.* at 2619 (Marshall, J., dissenting). Justice Blackmun also joined in this opinion.

232. *Id.* (Marshall, J., dissenting). Justice Marshall emphasized that *Booth* and *Gathers* were premised on the assertion that "death is a 'punishment different from all other sanctions,' " and that those decisions applied only to capital cases. *Id.* at 2620 n.1 (Marshall, J., dissenting) (citations omitted). He argued that the *Payne* decision was unresponsive to Eighth Amendment capital penalty jurisprudence requiring that unfairly prejudicial and irrelevant information be barred from the sentencing hearing. *Id.* at 2620-21 n.1 (Marshall, J., dissenting).

233. *Id.* at 2621-22 (Marshall, J., dissenting).

234. *Id.* at 2621 (Marshall, J., dissenting).

235. *Id.* at 2619 (Marshall, J., dissenting).

236. *Id.* at 2625 (Marshall J., dissenting). Justice Marshall cautioned:

IV. ANALYSIS

The Supreme Court's reasoning in *Payne v. Tennessee* is analytically unsound and ignores the basic underpinnings of Eighth Amendment death penalty jurisprudence. When the Court in *Furman v. Georgia* invalidated many capital punishment statutes, it made the acute observation that juries, provided with no objective criteria for assessing the appropriate penalty in capital cases, were swayed by unquantifiable, subjective determinants.[237] In *Furman*, the Supreme Court found that the arbitrariness resulting from that subjectivity violated the Eighth Amendment's ban against cruel and unusual punishment.[238]

The decisions in *Gregg v. Georgia* and two of its companion cases approved death penalty schemes that appeared to require heightened objectivity in capital sentencing.[239] Recognizing that capital cases are qualitatively different from non-capital cases, the *Gregg* Court required the sentencing authority to focus on the objective characteristics of the defendant and the crime.[240] The addition of statutory aggravating and mitigating factors and the provision for proportionality review on appeal created the expectation that the death penalty would operate in a more even-handed and consistent way.[241] These expectations, however, have not been fulfilled.[242]

Due to the overwhelming number of criminal defendants who plead guilty, the sentencing determination is perhaps the most crucial aspect of the criminal justice system.[243] However, several commentators maintain that despite the post-*Furman* attempts to

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> [T]he 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 J., dissenting).

237. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

238. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

239. *Gregg*, 428 U.S. at 153; Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); *see supra* notes 47-70 and accompanying text.

240. *Gregg*, 428 U.S. at 195 (opinion of Stewart, Powell, and Stevens, JJ.).

241. *See* BALDUS ET AL., EQUAL JUSTICE, *supra* note 46, at 404, 409-11.

242. *See id.*

243. WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 53 (1991) (reporting that approximately 70-90% of criminal defendants plead guilty or *nolo contendere*); Roy L. Goldman & James W. Mullenix, Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L.J. 1515, 1515 & n.2 (1978) (stating that in 1974, over 84% of criminal defendants pled either no contest or guilty).

ensure that capital defendants are punished on the basis of fair and objective criteria, arbitrary elements continue to factor into the result.[244]

Extra-legal factors influencing the result of the capital sentencing process include: (1) the jurisdiction in which the crime occurs;[245] (2) the role of the prosecutor;[246] (3) the competence of, and the specific problems facing, the defense attorney;[247] and (4) jury death penalty biases.[248] These factors increase the likelihood that a sentence of death will be imposed based on considerations that bear no relationship to the crime or to the accused.

The data also show that it may be impossible to completely eradicate the effect of any particular juror's bias. The 1970s changes to capital sentencing statutes were designed to objectively guide the jury's sentencing decision. Of the typical list of aggravating circumstances, the jury's only subjective determination is whether the murder was especially heinous, atrocious, cruel, or manifesting exceptional depravity.[249] On the other hand, the mitigating circum-

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244. *See, e.g.*, Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 798-99 (1986).

245. *See, e.g.*, WHITE, *supra* note 243, at 54-55. For example, due largely to economic reasons, prosecutors in small counties are more likely to offer the defendant a chance to plea bargain. *Id.*

246. *Id.* at 54-57; *see also* Tabak, *supra* note 244, at 799-800 (positing that the prosecutor's decision to seek the death penalty often is based on political considerations); NAKELL & HARDY, *supra* note 6, at 152-58 (noting that the role of the prosecutor and the impact of the jurisdiction in which the crime occurs are tied closely together).

247. *See* Tabak, *supra* note 244, at 801-10. Tabak states that the capital defendant often is represented inadequately due to the insufficient funding, inexperience (including a lack of awareness of applicable legal principles), and overwhelming workload of counsel. *Id.*; *see* AMERICAN BAR ASS'N, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 6-17, 49-76 (1990). The problems of incompetent and underfunded counsel in death penalty cases led the ABA to include specific recommendations regarding competent counsel in its report. *Id.*

248. *See, e.g.*, WHITE, *supra* note 243, at 186-207 (providing an entire chapter regarding the problem of death-qualified juries); *see also* Witherspoon v. Illinois, 391 U.S. 510, 518-19 (1968) (holding that it is constitutionally permissible to exclude for cause all potential jurors who are opposed to the death penalty). Professor White observed:

> Under the Court's decision in *Witherspoon v. Illinois*, the prosecutor is permitted to remove from a jury that will decide a capital defendant's penalty all prospective jurors who state either (1) that they would automatically vote against the death penalty . . . or (2) that their attitude toward capital punishment would prevent them from making an impartial decision as to the defendant's guilt. . . .

WHITE, *supra* note 243, at 186. A jury that is seated after death penalty-specific questioning is considered death-qualified.

249. *See, e.g., supra* note 86.

stances require both subjective and objective assessments.[250] Additionally, while the jury may be confined to finding enumerated aggravating circumstances, the Court has required that any and all relevant mitigating factors be taken into consideration.[251] These formal changes flowed logically from the 1976 edict that the jury focus on the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.[252] These changes also support Justice Stevens's contention that the Constitution and the common law do not require an even-handed treatment of the defendant and the victim.[253]

Despite the Court's refinements of capital sentencing, some researchers have found that the statutory aggravating and mitigating circumstances play less of a role than intended,[254] while others have found that race, particularly the victim's race, continues to play a pivotal role in capital sentencing determinations.[255] The

250. *See, e.g., supra* note 87.

251. *See* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

252. *See supra* notes 47-70 and accompanying text.

253. Payne v. Tennessee, 111 S. Ct. 2597, 2627 (1991) (Stevens, J., dissenting); *see supra* notes 221-22 and accompanying text.

254. *See, e.g.*, William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1988). In this interesting study, the authors interviewed fifty-four jurors in ten comparably aggravated capital murder cases: in five, the jury recommended life imprisonment; in the other five, the jury recommended death. *Id.* at 8-9, 26. Thirty-five jurors indicated that the statutory list of aggravating and mitigating circumstances had "little or no impact" on their decision while only four indicated that they were "greatly" influenced by the list. *Id.* at 24. In the cases in which imprisonment was recommended, sixty-nine percent of the jurors attributed their decision, at least in part, to "lingering doubt," *id.* at 27, while in the cases in which death was recommended, the manner of the killing was the most important statistical factor, followed by the perception that death was either mandatory or presumptively appropriate for first-degree murder, *id.* at 40. Based on their survey, the authors conclude that capital sentencing decisions cannot be sufficiently guided to operate satisfactorily in practice. *See id.* at 53-54.

255. Many studies have been conducted on this subject, including: David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 728-31 (1983) [hereinafter Baldus et al., *Comparative Review*] (reporting that the killer of a white victim is more likely to receive the death penalty than the killer of a black victim and concluding that the overall data suggest that the Georgia death sentencing scheme remains inconsistent and arbitrary despite the statutorily required proportionality review); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437, 473-74 (1984) (finding that in multiple felony homicides, the more aggravated the homicide, the less important the race of the victim becomes; but that when the homicide involves only one statutory aggravating felony, the probability of a death penalty request is almost three times greater when the victim is white rather than black); Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-*Gregg *Period*, 79 J. CRIM. L. &

data shows that despite the statutory guidelines, juries continue to be swayed by impermissible, subjective factors—most notably the race of the victim. Allowing victim impact evidence into the penalty phase of a capital trial sanctions the influence of these subjective factors by authorizing the jury to focus on the victim and not on the accused.

The foreseeability argument advanced by the Court in *Payne*[256] to support its contention that victim impact information illustrates the defendant's blameworthiness is logically flawed. It certainly is true that a determination of the harm caused by the defendant as a result of his criminal acts is an important concern in criminal law, both in determining the elements of the offense and in determining the appropriate punishment.[257] The different degrees of loss suffered by society and by a victim's family are already recognized by the criminal law. For example, an inchoate crime is not punished to the same degree as a completed crime.[258]

However, neither the *Payne* Court's reliance on *Tison v. Arizona*[259] nor the hypotheticals employed by the Court bolster the argument that the same principles should apply to evidence regarding the victim and the impact of the death on the victim's family.[260] In *Tison*, the Court held that "reckless indifference to human life" is as legally blameworthy as "intent to kill" when that recklessness results in the loss of life.[261] The *Tison* Court looked to the foreseeability of the resulting harm in the context of the defendants'

CRIMINOLOGY 483, 502 (1988) (concluding that prosecutors are more likely to seek the death penalty when a black kills a white than in other murder cases).

The exhaustive data compiled in the Baldus study was presented to the Court in McCleskey v. Kemp, 481 U.S. 279, 283-93 (1987). Although it assumed the study's statistical validity, in a 5-4 decision, the Court rejected McCleskey's Eighth and Fourteenth Amendment claims of arbitrariness and racial discrimination absent a showing that discrimination had actually influenced the results in that case. *See* BALDUS ET AL., EQUAL JUSTICE, *supra* note 46; Baldus et al, *Comparative Review*, *supra*, at 294-99, 306-20.

256. Payne v. Tennessee, 111 S. Ct. 2597, 2605 (1991); *see supra* notes 199-200 and accompanying text. This argument is essentially the same as that put forward by the dissenters in *Booth*. Booth v. Maryland, 482 U.S. 496, 519-20 (1987) (Scalia, J., dissenting); *see supra* notes 152, 155 and accompanying text.

257. *See Payne*, 111 S. Ct. at 2605. *But see* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1601-03 (1974) (characterizing the focus of criminal law on the actual harm caused as "irrational" because the harm may be unrelated to the defendant's moral blameworthiness).

258. *See* Schulhofer, *supra* note 257, at 1602-03.

259. 481 U.S. 137 (1987).

260. *See supra* notes 152, 155 and accompanying text.

261. *Tison*, 481 U.S. at 157; *see supra* note 152.

mental states.[262] Determining that the murder in that case was foreseeable, the *Tison* Court held that the defendants could be executed for the foreseeable, although not necessarily intended, harm that resulted from their acts.[263] Yet, neither *Tison* nor the hypotheticals used by the *Payne* Court justify the *Payne* Court's assertion that loss is determined by the identity of the victim, often a matter of chance, or by the existence of someone able to articulate the unique personal suffering caused by the crime. Instead, according to the *Payne* Court's reasoning, two equally brutal murders will have two different "consequences" and will thus be accorded two different levels of blameworthiness depending on the quality of the victim impact evidence presented.

Similarly, the *Payne* Court's judgment that victim impact evidence will not introduce arbitrariness into capital penalty trials is poorly reasoned. If a victim leaves behind no family to testify or if the victim simply is unsympathetic, the information may not be introduced. However, because no two equally aggravated or mitigated murders will affect a family in exactly the same way, the information contained in an offered VIS is highly arbitrary.[264] While it may be true that victim impact evidence is not introduced to *encourage* impermissible comparative judgments,[265] it may be impossible to determine when the information has that effect. On the other hand, that it will have some effect is not debatable. What reasonably compassionate person could help feeling an overwhelming sympathy for the victim or his or her family and a corresponding abhorrence for the defendant, after listening to the statements offered in *Booth*, *Gathers*, and *Payne*?

Similarly, the *Booth* Court's concern that the defendant will be unable to rebut the victim impact evidence has merit.[266] Not only may the defendant have difficulty finding witnesses willing to present negative testimony about the victim's character or the impact

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262. *Tison*, 481 U.S. at 157-58.

263. *Id.*

264. *See* Lodowski v. Maryland, 490 A.2d 1228, 1266-67 (N.J. 1985) (Cole, J., concurring). Judge Cole stated:

> [I]t is arbitrary to base a decision as to whether an accused should live or die on the basis of subjective impressions a widow has of the crime and the funeral . . . . [I]t is irrelevant to the death penalty decision that the daughter of a murder victim undergoes psychiatric treatment for the emotional injury caused by the offense.

Id. (Cole, J., concurring).

265. *See supra* text accompanying note 202.

266. Booth v. Maryland, 482 U.S. 496, 506-07 (1987); *see supra* note 131 and accompanying text.

on the victim's family, but, if the defendant is successful, this testimony may not have the desired effect. With life hanging in the balance, a jury may well suspect any rebuttal evidence the defendant presents.

The Supreme Court's decisions in *Booth* and *Gathers* were based on the tenet that "death is different." This principle requires courts to provide capital defendants with increased safeguards in order to ensure that sentencing decisions are based on fair and objective criteria. By overruling *Booth* and *Gathers* in *Payne v. Tennessee*, the Court casts aside that doctrine and holds that the Eighth Amendment permits arbitrary and capricious action on the part of a capital sentencing jury.

Booth, Gathers, and Payne were convicted for their acts of murder. For their crimes, they have been punished. For those who unfortunately follow in their footsteps, their punishments should not be arbitrarily influenced by the introduction of victim impact evidence into the sentencing hearing.

V. IMPACT

In the most superficial and immediate sense, the impact of *Payne* already has been felt. To date, courts faced with the constitutional admissibility of victim impact evidence have followed the *Payne* decision.[267] However, because the Court seems to relegate the "death is different" doctrine to the position of an interesting, though not highly significant, relic of capital sentencing jurisprudence, the *Payne* decision may have a substantial impact on capital sentencing procedures generally.[268]

While the decision in *Payne* was limited to evidence and argument relating to the victim and to the impact of the victim's death on the victim's family, the decision in *Payne* leaves open the question of the constitutional admissibility of the family's opinions of the defendant and of the appropriate sentence.[269] The *Payne* decision indicates that, should that specific issue arise once more before the Court, decisions on leniency could be influenced by the particular capital punishment attitudes of a victim's family.[270] Such a de-

267. *See, e.g.*, State v. Greenway, 823 P.2d 22 (Ariz. 1991); Watts v. State, No. 74-776, 1992 WL 157 (Fla. Jan. 2, 1992); People v. Howard, No. 65-473, 1991 WL 269121 (Ill. Dec. 19, 1991).

268. Ironically, in Harmelin v. Michigan, 111 S. Ct. 2680 (1991), decided on the same day as *Payne*, the Court used the "death is different" doctrine to justify the need for sentencing proportionality in capital cases but not in non-capital cases. *Id.* at 2701-02.

269. Payne v. Tennessee, 111 S. Ct. 2597, 2611 n.2 (1991).

270. As previously noted, victim impact forms often solicit such opinions. *See supra*

cision would allow yet another arbitrary element to invade the capital penalty determination.

VI. CONCLUSION

The Supreme Court's decision in *Payne v. Tennessee* is significant for a number of reasons. First, it contradicts the spirit of the Eighth Amendment death penalty cases by justifying the introduction of arbitrary, capricious, and inflammatory evidence into the sentencing phase of a capital trial. Second, by basing its decision almost exclusively on the arguments rejected by *Booth* and *Gathers*, *Payne* sets a dangerous precedent and justifies Justice Marshall's accusation that the change in the law was based on the change in the Court's personnel. The *Payne* decision indeed does raise the specter that a "campaign to resurrect yesterday's 'spirited dissents' will squander the authority and legitimacy of [the] Court as a protector of the powerless."[271] With its opinion that the role of *stare decisis* is at its lowest ebb in such cases, we can only wonder what decision the current Court will choose to reconsider next. "Power, not reason, is the new currency of this Court's decisionmaking."[272]

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notes 105-09 and accompanying text; *see also* State v. Sumpter, 438 N.W.2d 6, 9 (Iowa 1989) (noting, in a second-degree murder case, the natural assumption that "family members would be bitter toward a defendant . . . and that a hanging, if possible, would be appreciated"). *But see Pope's Plea Stops Execution*, N.Y. TIMES, Jan. 8, 1992, at A14 (reporting that Texas Governor Ann Richards, influenced by requests for clemency by the Pope, granted a last-minute stay of execution for a man sentenced to death for the rape and murder of a nun).

271. Payne v. Tennessee, 111 S. Ct. 2597, 2625 (1991) (Marshall, J., dissenting). Justice Marshall is not the only person to suggest that the rights of criminal defendants will be curtailed by the current Court. *See, e.g.*, Ted Gest, *Reining in Citizens' Rights*, U.S. NEWS & WORLD REP., Dec. 16, 1991, at 49.

272. *Payne*, 111 S. Ct. at 2625 (Marshall, J., dissenting).