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# Should the Characteristics of Victims and Criminals Count? *Payne v. Tennessee* and Two Views of Efficient Punishment

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# SHOULD THE CHARACTERISTICS OF VICTIMS AND CRIMINALS COUNT?: *PAYNE V. TENNESSEE* AND TWO VIEWS OF EFFICIENT PUNISHMENT

DAVID D. FRIEDMAN\*

The purpose of this Article is to investigate two interrelated issues. One is the question of how to use economic theory to construct an efficient set of criminal punishments. I will argue that a simple rule—set expected punishment equal to the damage done by the crime—provides a useful first approximation, but only a first approximation, to the correct answer.<sup>1</sup> The other question is how, if at all, punishment should be affected by the characteristics of criminal and victim. In answering that question, I hope to demonstrate both the usefulness and the limitations of the simple version of the economic theory of punishment, and the simple rule it implies, for dealing with several of the issues raised in a recent and controversial Supreme Court case—*Payne v. Tennessee*.<sup>2</sup>

Part I of the Article attempts to work out the economics of efficient punishment. Part II applies the analysis to the question of whether punishment ought to be affected by characteristics of the criminal—whether, for example, rich criminals should pay larger fines than poor criminals for the same crimes. Part III applies the analysis to the parallel question raised in *Payne*—whether punishment ought to be affected by characteristics of the victim. Part IV expands, from an economic viewpoint, on one issue raised by *Payne*—the possibility of varying punishment according to consequences, in order to selectively deter criminals who have some but not perfect knowledge of what the consequence of their crime will be. Part V considers a constitutional

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<sup>1</sup> Expected punishment is probability of punishment times amount of punishment. If offenders face a .1 probability of having to pay a \$1000 fine, their expected punishment is  $.1 \times \$1000 = \$100$ . If there are several different possible punishments for the same offense, then the expected punishment is probability times punishment summed over all the punishments. Thus if offenders face a .1 probability of a \$1000 fine and a .2 probability of a \$100 fine, their expected punishment is  $.1 \times \$1000 + .2 \times \$100 = \$120$ .

<sup>2</sup> 111 S. Ct. 2597 (1989).

issue raised by *Payne* and by the analysis of this Article—whether making punishment depend on the characteristics of the victim violates the requirement of equal protection, applied not to criminals but to victims. Part VI considers a problem in moral philosophy raised by *Payne* and this Article—whether it is just to make punishment depend on consequences of the crime that the criminal may not have anticipated.

### I. THE ECONOMICS OF EFFICIENT PUNISHMENT

A legal system may be evaluated in a variety of ways by economists, legal scholars or moral philosophers. Through most of this Article, however, I shall assume that it has only one purpose: economic efficiency.<sup>3</sup> I view a legal system as a set of rules designed to affect behavior. A change in legal rules is an improvement if the summed benefits to those affected, measured by their money equivalent, is larger than the summed losses, where the money equivalent of a benefit or loss is the largest sum the affected party would pay to receive the benefit or avoid the loss.

Seen from this perspective, what is wrong with crimes is that they occur even if they are inefficient. My willingness to buy a television set demonstrates that it is worth more to me than to its present owner, so a voluntary sale is an improvement and should be permitted. But I may be willing to steal a television set even if it is worth much less to me than to its present owner. Thus, inefficient theft may occur, and should be prevented.<sup>4</sup>

It seems to follow from this argument that we want to prevent only inefficient theft. If my stealing your television set produced a net benefit, even after allowing for associated costs (my time burgling, your expenses on burglar alarms), then changing the legal system to permit me to steal it would be an improvement.<sup>5</sup>

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<sup>3</sup> This is the same objective that Richard Posner describes as "wealth maximization." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12-16 (1990). See DAVID FRIEDMAN, *PRICE THEORY: AN INTERMEDIATE TEXT* 434-51 (2d ed. 1990), for a more detailed discussion of what it means and why it might be a desirable objective.

<sup>4</sup> One reason the television set is worth less to me may be that its value is net of the cost to me of stealing it—burglar's tools, time and effort spent breaking into a house, and the like. Economic analysis of the market for theft implies that marginal thieves get no net benefit; the cost to them of being thieves equals the value to them of what they steal, so the cost to their victims is a net loss with no benefit to balance it. See FRIEDMAN, *supra* note 3, at 565-69.

<sup>5</sup> This particular example is an implausible one. If your television set is worth more to me, there is no need for me to steal it; I can buy it instead. My gain from stealing it is only the money I save by not buying it from you. But that is equal to your loss, so after including the associated costs the theft is inefficient. It follows that if a crime is simply an involuntary substitute for a

One way of doing so is to set the expected punishment equal to the damage done. Criminals will commit crimes only if the value to them is greater than their expected punishment, hence greater than the damage, so efficient crimes and only efficient crimes will prove worth committing. Many discussions of efficient punishment argue either that this is what our legal system does or that it is what it should do.<sup>6</sup>

According to this view, a punishment for a crime<sup>7</sup> is simply a Pigouvian tax; like an emission fee for pollution, it forces actors to bear the cost of their actions. If a criminal commits a crime even though he knows that he will suffer an expected punishment equal to the damage done by his crime, that demonstrates that his benefit is greater than his victim's loss; the crime is efficient and ought not to be deterred.<sup>8</sup>

If this is right, the optimal expected punishment is simply equal to the damage done. All potential offenders whose benefit from committing the offense is less than the damage done will be deterred; they will face a punishment greater than their benefit, making the net return from the offense (benefit minus punishment) a loss. Potential offenders for whom the benefit is greater than the damage done will

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voluntary transaction, we would never expect it to be efficient. See FRIEDMAN, *supra* note 3, at 569-73; POSNER, *supra* note 3, at 14-16, 206-11, 220-22.

There are, however, involuntary transactions that have no voluntary substitute. Many are things we usually classify as torts, but some are crimes. If, for instance, I drive home after having two glasses of beer, I save myself a taxi fare but impose a cost, in possible death or injury, on every driver, rider and pedestrian along my route. Even if the savings to me is larger than the cost to them, there are severe transactional problems with trying to get all of them to agree to allow me to drive. Or consider an efficient assault. One can imagine a situation where one person is angry enough to attack another despite knowing that the resulting punishment will be a fine equal to the full damage done. A more exotic example would be efficient theft—by someone who enjoyed the excitement enough to more than make up for the associated costs. See POSNER, *supra* note 3, at 218.

<sup>6</sup> See POSNER, *supra* note 3, at 217-67. Posner suggests that expected punishment should be slightly above damage done to deter inefficient crimes and force criminals whose crimes would be efficient to substitute still more efficient market transactions, while permitting efficient crimes for which no good market substitute exists. *Id.*

<sup>7</sup> The analysis applies to civil damages as well as to criminal penalties. See David Friedman, *An Economic Explanation of Punitive Damages*, 40 ALA. L. REV. 1125, 1126 (1989). The same analysis could also be applied to administrative penalties and to sanctions used by a firm to control the behavior of its employees.

<sup>8</sup> Throughout my analysis, I assume that costs and benefits to criminals count, in social welfare calculations, just like costs and benefits to anyone else. This assumption has been questioned by a few scholars in the law and economics field, most notably George Stigler and Gordon Tullock, who suggest that benefits to criminals ought to be given no weight in such calculations. GORDON TULLOCK, *THE LOGIC OF THE LAW* 243 (1971); George Stigler, *The Optimum Enforcement of Laws*, J. POL. ECON. 526, 529 (1970). My reasons for rejecting this position are discussed in FRIEDMAN, *supra* note 7, at 1128-19.

face a punishment less than their benefit, making the offense a net gain. Hence they will commit it. Inefficient offenses are deterred, efficient offenses are not deterred, and so we have the efficient outcome.

If we are talking about speeding tickets, this sounds plausible enough. Presumably one reason we do not confiscate the cars of convicted speeders is that might be too effective a punishment. We are not sure we want everyone always to keep to the speed limit. When applied to offenses such as rape or murder, however, the efficient crime paradigm of enforcement strikes many legal scholars, especially those who are not economists, as both unrelated to the real legal system and morally bizarre. It implies, among other things, that the reason we do not impose stiffer penalties on convicted murderers is that we are afraid of having too few murders.<sup>9</sup> It also seems to imply that the optimal punishment for murder is an increasing function of the value of the victim—an issue that was central to the recent Supreme Court case of *Payne v. Tennessee*.<sup>10</sup>

#### A. *The Inefficiency of Preventing All and Only Inefficient Crimes*

The argument given above for setting expected punishment equal to damage done is wrong. The reason it is wrong is that it ignores the cost of preventing crime.<sup>11</sup> In order to impose a given expected punishment, we must catch some fraction of offenders and punish them. Both activities are costly. Typically, the cost per offense increases with both probability of apprehension and severity of punishment.<sup>12</sup>

It is obvious why the cost per offense increases with probability of apprehension. It takes more police to catch fifty murderers out of a hundred than to catch only twenty-five, and it takes more prosecutors and court time to convict them. To see why it also increases with the

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<sup>9</sup>This point, and to some extent this Article, were suggested to me by discussions with Stephen Schulhofer, themselves arising out of a correspondence between Stephen Schulhofer and John Lott.

<sup>10</sup>111 S. Ct. 2597 (1989).

<sup>11</sup>I am ignoring in this essay two other problems with the argument. The probability of apprehension, and hence the expected punishment, is different for different criminals, so even if we wanted to prevent inefficient and only inefficient crimes, there is no pattern of enforcement that would do so. In addition, some punishments, such as imprisonment or execution, not only provide an incentive not to commit a crime but also make it more difficult to commit further crimes. I am considering only deterrence, not incapacitation.

<sup>12</sup>This argument appears in David Friedman, *Reflections on Optimal Punishment or Should the Rich Pay Higher Fines?*, 3 RES. IN LAW AND ECON. 185 (1981). For a more recent discussion, see Friedman, *supra* note 7, at 1125–26. See also A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Welfare Implications of Costly Litigation for the Level of Liability*, 17 J. LEGAL STUD. 151 (1988).

severity of the punishment, it is worth thinking about what, from an economic standpoint, the cost of punishment means.

Suppose the punishment for an offense simply consists of the convicted offender paying a thousand dollar fine to the state. The cost to the criminal, which is what gives the punishment its deterrent effect, is a thousand dollars. But the net cost, what economists call "social cost," is zero. Every dollar the criminal loses the state collects. In this case, punishment cost, defined as the difference between the cost the punishment imposes on the criminal and the benefit it provides to others,<sup>13</sup> is zero.

What if a criminal cannot pay a fine high enough to provide the amount of deterrence we want to impose? In that case, instead of (or addition to) fining him, we imprison him—say for a year. Suppose a year's imprisonment is equivalent, from the criminal's standpoint, to a ten thousand dollar fine.<sup>14</sup> The cost the punishment imposes on them each is ten thousand dollars, but the enforcement system receives none of that. Instead, the enforcement system must spend money—say another ten thousand dollars—to pay the cost of the imprisonment. So the net cost of the punishment, the criminal's loss plus the enforcement system's loss, is twenty thousand dollars.

As we increase the size of the punishment we wish to impose, the number of offenders who can pay it as a fine decreases, forcing us to shift to more costly punishments such as imprisonment. So increasing

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<sup>13</sup> The benefit considered here is the direct benefit of the punishment—a fine received by the state, tort damages received by the victim in a civil case, the cost of running a prison (a negative benefit) or the like. It does not include the deterrent effect of the punishment, which is considered separately in the analysis. It does include benefits or costs that the victim, or others, receive from knowing that the punishment has been imposed. The death penalty might be a very inefficient punishment if many people in the society were made unhappy by the knowledge that a criminal had been executed.

Deterrence depends on expected punishment, but punishment cost per unit of punishment typically depends on the actual punishment employed. This is probably true of costs such as public disapproval as well as costs such as maintaining a prison. While economic theory focuses on the appropriate *expected punishment* for a given crime, the public, observing punishment but not probability, may well judge the system by the relation of the *actual punishment* to the crime. If so, then one effect of the victim impact statements discussed below may be to raise the perceived wickedness of the crime in the eyes of the jury, and thus raise the ceiling on the maximum punishment the jury is willing to impose. The effect is the same as if the jury were adjusting expected punishment—probability times actual punishment—in response to an increase in its perception of the damage done by the offense, because in either case the probability of imposing the death penalty rises, but the reason for the effect is different. This point was suggested to me by James Lindgren.

<sup>14</sup> When I say that one punishment is equivalent to another, I mean that they have the same deterrent effect. From the standpoint of utility theory, this is equivalent to saying that both punishments have the same disutility for the offender.

the severity of the punishment typically increases the punishment cost per offense punished.<sup>15</sup>

It is inefficient for me to steal a television set that is worth five hundred dollars to you and only four hundred dollars to me. But it is still more inefficient to prevent me from stealing the set if the cost of doing so is two hundred dollars additional expenditure on police, courts and prisons. The rule "prevent all inefficient offenses and only inefficient offenses" is correct only if doing so is costless. The economically correct rule is to prevent an offense if and only if the net cost from the offense occurring is greater than the cost of preventing it. It follows that if there is a positive cost to preventing an offense, an efficient legal system will let some inefficient offenses occur.

We now have an answer to one of the criticisms of the economic approach. The reason we do not increase the punishment for murder need not be that we are afraid we would then have too few murders. It may be, and probably is, that although we would like to prevent more murders than we do prevent (indeed, we might like to prevent all murders), the cost of doing so is more than we are willing to pay.<sup>16</sup>

The cost of preventing an offense may sometimes be negative. While cost per offense rises with increases in expected punishment, the number of offenses decreases, because the higher expected punishment deters some offenses that would otherwise have been committed. The fewer offenses that occur, the less must be spent to apprehend and punish offenders. If this second effect outweighs the increase in cost per offense, then raising the expected punishment lowers the total enforcement and punishment cost—a system with higher punishments (and fewer offenses) costs less than a system with lower punishments (and more offenses). In such a situation, the additional cost of deterring one more offense is negative, so it is efficient to prevent not only all inefficient offenses but some efficient ones as well. In the extreme, one could imagine a society where the penalty for shoplifting was death, with the result that there were no shoplifters and nobody ever had to be caught, convicted and executed.

As a less extreme example of a situation where the cost of preventing an offense is negative, consider an offense with the following characteristics:

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<sup>15</sup> A more rigorous form of the argument appears in Friedman, *supra* note 12, at 198.

<sup>16</sup> While my discussion will focus on direct costs of enforcement and punishment, one should also include costs such as the possibility that more severe enforcement will result in more innocent parties being convicted, or that increases in governmental powers designed to catch more criminals may be used in other and less desirable ways.

Cost to victim: \$1000 per offense

Cost per offense (enforcement plus punishment costs) of imposing an expected punishment of  $P:P/2$

Number of offenses if  $P = \$1000$ : 100/year

Number of offenses if  $P = \$1100$ : 50/year

To simplify the exposition, let the probability of conviction be one, making expected punishment  $P$  equal to actual punishment.

We begin with a penalty of \$1000; a hundred offenses are occurring each year. They are all efficient offenses; the fact that they are committed despite the penalty means that the offenders are getting more than \$1000 by committing them, so the offenders gain more than the victims lose. If we raise the penalty to \$1100 we will deter fifty efficient offenses a year. Each would have harmed the victim by \$1000 and benefited the criminal by something between \$1000 and \$1100. We know that the benefit to the criminal is at least \$1000 because he or she still commits the offense even when the expected punishment is \$1000. We know it is no more than \$1100 because the criminal does not commit it when the expected punishment is \$1100. The net gain from each of those offenses is between zero and \$100, so the loss from deterring fifty of them is between zero and \$5000. By deterring those offenses, however, we save the cost of catching and punishing the offenders. Imposing a \$1000 punishment on 100 criminals costs us \$50,000. Imposing an \$1100 punishment on 50 criminals costs \$27,500. By raising the punishment we have saved \$22,500 in punishment and enforcement cost. On net we are better off.<sup>17</sup>

The situation is shown by Table 1; everything except punishment is per year. Cost to victims is \$1000 (the injury per victim) times the number of offenses. Gain to criminals is the value to them of committing the offenses. Net cost is the loss to victims plus enforcement and punishment cost minus the gain to the criminals; our objective is to minimize it.

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<sup>17</sup>An even better solution would be to punish only the inefficient offenses. We would thus avoid both the cost of punishing the efficient offenses and the inefficiency of preventing them. But in order to know which offenses are efficient, we must somehow find out whether the criminal's gain is more or less than the cost imposed on the victim. The way we find out, just as on ordinary markets, is by charging a price—an expected punishment in the case of offenses—and seeing whether the criminal is willing to pay it. In order to do that we must impose the punishment on inefficient as well as efficient offenses.

Where there is some other way of identifying the efficient offenses, we can save the expense of punishing them. One example is the excuse of necessity. The hunter who, lost in the woods and starving, breaks into a locked cabin in order to telephone for help will not be treated like an ordinary trespasser.



Table 1

Expected Punishment	Number of Offenses	Cost to Victims	Gain to Criminals	Enforcement and Punishment Cost	Net not including E&P Cost	Net Cost
\$1000	100	\$100,000	X	\$50,000	\$100,000-X	\$150,000-X
\$1100	50	50,000	X-\$52,500	27,500	102,000-X	130,000-X

X is the total gain to the criminals if the punishment is \$1000 and 100 offenses occur each year. The value of the offense to the fifty offenders who would be deterred if we raised the punishment to \$1100 is between \$1000 and \$1100. For simplicity, I assume it is \$1050, making the total value to the criminals of the fifty offenses equal to \$52,500. So the total gain to the criminals falls to X - \$52,500 when we raise the punishment to \$1100, as shown in Table 1.

If we increase the punishment from \$1000 to \$1100, gain to criminals falls by more than cost to victims, because we are deterring efficient offenses, so net cost *not including enforcement and punishment cost* is higher with the higher punishment, as shown in the next to last column. But that is more than balanced by the drop in enforcement and punishment costs, so net cost, the final column, is lower with the higher punishment.

The table does not show the cost to the criminals of paying the punishment. If included, it would appear twice, once as a cost and once as a benefit, and so have no effect on the net cost. It is a cost to the criminals. If the punishment is \$1000, the net gain to the criminals is only X - \$100,000, because they are paying \$100,000 in fines as punishment for their offense. It is a benefit to the enforcement system that collects the fines. Punishment cost is the difference between what the criminal pays and what the enforcement system receives. With a punishment of \$1000, for example, the enforcement system receives \$100,000, \$50,000 of which goes to pay the cost of catching and punishing criminals.

We have now seen an example of a situation in which it is efficient to set an expected punishment higher than the damage done by the offense, thus deterring some efficient offenses. Generalizing the argument, we can show that the level of expected punishment should be set equal to the damage done by an offense only if the marginal cost of deterring one more offense is zero. If the marginal cost of deterring one more offense is positive, then expected punishment should be less than damage done; offenses that are only slightly inefficient, that injure the victim by only a little more than they benefit the criminal,

are not worth the cost of deterring. We expect marginal cost of deterrence to be positive for crimes for which an increase in expected punishment deters only a small fraction of offenses, so that we end up with almost as many offenses as before the increase and a substantially larger enforcement and punishment cost per offense. Such crimes are described, in economic terms, as in very inelastic supply.

If, on the other hand, the marginal cost of deterring one more offense is negative, if the sum of enforcement and punishment costs decreases as we increase the level of punishment, due to the decrease in the number of offenses to be punished, then the level of punishment should be more than the damage done. In such a situation, as in the example of Table 1, we are willing to deter a few efficient offenses in order to avoid the cost of punishing them. We would expect that situation to occur for crimes for which a small increase in expected punishment produces a large reduction in offenses—crimes in very elastic supply. For such crimes, the large reduction in number of offenses as we increase the punishment outweighs the increase in enforcement and punishment cost per offense.<sup>18</sup>

This solution to the problem of setting optimal punishments combines elements of two different intuitions: punishment equal to damage done and enough punishment to deter. If imposing punishment is inexpensive, the optimum is about equal to damage done—enforcement and punishment costs are unimportant, so we simply design our system to deter all inefficient and only inefficient crimes. If the supply of offenses is highly elastic at some particular level of punishment, so that below that level there are many offenses and above it very few, the optimal punishment is at the point where any further increase would have very little deterrent effect to balance its cost—just enough punishment to deter most offenses.

### B. *Efficient Punishment: A Formal Treatment*

The same argument can be put in a more precise mathematical form as follows. We define:

$\rho(b)$ : the density of offenses per year as a function of the gain  $b$  to the offender of committing the offense.<sup>19</sup>

$O(P) = \int_P^\infty \rho(b) db$ : the number of offenses per year whose perpetrators gain more than  $P$  by committing them. Since an

<sup>18</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), for an early discussion of the effect of the elasticity of the supply function for offenses on optimal punishment.

<sup>19</sup> I am making no assumption as to whether or not each offense is committed by a different

offense will be committed only if the gain is at least as great as the expected punishment,  $O(P)$  is the number of offenses that occur annually if the expected punishment is  $P$ .

$C(P)$ : the cost per offense of imposing an expected punishment  $P$ , using the least costly combination of actual punishment and probability. I assume that this does not depend on the number of offenses.

$D$ : the damage done per offense. For simplicity this too is assumed independent of the number of offenses.

We wish to find  $\hat{P}$ , the expected punishment which minimizes a social cost function:

$$\begin{aligned} SC(P) &= O(P)[D + C(P)] - \int_P^\infty b\rho(b)db \\ &= \int_P^\infty \rho(b)db [D + C(P)] - \int_P^\infty b\rho(b)db \end{aligned} \quad \text{(Equation 1)}$$

The first term on the right-hand side is the cost of crime—number of offenses multiplied by damage per offense plus enforcement cost (the cost of catching, convicting and punishing offenders) per offense. The second term is the benefit of offenses to the offenders. The integral starts at  $b = P$  because only crimes for which benefit to the criminal is at least equal to expected punishment will be committed.

Setting the derivative of  $SC(P)$  with regard to  $P$  equal to 0, we have, for  $P$  equal to its optimum value  $\hat{P}$ :

$$\begin{aligned} 0 &= D\rho(\hat{P}) + \frac{d[O(\hat{P})C(\hat{P})]}{dP} + \hat{P}\rho(\hat{P}) \\ &= \rho(\hat{P})[\hat{P} - D] + \frac{d[O(\hat{P})C(\hat{P})]}{dP} \end{aligned}$$

Solving for the optimal punishment  $\hat{P}$  we have:

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offender. Because I am considering only deterrence and not incapacitation, the analysis is the same for the case where all offenses are committed by the same criminal, the case where each offense is by a different criminal, or anything in between.

$$\hat{P} = D - \frac{1}{\rho(\hat{P})} \frac{d[O(\hat{P})C(\hat{P})]}{dP} \quad (\text{Equation 2})$$

Equation 2 is the mathematical equivalent of the result derived in the earlier verbal argument.  $O(P)C(P)$  is the total cost of imposing an expected punishment of  $P$  on  $Q(P)$  offenses. Deterring one more offense requires an increase in  $P$  of  $1/\rho(P)$  so  $1/\rho(P) \cdot d[O(P)C(P)]/dP$  is the cost of deterring one more offense. If  $P$  of  $1/\rho(P)$  so  $1/\rho(P) \cdot d[O(P)C(P)]/dP > 0$  at  $P = \hat{P}$ , then total enforcement cost is increasing with increasing punishment, and, as can be seen from Equation 2, the optimal punishment is less than the damage done. If  $1/\rho(P) \cdot d[O(P)C(P)]/dP < 0$  at  $P = \hat{P}$ , then total enforcement cost is decreasing with increasing punishment (due to the decrease in the number of offenses) and the optimal punishment is more than the damage done.<sup>20</sup>

### C. *Wrong Argument, Right Answer?*

My analysis so far implies that the simple description of efficient punishment is wrong. If our objective was economic efficiency, we would not, even if we could, choose to punish all inefficient offenses and only inefficient offenses.

Although this way of looking at efficient punishment is wrong, it is also useful. It provides a simple model that can be applied to a wide range of legal regulation of behavior. At some extremes, the model's description is a deceptive one—as when it implies that we are concerned about not deterring too many murders. But for much behavior—speeding, polluting, fining for overdue library books, arguably most of civil law—preventing inefficient behavior is a fairly good, although somewhat oversimplified, description of our objective.

Even in cases such as murder, where the literal application of the model may seem absurd, it still contains a considerable element of truth. The limiting factor in how many murders we deter is not our fear of deterring efficient murders. But, seen from the standpoint of economic efficiency, the reason we are willing to bear substantial costs in order to deter murder is that we believe it is (very) inefficient—that the gain to the murderer is typically much less than the loss to the victim.

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<sup>20</sup>The relationship between optimal expected punishment and damage done depends on how enforcement cost changes with expected punishment *at the optimum*. In general, the elasticity of the supply of offenses will be different at different values of  $P$ .

Even those who reject economic efficiency as a complete description of the objectives of our legal system should not reject it as a partial description. It may well be true that we would want to deter all murders (supposing we could do so costlessly) even if we believed that some were, in the strict economic sense, efficient.<sup>21</sup> But we would be a great deal less concerned with deterring murders if we did not believe that the costs of murder were large compared to the benefits.

Consider the following as evidence for that claim. There have been several famous shipwreck cases involving murder and cannibalism.<sup>22</sup> People who write and think about such cases find the punishment of such behavior much more troubling than the punishment of ordinary murder. That suggests that if the benefit of committing murder were much higher relative to the cost, if situations where individuals could preserve their own lives only at the cost of someone else's were common, we might have substantially different attitudes toward murder.

Alternatively, imagine a society where everyone regarded life after death—perhaps reincarnation—as a proven fact. To the members of that society the cost imposed by murderers on their victims would seem much lower than it does to most of us. I conjecture that in such a society murder would be considered less serious relative to other crimes—more nearly comparable to, say, grand larceny—than it is in ours.<sup>23</sup>

One reason the efficient crime model is useful is that it provides a simple picture that helps unify our view of legal sanctions. Its simplicity is an advantage, especially for expository purposes, over the more complicated, more correct, and more general model set out

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<sup>21</sup> Readers who cannot imagine how a murder could be efficient may find the following hypothetical of interest. A wealthy and bored big game hunter decides that the only animal dangerous enough to be really worth hunting is man. He accordingly offers a group of adventurers a million dollars each if each agrees that he may choose one of the ten at random and attempt to kill him. Ten adventurers accept the offer. The contract is a Pareto improvement—everyone concerned is better off, because the adventurers are each willing to accept a ten percent chance of being picked in exchange for a million dollars (assume nobody else knows about the contract). Yet many people would still believe that such a contract should not be enforced—that murder ought to be illegal even between consenting adults.

<sup>22</sup> See *The Queen v. Dudley and Stevens*, 14 Q.B. 273 (1884), discussed in POSNER, *supra* note 3, at 241–42.

<sup>23</sup> A further complication is that in such societies death may be a weaker sanction than in ours, at least if the offender expects an attractive afterlife—which may explain why heretics were often not merely executed, but executed in strikingly painful ways. See POSNER, *supra* note 3, at 229–30; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 221 (1980).

above. It is also an advantage over models that treat specific moral judgments, such as our opposition to murder or theft, as givens, rather than as conclusions to be derived from more general considerations such as economic efficiency. Its generality is an advantage over the alternative of considering separately offenses that we do not deter because they are efficient (some speeding violations) and offenses that we do not deter because it would cost too much to do so (some murders).

A second reason why the model is a useful one is that although it is quantitatively wrong, it is, for a wide range of cases, qualitatively right. It does not tell us what the punishment for any particular offense should be. But it does tell us, in most cases correctly, in what direction changes in the characteristics of the offense will move the optimum punishment.

If we actually used our theory to pick out offenses that should or should not be deterred, the two models would give different results. In practice, though, that is not how we use our theory, because we usually do not have an accurate measure of the benefit to the offender or the cost to the victim. Rather, we use the theory to produce qualitative conclusions, to argue, for instance, that certain offenses or certain offenders will, in an efficient system, be punished more severely than others.<sup>24</sup> If we believe that efficiency is desirable, we might also use the analysis to make qualitative recommendations—to argue that certain offenses ought to be punished more severely than others. As we will see, arguments of this sort can be transferred intact from the first model (efficient crimes) to the second. The quantitative conclusions change and additional factors become relevant, but the qualitative argument remains.

I have spoken in the abstract of how moving from one model to the other affects the conclusions. The rest of this essay provides a series of examples, showing both how an argument formulated in terms of the prevention of inefficient crimes remains relevant under the more sophisticated analysis and how the change introduces additional factors that might change the conclusion. I start with the question of how punishment should be affected by the income of the offender, and then go on to consider how it should be affected by the characteristics of the victim—the central issue in *Payne v. Tennessee*.

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<sup>24</sup> If we believe that efficiency is desirable, we might also use the analysis to make qualitative recommendations—to argue that certain offenses ought to be punished more severely than others.

## II. SHOULD THE RICH PAY HIGHER FINES OR RECEIVE SHORTER SENTENCES?

In an article published a few years ago in the *Journal of Political Economy*, John Lott argued that the tendency of our legal system to produce lower probabilities of conviction for higher income defendants is evidence for, not against, the economic efficiency of the criminal justice system.<sup>25</sup> His analysis used a model of efficient law enforcement in which expected punishment was set at a level designed to deter only inefficient crimes. His argument may be summarized as follows:

A month in jail, or a week in court, represents a larger dollar cost to someone with a higher income; measured in money, his time is more valuable. If rich defendants receive the same jail sentences with the same probability as poor defendants, then they are actually paying a higher (dollar) penalty. If the efficient penalty is equal to the damage done, it should be the same for rich and poor. It follows that an efficient legal system will either impose lower (non-money) penalties on richer defendants or impose them with lower probability. Our legal system does in fact impose lower expected (non-money) punishments on richer defendants; that is evidence in favor of the thesis that our system is economically efficient.<sup>26</sup>

How does the inclusion of punishment costs affect the conclusion that richer people should receive lower expected jail sentences? In the simplest case, it does not. If all the relevant functions—cost of apprehension, cost of punishment and elasticity of the supply of offenses—are the same for rich and poor, then Lott's argument goes through in this more complicated case. The optimal expected punishment is a particular amount of money, hence fewer days in jail (or an equal fine) for people with higher incomes.

Intuitively, that result makes sense. In Lott's model, imposing equal jail terms on rich and poor would mean either that rich people were being charged more than the damage done by their offenses (and

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<sup>25</sup> John Lott, *Should the Wealthy Be Able to 'Buy Justice,'* 95 J. POL. ECON. 1307-1316 (1987). We would also expect, from applying the simple model to differences in the money equivalent of the damage done rather than the money equivalent of the punishment, that fines for assaulting rich people would be higher than for assaulting poor people. Here again, one may believe that the result is unjust but also that it is correct—that in this regard our legal system does resemble an economically efficient one, whether or not it should. Such distinctions were an explicit element of the Anglo-Saxon law out of which our law developed.

<sup>26</sup> *Id.*

hence that some efficient crimes were being deterred) or that poor people were being charged less than the damage done (and hence that some inefficient crimes were occurring). In my model, equal jail terms would mean that the marginal offense committed by a rich person, while perhaps inefficient, would be less inefficient than the marginal offense committed by a poor person—hence less worth the cost of deterring. Both models imply equal fines for rich and poor, or unequal jail sentences.

The assumption that the functions are independent of income is, however, an implausible one, for several reasons.<sup>27</sup> One, at least, brings us back to one of the intuitions of those who believe that rich and poor should receive the same jail sentences—and that the rich should pay higher fines.<sup>28</sup> The supply function for offenses shows the number of offenses as a function of the expected punishment. If punishments are in money and rich and poor people have different values for money, we would expect the deterrent effect of a given punishment to vary with income.<sup>29</sup>

To make the argument more rigorous, it is worth distinguishing between two sorts of offenses—those that have a roughly equal payoff in utility for rich and poor and those that have a roughly equal payoff in money. Stealing \$100 provides the same amount of money to a rich person as to a poor person, so we would expect that the same fine would deter it. Indeed, because the time of the rich person is worth more dollars per hour than that of the poor, we would expect that if they are equally good thieves, so that it takes each the same amount

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<sup>27</sup> See generally Morris Raphael Cohen, *Moral Aspects of the Criminal Law*, 49 *YALE L.J.* 987 (1940).

<sup>28</sup> One scholar wrote:

Some crimes are attempts against the person, others against property. The penalties for the first should always be corporal punishments. . . . The great and rich should not have it in their power to set a price upon attempts made against the weak and the poor; otherwise riches, which are, under the laws, the reward of industry, become the nourishment of tyranny. . . . I shall limit myself to considering only the punishments to be assigned to noblemen, asserting that they should be the same for the first as for the least citizen.

CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 69–70 (Henry Paolucci trans., 1963) (1764). In this passage, Beccaria is arguing, in effect, for equal jail sentences rather than either equal fines or unequal jail sentences; he does not consider the possibility of unequal fines. He goes on to deal with the claim that the punishment really imposes a larger cost on a noble, because of his greater education and greater vulnerability to social stigma, by arguing that the proper measure of punishments is the public injury done and that greater damage is done by a crime “when committed by a person of rank”—presumably because of the bad example. His argument is in part consistent and in part in conflict with mine.

<sup>29</sup> For more detail, see Friedman, *supra* note 12, at 189.



of time to steal \$100, the rich man would be deterred by a lower fine than the poor.

Consider, however, an offense whose payoff, measured in money, is higher for richer offenders. One example would be saving ten minutes by speeding; another would be slugging someone who you were mad at. The money value of the offense is higher to the richer offenders, so it will require a higher (money) punishment to deter them.

Whether this implies a higher efficient punishment depends, in a somewhat complicated way, on the shape of the supply function for offenses and the related cost functions for deterrence.<sup>30</sup> Where the rule "impose just enough punishment to deter offenders" is a good approximation to the efficient rule, then the efficient system would impose higher (dollar) punishments on higher income offenders, because higher punishments are needed to deter them. The opposite result occurs if imposing the high expected punishment necessary to deter high income offenders is so costly that it is not worth deterring those crimes.

So far, the only difference between high and low income offenders I have considered is in the supply function for offenses. There is a second difference with less ambiguous implications. A fine is a more efficient punishment than a prison term, and richer offenders can pay higher fines. Even if neither offender can pay a sufficiently high fine, imposing a given dollar punishment via imprisonment requires fewer days in jail for a higher income offender, and is therefore cheaper. So punishment costs (per dollar of punishment) should decrease as income rises, which implies a higher efficient dollar level of punishment for richer offenders.<sup>31</sup>

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<sup>30</sup> See *id.* at 187-98, for an explanation and formal analysis.

<sup>31</sup> A similar argument might apply to the enforcement of rules regulating the behavior of firms. Suppose that any judgment above \$10 million will push a particular firm into bankruptcy. Further suppose that bankruptcy is a bad thing—the real value of the firm is greater as a going concern. In that case, a punishment of \$11 million (of which only \$10 million will be paid) is much more costly than a punishment of \$9 million. This would apply to criminal punishments, civil punishments and administrative penalties. In each case, punishment cost becomes large when the punishment reaches a level that creates a significant probability of bankruptcy and becomes infinite when it exceeds the liquidation value of the firm. It follows that it may be efficient to impose larger punishments on wealthier firms, even if the offense is the same.

Another application of the analysis would be to a firm attempting to control the behavior of its employees. Some employees can be punished for malfeasance by firing, denial of promotion or other internal sanctions. Others can only be punished by expensive legal procedures. The optimal sanctions for employee malfeasance and the appropriate level of precautions will vary accordingly.

### III. *PAYNE V. TENNESSEE*: DOES THE VALUE OF THE VICTIM'S LIFE MATTER?

*Today's majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion. Because our decision in Lockett . . . recognizes the defendant's right to introduce all mitigating evidence that may inform the jury about his character, the Court suggests that fairness requires that the State be allowed to respond with similar evidence about the victim. . . . This argument is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance.*<sup>32</sup>

On the face of it, Justice Stevens' argument seems compelling. Permitting the character of the victim, like the character of the defendant, to be introduced in evidence may be fair as between victim and defendant, but the victim in a criminal case is not a party to the suit. Insofar as fairness is relevant in that context, it is fairness between the defendant and the state. And, as pointed out elsewhere in the dissent,<sup>33</sup> the usual policy in criminal law is to try to tilt in favor of the defendant, in order to balance the superior power of the state.

There is, however, a sense in which the Court's position is correct. If, as I have been assuming, criminal law is intended to produce an efficient outcome, then decisions about imposing the death penalty involve balancing costs and benefits. One of the benefits is saving the lives of potential victims by deterring crimes that might have been committed against them.<sup>34</sup> One of the costs is executing criminals. The value of saving lives depends on the value of the lives saved; the cost of execution depends on the value of the life ended. A correct decision requires the jury to balance the value of the victim's life against the value of the defendant's life.<sup>35</sup> To that extent, the Court is right and Justice Stevens is wrong.<sup>36</sup>

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<sup>32</sup> *Payne*, 111 S. Ct. 2597, 2627 (1989) (Stevens, J., dissenting).

<sup>33</sup> *Id.* at 2627.

<sup>34</sup> Like most economists, I assume that increasing the penalty for a crime will tend to decrease its occurrence; I realize that some people disagree, and that there are other grounds on which the case for and against capital punishment can be, and is, argued.

<sup>35</sup> Throughout my discussion, I assume that the sentence is set by the jury, as was the case in *Payne*. Essentially the same arguments would apply if it were set by the judge instead.

In order to avoid misunderstanding, I should make it clear that I am not claiming that jurors (or judges) are necessarily trying to produce the economically efficient result, still less that they always succeed in doing so. My claim is only that the relation between the value of the victim and the value of the defendant is relevant both to the efficient decision and to the actual behavior of the jury.

<sup>36</sup> For a general overview of the history of capital murder and the attempt to determine which

This does not mean that murderers should be executed if and only if their lives are deemed by the jury less valuable than their victims' lives. Executing a particular murderer will not save his victim's life—that is already lost. The jury's willingness to execute a particular murderer for killing a particular sort of victim may, however, affect how many similar murders occur in the future. There is a tradeoff between murderers' lives and victims' lives, although not necessarily at a rate of one for one.<sup>37</sup>

To the extent that potential murderers know the value of the lives of their potential victims, the rule announced by the Court means that expected punishment as perceived by the offenders is an increasing function of the damage done by the offense, as efficiency requires. The murderer in *Payne* was aware of the fact which the prosecution used in arguing for the death penalty, that his victim was a mother with two small children.<sup>38</sup> In such cases the Court's rule will tend, *cæteris paribus*, to increase the protection that the law provides to mothers of small children, and to other victims whose death will impose large costs on their survivors. Someone contemplating killing such a person will expect a more severe penalty, and thus be more likely to be deterred.

The rule established by *Payne* would also permit such evidence to be introduced in cases where the offender was not aware of the relevant facts at the time of the murder. The dissent argued that this feature of the rule violated the Eighth Amendment because it could make the application of the death penalty depend on something irrelevant to the wickedness of the murderer's act.<sup>39</sup> A similar argument could be made from an economic standpoint. If murderers do not know the value of their victims' lives, then selective punishment will

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murderers ought to be executed, see MODEL PENAL CODE § 210.6 commentary, at 110–71 (American Law Institute 1985).

<sup>37</sup>Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Matter of Life and Death*, 65 AM. ECON. REV. 397, 414–15 (1975) (concluding that each execution deterred several murders).

<sup>38</sup>He was not aware that one of the children would survive, to be the subject of the prosecutor's oratory. The dissent did not, however, try to argue that, having done his best to kill all three victims, Payne should not be held morally responsible for the emotional pain to the one who survived.

<sup>39</sup>*Payne*, 111 S. Ct. 2627, 2629 (1989) (Marshall, J., dissenting). "Where, as is ordinarily the case, the defendant was unaware of the personal circumstances of his victim, admitting evidence of the victim's character and the impact of the murder upon the victim's family predicates the sentencing determination on factors . . . wholly unrelated to the blameworthiness of [the] particular defendant." *Id.* at 2619–20. The dissent also argued that, even if the defendant was aware of the relevant circumstances, presenting them to the jury would tend to produce a decision based on emotion rather than reason. *Id.* at 2620–21. The experience of reading the case, surely less moving than the experience of sitting through it, provides both evidence for this claim and a powerful argument in favor of the jury's decision.

not provide selective deterrence. Even if potential murderers know they will be punished more severely for killing certain kinds of victims, they do not know whether their potential victim is one of them.<sup>40</sup>

In this case, however, the Court's position can be defended in a slightly different way. Even if all victims are identical, so that the issue of selective deterrence does not arise, there is still the problem of deciding what the penalty for murder should be. A more severe penalty imposes larger costs on convicted murderers in order to deter crimes and reduce the cost to potential victims. Where the decision is whether to impose capital punishment for murder, the jury is deciding whether to sacrifice the life of a specific murderer in order to save the lives of generic victims. In choosing a penalty, the jury is implicitly balancing those costs and benefits.

If the legal rules present the defendant as a living, breathing human being with loving parents weeping on the witness stand, while presenting the victim as a shadowy abstraction, the result will be to overstate, in the minds of the jury, the cost of capital punishment relative to the benefit. The rule announced in *Payne* can be interpreted, not as a way of giving the jury information about the special value of one victim relative to other victims, but as a way of reminding the jury that victims, like criminals, are human beings with parents and children, lives that matter to themselves and others. That seems to be relevant information, if the jury is to decide whether the benefit of deterring some murders is worth the cost of executing some murderers.<sup>41</sup>

So far in this section I have not distinguished between the simple version of the efficient punishment model and the correct version. The reason is that both lead to the same conclusion. If our objective is to

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<sup>40</sup>If the criminal has some information about the value of the victim's life—knows, for example, that she is of an age at which she is likely to be a mother with small children—then selective punishment produces some selective deterrence, although less than if the criminal were perfectly informed about the victim. This point is discussed at greater length below.

<sup>41</sup>The point is demonstrated, unintentionally, by one of the briefs opposing the result eventually reached by the court:

In the case at bar, therefore, the prosecution could have argued to the jury that the perpetrator likely knew that, if by chance a child survived the attack, he or she would long for his or her mother or sibling.

The fact that the prosecution could have made this argument does not justify its formal presentation of Ms. Zvolanek's testimony in blatant violation of *Booth*. Her live emotional testimony that Nicholas did in fact cry for his mother, that he repeatedly asked for "my Lacie," and that he asked his grandmother if she "also missed Lacie" is markedly different from the prosecutor's merely drawing a general inference during an argument.

Brief of Petitioner, *Payne v. Tennessee*, 111 S. Ct. 2597 (1989).

prevent all inefficient murders by setting punishment equal to damage done, then the punishment for destroying a life should be higher when the life is more valuable. If our objective is to prevent murders whenever the cost of prevention is less than the net damage done by the murder, then we should be willing to pay the cost of more severe punishments—execution rather than imprisonment, for example—for murders that do more damage. The result in *Payne v. Tennessee* makes sense in terms of both the simple and the complicated versions of the model.

One feature of the decision that does not seem to fit either version of the efficient punishment model, however, is the Court's discussion of what "value of life" means.<sup>42</sup> The Court explicitly rejected the idea of comparing the value of one life to the value of another, and seemed to reject the idea of evaluating lives on any economic basis.<sup>43</sup> The dissent responded by arguing that, without such a comparison, evidence about the victims would tell the jury nothing they did not already know, and would introduce such illicit considerations as the victim's status in the community.<sup>44</sup>

One way of making sense out of the Court's position has already been suggested. If the objective of victim impact statements is not to give the jury special information about why one victim is more deserving than another, but rather to remind the jury of the value of the lives of victims, then no comparative judgment *among victims* is required. The comparative judgment is rather between the lives of victims and

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<sup>42</sup> *Payne*, 111 S. Ct. 2597, 2607 (1989).

<sup>43</sup> *See id.* *Payne* echoes the concern voiced in *Booth*'s case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. *Booth*, 482 U.S. at 506 n.8. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind. Rather, it is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think to be the loss to the community. The facts of *Gathers* are an excellent illustration of this: the evidence showed that the victim was an unemployed, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being. *Payne*, 111 S. Ct. at 2607.

In contrast, the amicus brief by the State of California argued for comparative judgments among victims: "Contrary to the assumptions in *Booth*, the harm to society may be greater depending upon the characteristics of the victim. The murder of a police officer, parent or child harms society more than the murder of a drug dealing child molester."

<sup>44</sup> *Id.* at 2620 (Marshall, J., dissenting). As another dissent noted, "The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others." *Id.* at 2631 (Stevens, J., dissenting).

the lives of their murderers. This interpretation seems more consistent with what the Court actually said than the alternative, in which victim impact statements are intended to provide the information necessary for selective deterrence.<sup>45</sup>

A second possible justification for the Court's position was implied by the Attorneys General of Tennessee and the United States in oral argument.<sup>46</sup> Even if juries cannot compare the life of one victim to the life of another, the victim is not the only injured party. If the effect of one murder is simply to kill the victim, while the effect of another is to kill the victim and orphan her two small children, one can argue that the latter is a more serious offense even though the lives of the victims themselves are equally valuable.<sup>47</sup>

If either of these interpretations is correct, then the Court, like the dissent, is rejecting one of the implications of the economic approach to criminal law. Where criminals are, or might be, aware of characteristics that affect the value of the lives of their victims, selective punishment would provide selective deterrence and thus make the criminal law more efficient. The result in *Payne v. Tennessee* will allow that to happen but only, to judge by the Court's dicta, as an unintended consequence.

#### IV. PUNISHMENT BY CONSEQUENCES: THE SELECTIVE DETERRENCE OF IMPERFECTLY INFORMED CRIMINALS

One argument made repeatedly in both *Payne* and the prior literature is that it is unjust to make the punishment of criminals depend on factors, such as characteristics of victims, of which they were unaware when they committed the crime.<sup>48</sup> A similar argument applies

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<sup>45</sup> Another possible interpretation of what is actually happening in cases like *Payne* is that the prosecution is establishing not the value of the victim's life, but the innocence of the victim. Jurors may be more likely to identify with victims who are entirely innocent than with those who were, in some sense, partly the cause of their own deaths. One example would be a drug dealer killed by a rival; a less clear one would be the victim in a marital quarrel. This point was suggested to me by Wendy Gordon. Such considerations were not raised by either the Court or the dissent.

<sup>46</sup> Tennessee Attorney General Burson distinguished during the hearing between "worth and sanctity of a human life," which is the same for all lives, and societal harm, which might vary from one victim to another. Transcript of Oral Argument at 38, *Payne v. Tennessee*, 111 S. Ct. 2597 (1989). United States Attorney General Thornburgh responded to a question by Justice Scalia, "It's not the characteristics themselves but what has resulted from the death of that individual in a loss to the victim, the family, and the community." *Id.* at 54.

<sup>47</sup> The civil law, in cases of wrongful death, has traditionally carried this argument even farther, basing damages upon the injury to everyone except the victim. The concept of "hedonic damages" represents a recent attempt to include in the calculation the value of the victim's life to himself.

<sup>48</sup> See *Payne*, 111 S. Ct. at 2628.

if one's concern is efficient deterrence. In most real cases, however, criminals are neither perfectly informed nor perfectly ignorant. Even someone who murders a stranger in the course of a robbery is likely to have some idea of the age and sex of the victim, which are relevant to the probability that the victim is a mother with small children. In less anonymous cases, the criminal is likely to have more information. In *Payne*, the only relevant pieces of information the criminal did not have when he committed the murder were that one of his victims would survive and the details of how that victim would react to the death of his mother and sister.

This raises the question of how the economic analysis of selective deterrence applies to a criminal with some, although imperfect, information.<sup>49</sup> The answer to that question provides another example of the general thesis of this essay—that the simple version of the economic analysis of optimal punishment gives a first approximation, but only a first approximation, to the result of the correct model.

In order to see that, consider a simple case. There are two types of victims—low-value victims and high-value victims.<sup>50</sup> The total damage done to everyone affected by a murder—the victim, survivors, other members of society—is  $H$  for a low-value victim and  $2H$  for a high-value victim. Each potential murderer  $i$  has a probability  $p_i$  that his victim is a low-value victim and  $1 - p_i$  that his victim is a high-value victim.<sup>51</sup> Each actual murderer has a .5 probability of being apprehended and convicted.<sup>52</sup> What is the consequence of making the punishment of a convicted murderer depend on the value of his victim? How does that legal rule compare, from the standpoint of economic efficiency, with the alternatives of either imposing the same punishment on all murderers or making the punishment depend upon what

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<sup>49</sup>In this discussion, I am taking the criminal's knowledge as given. One effect of a legal system that made the severity of punishment depend, in part, on the characteristics of the victim would be to give potential criminals an incentive to learn more about potential victims before deciding whether to kill them.

<sup>50</sup>At this point I am adopting the view the court rejected—that punishment should vary with the value of the victim's life. Readers who are uncomfortable with the idea that some victims are more valuable than others may wish to think of high-value victims as mothers with small children and low-value victims as ninety-year-old men with incurable cancer. Those who are still uncomfortable with the idea may wish to transfer the analysis to some less serious crime than murder, and consider it as applicable to the question of whether imperfectly foreseen harm should be considered in setting the sentence for that crime.

<sup>51</sup>The probability is a description of what potential murderers know when they decide whether to commit a murder. It is their knowledge that is relevant to their decisions, and it is their decisions that we are trying to affect by imposing a punishment in order to deter a crime.

<sup>52</sup>In a more elaborate analysis, one would want to let the probability of apprehension depend on the value of the victim; the police could, probably do, and in an efficient system probably would, try harder to apprehend murderers of victims whom they consider more valuable.

the court believes the murderer knew at the time of the crime—the court's estimate of  $p_i$ ?

We first consider this question in the context of the simple model. We assume there are no costs of punishment<sup>53</sup> or apprehension. Our objective, therefore, is to set the expected punishment equal to the damage done, deterring all inefficient crimes and only inefficient crimes. We do so by setting the punishment at  $2H$  for killing a low-value victim (expected punishment = probability of conviction  $\times 2H = H =$  damage done) and  $4H$  for killing a high-value victim.

Consider a potential criminal  $i$ . The expected harm the offense will do is the probability the victim is low-value times  $H$ , plus the probability his victim is high-value times  $2H$ , which is:

$$\text{Harm} = p_i \times H + (1 - p_i) \times 2H$$

If  $i$  commits the murder, his expected punishment is the probability his victim is low-value ( $p_i$ ), times the expected punishment for killing a low-value victim, plus the probability his victim is high-value ( $1 - p_i$ ), times the expected punishment for killing a high-value victim, giving:

$$\begin{aligned} \text{Punishment} &= .5 \times p_i \times 2H + .5 \times (1 - p_i) \times 4H \\ &= p_i \times H + (1 - p_i) \times 2H = \text{Harm} \end{aligned}$$

So expected punishment equals expected harm, whatever  $p_i$  may be.

To put the same analysis verbally, expected damage is a weighted average of actual damage, averaged over possible victims, expected punishment is a weighted average of expected punishment for killing a particular victim, also averaged over possible victims, and the weights ( $p_i$  and  $1 - p_i$ ) are the same in both cases, so if actual punishment equals actual damage, expected punishment will equal expected damage. Selective punishment thus results in the schedule of expected punishments that the court would impose if it knew  $p_i$  and could calculate the expected damage imposed by each murder and adjust the punishment accordingly.<sup>54</sup> That is a more efficient result than could be imposed directly by a court with anything short of perfect information about what each criminal knew when he committed his crime.<sup>55</sup>

<sup>53</sup> This assumption implies that criminals are risk neutral; an uncertain but otherwise costless punishment imposed on a risk-averse criminal would generate a cost of risk bearing.

<sup>54</sup> This appears to be the policy advocated by most of the opponents of the Court's decision in *Payne*, insofar as they are willing to accept the idea that the consequences of some murders are predictably more heinous than the consequences of others.

<sup>55</sup> Throughout this analysis I assume that any attempt at selective deterrence by a court must be based on the criminal's beliefs about the victim. One could imagine a system where a court was better informed than the criminal, *ex ante*, about the costs imposed by a particular offense,



Consider the limiting case where potential criminals know nothing about their potential victims. In that case,  $p_i$  is the same for all  $i$ , say .5. Each criminal faces an expected punishment of  $(3/2)H$ , equal to the expected harm done by the crime. The criminal has one chance in four of being convicted of killing a low-value victim (punishment  $2H$ ) and one chance in four of being convicted of killing a high-value victim (punishment  $4H$ ). Because criminals are assumed to be risk-neutral, this is equivalent to a system where all criminals who were convicted (probability one-half) received a punishment of  $3H$ .

In the worst case for selective punishment, where criminals have no information about their victims, or the best case for punishment based on criminals' knowledge, where the court has perfect information about each criminal, punishment according to outcome (what sort of victim actually got killed) is no worse than the alternatives. In any other situation it is better.

What happens to this result in the more sophisticated model, where we include in our calculations the cost of catching and punishing criminals? The answer is that the argument carries over in a qualitative but not a quantitative sense. It is still true that selective punishment results in a higher expected punishment for criminals whose victims are more likely to be of high value, and that a higher punishment for those criminals is desirable. But it is no longer true that selective punishment produces the optimal result, nor that it is better than the alternatives as long as criminals have some information, however little, about their victims, and courts have less than perfect information about criminals. This is true for two reasons. The first is that, although an efficient system will, *ceteris paribus*, impose higher punishments on offenses that do more damage, the relation is no longer one of simple proportionality between damage done and efficient punishment. The optimal expected punishment, for reasons explained above, is damage minus the cost of adjusting the schedule of punishments (and enforcement) to reduce the number of offenses by one.<sup>56</sup> That cost will generally be different at different levels of

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and conveyed that information to the potential criminal by announcements about its penalty schedule. For example, the court might, as some legislatures do, announce that the lives of police officers are especially valuable, and therefore the penalty for killing one is death.

In my analysis, I am concerned with how a court uses the criminal's knowledge about the victim to provide selective deterrence—either by basing punishment on what the court thinks the criminal knew, or by basing punishment on the actual outcome and relying on the effect of that policy working through the criminal's probabilities for the alternative outcomes. See David Friedman, *Deterring Imperfectly Informed Tortfeasors: Optimal Rules for Penalty and Liability* (1992) (manuscript available from the author).

<sup>56</sup> See Equation 2 *supra* and accompanying text; see also Friedman, *supra* note 12, at 190–92.

punishment. There is no reason to expect that an offense doing twice as much damage should be punished exactly twice as severely. The optimal punishment might be three times, or only one and a half times, as large.

Criminals, in calculating the expected punishment they face, average the punishments for killing the two different kinds of victims, using as weights the relevant probabilities. But the optimal punishment calculated using the more sophisticated model is not simply the weighted average of the two punishments. Therefore, expected punishments that criminals calculate will vary in the right qualitative way—they will be higher for criminals who have a higher probability of killing high-value victims and thus doing more damage—but they may well be different from the optimal punishments that would be set by a court that had all the information the criminals had and used that knowledge to make punishment depend on what the criminal knew at the time of the offense.

The second reason why selective punishment is no longer necessarily optimal is that, once we introduce punishment costs, different patterns of punishment that are equivalent from the standpoint of the criminal may no longer be equivalent from the standpoint of the rest of society—instead, they may have different costs. To see the relevance of this, again consider the case where criminals have no information about their victims, with  $p_i = .5$  for all  $i$ . With selective punishment, criminals who are convicted face a .5 chance of the punishment for killing a high-value victim, plus a .5 chance of the punishment for killing a low-value victim. Even if this punishment lottery happens to produce the right expected punishment, it may not be the least expensive way of doing so. It might be less expensive to choose an intermediate punishment and impose it on all offenders.

Consider the following example. It may well be that execution, because of the repulsion toward killing in our society, is a much more inefficient punishment than imprisonment—one that imposes a larger cost per unit of deterrence.<sup>57</sup> Suppose that, from the standpoint of the criminal, life imprisonment is exactly equivalent—exerts the same deterrent effect—as a fifty percent chance of execution combined with a fifty percent chance of a ten-year sentence. If so, and if the social cost of the latter alternative is higher than the social cost of the former,

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<sup>57</sup>Here, as in most (but not all) of the law and economics literature, the social cost of the punishment includes both the cost to the criminal (his life, in the case of capital punishment) and the cost to others, including moral revulsion, the cost of running prisons, the hangman's fee, etc.

then selective punishment of completely ignorant criminals (execution for killing a high-value victim and ten years for killing a low-value victim) provides the same deterrence as unselective punishment (life for all murderers), but at a higher cost.<sup>58</sup>

In this case, as in the case discussed earlier where punishment might vary with the income of the criminal, the simple model of deterring all inefficient crimes and only inefficient crimes gives us an approximation of the right answer, but only an approximation. The argument and the conclusion carry over to the sophisticated model, but only approximately. If criminals know a good deal about their potential victims ( $p_i$  varies substantially with  $v_i$ ), and courts do not know much about what criminals know (courts do not have good information about  $p_i$ ), selective punishment based on victim characteristics is probably more efficient than either unselective punishment (all murderers get treated equally) or selective punishments based on the court's estimate of the criminal's knowledge at the time of the crime. If criminals are badly informed, or if courts are well informed about what criminals know, selective punishment based on victim characteristics is still superior in the simple model, but not in the sophisticated model.<sup>59</sup>

I have discussed this question in the context of capital punishment for murder, because that was the issue raised by *Payne*, but the analysis applies more generally. The argument of this section provides both an economic justification for making the severity of the punishment imposed for a crime (or the amount of damages awarded for a tort) vary with the damage done and a qualification to that justification in situations where offenders are badly informed about the consequences of their acts and courts are well informed about the minds of offenders.

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<sup>58</sup> Such a situation is particularly likely if one of the alternatives has a very low probability but a very high cost. Consider a crime, such as replacing the medicine in a bottle with aspirin or putting a sub-lethal dose of poison on Chilean produce in a U.S. grocery store as a protest against the policies of the Chilean government, which usually does no significant damage but has a small probability of killing someone. The equivalent of selective deterrence would be a policy of punishing the perpetrator according to the damage done—a small fine most of the time, and execution if someone dies. It may be less costly and more effective to instead impose a moderately severe punishment based on the expected damage. A version of this example was suggested to me by David Emmanuel.

<sup>59</sup> This result must be stated in such an imprecise form because I have not specified the actual form of the relevant supply curve (of offenses as a function of expected punishment) and cost curves (for punishment, apprehension and conviction). If the additional term in the optimal punishment calculation added by the existence of these costs varies only slightly over the relevant range of punishments, then the sophisticated model gives almost the same result as the simple model. In that case, either a very well-informed court or a very badly informed set of criminals would be necessary to make selective punishment by victim less efficient than selective punishment by a court's estimate of each criminal's knowledge.

In the context of tort law, the same argument provides a justification for the familiar rule that the tortfeasor takes his victim as he finds him.<sup>60</sup>

Throughout the discussion, I have assumed that after the offense has occurred it is possible to measure the consequences, and that it is therefore at least possible, although not necessarily desirable, to make the punishment depend on the damage done. There are some interesting cases where that is not possible. Many, such as pollution, are handled through the regulatory system. The emission of a particular pollutant at a particular place and time may do no damage at all, or it may result in someone dying who would otherwise have lived. Punishment is based on some *ex ante* estimate of expected cost, because actual cost can usually not be measured. A similar problem occasionally arises in tort law, as in the DES cases,<sup>61</sup> where it was impossible to assign liability for particular injuries to particular defendants.

#### V. PAYNE, MCCLESKEY, AND EQUAL PROTECTION FOR VICTIMS

Neither the *Payne* Court nor the dissent discussed in detail the reasons for rejecting comparative judgments among victims, and hence selective deterrence. One obvious candidate is the general norm of equal protection, as embodied in the Fourteenth Amendment to the U.S. Constitution.<sup>62</sup> This possibility is suggested by the evidence offered by the defense in another case, *McCleskey v. Kemp*.<sup>63</sup>

In *McCleskey*, a Georgia trial court convicted a black man of the murder of a white police officer.<sup>64</sup> Appealing his conviction and death penalty, the defendant claimed that the Georgia capital sentencing process was racially discriminatory in violation of the Eighth and Fourteenth Amendments.<sup>65</sup> From the standpoint of the present discussion, one striking feature of that case is the failure of either the majority or minority opinions to apply the principle of equal protection to the protection of potential victims. To see why one might have expected that issue to arise, it is worth reviewing the evidence offered:

In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski,

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<sup>60</sup> This issue is discussed at greater length in Freidman, *supra* note 55. For a somewhat different view, see A. Mitchell Polinsky, *Optimal Liability When the Injurer's Information About the Victim's Loss Is Imperfect*, 7 IRLE 139-47 (1987).

<sup>61</sup> See, e.g., *Murphy v. E.R. Squibb & Sons, Inc.*, 710 P.2d 247 (1985); *Sindell v. Abbott Labs.*, 607 P.2d 924 (1980).

<sup>62</sup> U.S. CONST. amend. XIV.

<sup>63</sup> 481 U.S. 279 (1986).

<sup>64</sup> *Id.* at 279.

and George Woodworth (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

. . . Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants.<sup>66</sup>

The defense argued that this evidence showed an unconstitutional discrimination against black defendants. On the evidence presented, the direction of the discrimination is ambiguous. Black murderers appear slightly more likely to receive a death sentence than white murderers, all other things held constant—including the race of the victim. But black murderers, on average, kill black victims—with the result that actual black murderers are substantially *less* likely than actual white murderers to receive a death sentence—4 percent versus 7 percent.<sup>67</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 286.

<sup>67</sup> "Most black victims are killed by black murderers, and a disproportionate number of murder victims is black. Wherefore the discrimination in favor of murderers of black victims more than offsets, numerically, any remaining discrimination against other black murderers." Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 961 (1985). "Those who demonstrated the pattern seem to have been under the impression that they had shown discrimination against black murderers. They were wrong. However, the discrimination against black victims is invidious and should be corrected." *Id.* at 961 n.23. Gary Kleck found that the risk of a death sentence was higher for a white defendant than a black defendant throughout the period

What is unambiguous is the discrimination against black victims.<sup>68</sup> The evidence suggests that, all other things held constant, the murderer of a white victim is more than four times as likely as the murderer of a black victim to receive a death sentence. If we take murders as they occur, rather than trying to use statistical methods to control for factors that correlate with race, the actual murderer of a white victim in Georgia was about eleven times as likely as the murderer of a black victim to receive the death penalty.<sup>69</sup>

The Fourteenth Amendment to the Constitution provides: “. . . nor shall any State . . . deny any person within its jurisdiction the equal protection of the laws.”<sup>70</sup> Part of the protection I receive from the law, arguably the most important part, is the protection provided by a legal system that punishes crimes committed against me. One important argument in favor of the death penalty is that it deters more effectively than lesser punishments. If so, then the evidence presented in *McCleskey* strongly suggests that blacks in Georgia get substantially less protection of the law from murder than do whites. It seems odd that neither the Court nor (with one partial exception) the minority in the case discussed that issue.<sup>71</sup>

The Court in *McCleskey* neither explicitly accepted nor rejected the proposition that a judicial system whose policies resulted in less

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1967–1978, presumably because of discrimination by race of victim. Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 797–98 (1981).

<sup>68</sup> See Norval Morris, *Race and Crime*, 72 JUDICATURE 111 (1988). For a survey of the various studies, see Samuel R. Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275 (1985). The author concludes, “The scientific implications of these studies are simple. The evidence indicates, unmistakably, that there has been substantial discrimination in capital sentencing by race of victim, at least in those states that have been extensively studied.” *Id.* at 1282.

<sup>69</sup> “All [Baldus’s models] showed race-of-victim disparities, virtually all of which were highly statistically significant. Many showed race-of-defendant disparities as well.” *McCleskey v. Kemp, Statement of the Case: Petitioner’s Record Evidence*, in 171 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 468–69 (Philip B. Kurland & Gerhard Casper eds. 1988). Race of defendant disparities also regularly appeared, although not with the invariable consistency of the victim statistics.

<sup>70</sup> U.S. CONST. amend. XIV, § 1.

<sup>71</sup> The one exception is a passage in Justice Blackmun’s dissent which raises the issue of unequal protection of potential victims but does not apply it to the case under discussion. See 481 U.S. 279, 346 (1987) (Blackmun, J., dissenting) (discussing history of discriminatory law enforcement during post-Civil War era). The Court did not discuss the implication that Georgia’s law might be unconstitutional because it failed to protect black potential victims. Thus the Court wrote: “Similarly, since *McCleskey*’s claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys.” *Id.* at 317.

It is possible that the Court ignored the issue on the grounds of lack of standing, as

protection for blacks than for whites violated the Fourteenth Amendment. If the Court had rejected that proposition, it might still have accepted the weaker claim that features of a legal system deliberately designed to provide different levels of protection to different potential victims were unconstitutional. Even if it is obvious that the law does not, in practice, protect everyone equally, it may still be improper to make stronger protection for more valuable lives an explicit justification for a legal rule. If the objective of criminal punishment is deterrence, then using selective punishment to produce selective deterrence implies that the law is deliberately choosing to protect some potential victims more than others. If so, that would provide an explanation of the Court's unwillingness to base its defense of victim impact statements on their ability to provide selective deterrence.

The dissent hints at a slightly different reason. If it is appropriate to impose especially high punishments on the murderers of especially valuable victims, then it would seem equally appropriate to impose especially low punishments on the murderers of especially worthless victims. This raises the specter of a system where sufficiently unpopular people—prostitutes, drug users and members of unpopular religious, racial, or political groups—could be killed with impunity.<sup>72</sup>

One way that a court might try to deal with this problem would be by creating a legal rule that permitted victim impact statements by the prosecution but not by the defense—a possibility discussed in the oral argument.<sup>73</sup> Because the prosecution would presumably be trying to get as high a punishment as possible, only evidence favorable to the victim would be introduced. Aside from due process concerns, this raises interesting difficulties of a game—theoretic nature.

### A. *Will Prosecutors Tell All?*

Suppose we have a legal system in which the prosecution, but not the defense, may introduce evidence on characteristics of the victim.

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McCleskey was a murderer, not a victim. But, as the recent case of *Powers v. Ohio*, 111 S. Ct. 1364 (1989), shows, a convicted criminal can sometimes succeed in raising a *jus tertii* defense based on the violation of someone else's rights.

<sup>72</sup> See, e.g., Lisa Belkin, *Texas Judge Eases Sentence for Killer of 2 Homosexuals*, N.Y. TIMES, Dec. 17, 1988, § 1, at 8 (thirty-year sentence for murders of two homosexuals explained by: "I put prostitutes and gays at about the same level. And I'd be hard put to give somebody life for killing a prostitute."). From the standpoint of economics, if not of justice, this is a problem of jury error. There is nothing inefficient about a system where the punishment for ending a life with little value—say the life of someone who is dying from cancer and has only a few days left—is relatively low. The problem is that the jury may be measuring, not how much the victim's life is worth, but how much it is worth to the jury—which is a very different thing.

<sup>73</sup> See *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). The Court held that certain negative

Further assume that the objective of each prosecutor is to get as severe a sentence as possible in the case currently being prosecuted, and that juries are fully rational and aware of how prosecutors behave. Finally, assume that the characteristics of victims can be ranked by their potential effect on the jury, and that prosecutors are aware of the ranking; they know how juries will react to the facts about particular victims. How will prosecutors behave?

Suppose a prosecutor follows a policy of only introducing evidence on the characteristics of a victim if the victim is "above average"—if the information will lead the jury to impose a more severe sentence than if the jury knew nothing at all about the victim. The problem with this policy is that having the jury know nothing at all about the victim is not one of the prosecutor's options, because the jury can get information not only from what the prosecutor says but from what the prosecutor does not say. When the prosecutor chooses not to introduce evidence on the characteristics of the victim, a rational jury will deduce that the victim must be below average. The jury will therefore treat the victim about whom it has been told nothing not as an average victim but as an average unattractive victim—and reduce its sentence accordingly.

To make the argument more precise, imagine that we rank the victims on a percentile scale, with the most attractive victim rated 1.00, the median victim 0.50, and the least attractive 0.00. Prosecutors pick some  $X$  between 0 and 1 and introduce evidence on the victim's characteristics if and only if the victim rates above  $X$ . If the prosecutor does not introduce such evidence, a rational jury aware of how prosecutors behave will conclude that the victim ranks between 0 and  $X$ , and will base the verdict on an average victim, ranking about  $X/2$ .

Consider a prosecutor in a case where the victim ranks slightly below  $X$  but above  $X/2$ . Such a prosecutor can expect to get a more severe sentence by revealing the victim's characteristics to the jury than by keeping them secret. So a strategy of only introducing evidence for victims who rank above  $X$  is unstable—it pays a prosecutor to break the rule by introducing evidence on any victim slightly below the cutoff. The argument applies as long as  $X$  is greater than zero. The only stable strategy is for prosecutors to introduce evidence on the characteristics of all but the least attractive victims.

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information about the offender (his membership in a prison gang called Aryan Brotherhood) could not be introduced in the sentencing stage of the trial, even though all positive evidence could be. The Court based its decision on First Amendment grounds, but Justice Thomas, the lone dissenter, argued that the case created a double standard allowing defense lawyers to point out good associations but forbidding prosecutors from pointing out bad ones.



This analysis assumes that prosecutors, in deciding whether to introduce evidence in a case, consider only the effect on the outcome of that case. A single prosecutor controlling all cases would realize that lowering  $X$  in order to get a better result in one case would produce a worse result in cases where he or she chose not to reveal the information, because a lower  $X$  would result in a lower estimate by the jury of the attractiveness of victims whose characteristics were not revealed.

In such a situation, the two effects on the average verdict of changes in  $X$  tend to balance each other. For each victim, there is a penalty that a fully informed jury would give to the victim's killer. If the penalty chosen by a jury ignorant of the victim's characteristics is simply its desired penalty averaged over the characteristics the victim might have had, the balancing is exact; with more complicated jury preferences it is not.<sup>74</sup> In the simple case, at least, a single prosecutor controlling all cases would be indifferent to the level of  $X$ , unless the prosecutor, like the jury, was in favor of giving more severe punishments to defendants who had killed more attractive victims, in which case the prosecutor would set  $X = 0$  and reveal all.

In a system with many prosecutors, where jurors know the behavior of prosecutors in general but not of an individual prosecutor, and each individual prosecutor is more concerned with the severity of his or her sentences than with the severity of the sentences won by other prosecutors, the incentive for a prosecutor to lower  $X$  is stronger. Most of the undesirable effect of lowering  $X$  in a particular case is borne by other prosecutors in other cases, so the gain to a prosecutor from lowering  $X$  for his or her cases will almost always be less than the loss, making the only stable situation one in which  $X = 0$  and juries are fully informed of the characteristics of victims.

So there is reason to believe that rational prosecutors dealing with rational juries would find themselves driven to tell all—to reveal the characteristics of all but the least attractive victims. Rational juries would then deduce that any case in which the prosecution did not provide a victim impact statement involved an extraordinarily unattractive victim, and set the sentence accordingly. In such a situation, giving only the prosecution the power to introduce evidence on victim characteristics would not be sufficient to protect unattractive victims.

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<sup>74</sup>For instance, jurors may be more or less willing to impose a given average level of punishment if they believe that it will go selectively to those who have killed particularly valuable victims. One could imagine a juror who considered it very important to deter killers of young mothers, but only moderately important to deter killers of old men. With no information on victim characteristics, this juror would favor the death penalty for all murderers, in order to get a sufficiently high level of deterrence against those who killed young mothers.

If this argument is correct, there may be no way of achieving the efficiency gains of selective deterrence without the cost of permitting juries to effectively nullify the law against murdering unpopular people. This would be a strong argument against the result in *Payne* if there were no other way in which juries could achieve that undesirable result. Unfortunately, that is not the case. One of the costs of a jury system is the potential for jury nullification of good laws as well as bad ones.

#### VI. PUNISHMENT BY DESERT OR PUNISHMENT BY CONSEQUENCE: THE PROBLEM OF MORAL LUCK

A second issue suggested by *Payne v. Tennessee* raises some philosophical puzzles about what ought to determine punishment. The dissent argued that, at least in the case of capital punishment, the only thing that matters is the blameworthiness of the particular defendant. If, as may often be the case, murderers do not know much about the victims when they decide to kill them, then the victims' characteristics are irrelevant to how wicked the criminals are and should be irrelevant to the criminals' punishment. A victim impact statement, in those cases where the criminal did not know the victim, makes the murderer's punishment depend on morally irrelevant factors, and should therefore be prohibited.

In order to fit this argument into the discussion of this Article, I now drop the assumption that economic efficiency is the only value by which legal rules ought to be judged. Suppose we assume, instead, that efficiency and justice are distinct goals, and that both are desirable. We may be willing to accept some reduction in efficiency in order to make our system more just, and we may be willing to accept some reduction in justice in order to make the system more efficient. How will this change in our assumptions alter our conclusions so far as the question of punishing by results is concerned? If it is just to impose a more severe punishment on a criminal who has done more damage, then that reinforces any efficiency arguments in favor of punishment by consequences. If, on the other hand, the only just basis of punishment is the nature of the act as perceived by criminals when they commit their crimes, that is an argument for basing punishment on the best estimate the court can make of *ex ante* expected injury rather than on the court's observation of *ex post* actual injury—even if we conclude that the latter rule would be more efficient.

On the face of it, the moral argument against basing punishment on actual consequences seems to apply to all crimes and punishments,

not merely murder and execution.<sup>75</sup> If punishment ought to be a function of how blameworthy the criminal is, then punishment should never be affected by factors that the criminal did not know about or could not control. That sounds persuasive, but it does not describe how our system actually works.<sup>76</sup> Indeed, it probably does not describe how any legal system actually works. A drunk driver who runs into a tree is subject to considerably less severe sanctions than one who runs into a pedestrian. A gunman whose victim survives is guilty of attempted murder; one whose victim dies is guilty of actual murder. The blameworthiness is the same, but the penalty is different.<sup>77</sup> In a wide range

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<sup>75</sup> Richard S. Murphey, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303 (1988). The author argues that, on a retribution theory of punishment, the harm criminals actually cause is irrelevant to the punishment they deserve, and that the "Supreme Court's decision in *Booth*, by holding that victim impact statements are *per se* irrelevant to the capital sentencing decision, is completely consistent with and in fact required by the retributivist model of punishment." *Id.* at 1309.

<sup>76</sup> H.L.A. Hart noted:

The almost universal tendency in punishing to discriminate between attempts and completed crimes rests, I think, on a version of the retributive theory which has permeated certain branches of English law. . . . This is the simple theory that it is a perfectly legitimate ground to grade punishments according to the amount of harm actually done, whether this was intended or not. . . . To many people such a theory of punishment seems to confuse punishment with compensation. . . . Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked? I may be wrong in thinking that there is little to be said for this form of retributive theory. It is certainly popular . . . .

H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 130-31 (1968).

<sup>77</sup> J. WAITE, THE PREVENTION OF REPEATED CRIME 8-9 (1943).

Obviously this apportionment of punishment [for attempt] can be explained only by an assumption that to some extent it is designed for retribution. If the law's purpose were merely preventive, it would apply to the act done the same consequence, regardless of whether the act were successful or unsuccessful, since its objective would be the prevention of acts likely to result in harm. The fact that the punishment for success is twice as severe as the punishment for an unsuccessful attempt must mean that the additional suffering consequent upon success is a matter of expiation of retribution because of that success.

*Id.* Waite's claim that a system of punishments designed only for deterrence must impose the same punishment for an unsuccessful attempt as for a completed crime is wrong. To see why, apply the analysis of optimal punishment for the killing of high-value and low-value victims given above to the case of murder (high injury—corresponding to killing a high-value victim) and expected murder (low injury—corresponding to killing a low-value victim). Waite's point is valid, however, if we take it as demonstrating that differential punishments for attempts, if based on desert rather than deterrence, implies that desert is affected by consequences.

The Model Penal Code ("MPC") takes a different approach. MODEL PENAL CODE § 5.05(1) (American Law Institute 1985). The MPC provides: "Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense that is attempted or solicited or is an object of the conspiracy. An attempt, solicitation or conspiracy to commit a [capital crime or a] felony of the first degree is a felony of the second

of civil and criminal cases, the sanction visited upon an offender depends in part on things that have little or nothing to do with how bad a person he is.<sup>78</sup>

This paradox—that punishment does, and that to most people it seems that punishment should, depend on factors unrelated to how wicked the crime shows the perpetrator to have been—has long concerned philosophers writing about both moral desert and legal punishment. Current discussions often include it in the more general category of “Moral Luck.”<sup>79</sup> The case in favor of ignoring luck in moral judgments was made by Immanuel Kant, who wrote:

The good will is good not because of what it causes or accomplishes, not because of its usefulness in the attainment of some set purpose, but alone because of the willing, that is to say, of itself. . . . Its usefulness or fruitfulness can neither add nor detract from its worth.<sup>80</sup>

Kant does not go on to apply the argument to bad will. Adam Smith, however, made a strong argument against the moral relevance of

degree.” *Id.* Putting aside the exception for first degree felonies, this is consistent with the idea that punishment should depend only on intent, not outcome. Similarly, in discussing aggravating circumstances that may justify the death penalty, the Code does not seem to include the outcome of the crime, except insofar as it is foreseeable. *See id.* § 210.6. An aggravating circumstance can be that “the murder was exceptionally heinous, atrocious or cruel, manifesting exceptional depravity.” *Id.* § 210.6(3)(h). The final requirement would seem to exclude a murder that was especially heinous for reasons of which the murderer was unaware when he committed the crime. *See id.* § 210.6(3)(g) (mitigating circumstances).

<sup>78</sup> Stephen Shulhofer has raised this issue with regard to torts as well as crimes:

Theoretically, it would be more appropriate to pay into an insurance fund a premium based on the risks he creates in the course of his activities. Those who suffer injury would then seek compensation from the fund rather than impose the entire loss on the negligent defendants who happened to cause their particular injuries. . . . In the absence of such a framework, however, the law of torts can properly treat those who cause harm differently from those who do not, in order to allocate fairly the loss which has befallen the victim. This allocation of the loss, fortuitous as between risk-creators, is preferable to an allocation of the loss which would be fortuitous as between faultless victims.

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, 1513 n.64 (1974). The final conclusion seems problematic. If a driver is only liable for risk and not for result, then imposing costs upon him beyond the amount of the risk is no more just than imposing them on another driver, or on the victim. The fact that this seems sharply contrary to our moral intuition strikes me as evidence against the thesis that, in determining the obligations of those who have done damage, justice requires that we ignore consequences insofar as they are due to events beyond the actor’s control.

<sup>79</sup> *See* Bernard Williams, *Moral Luck*, in I PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 115–35 (Supp. vol. 1976); *see also* BERNARD WILLIAMS, *MORAL LUCK* 20–39 (1981).

<sup>80</sup> IMMANUEL KANT, *THE FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* 9 (Otto Manthey-Zorn, trans., 1938) (1785).

luck, for good or ill. Smith argues that there are three elements to an action: intention, action, and consequences.<sup>81</sup> All praise or blame for the action should go to the intention. The consequence of the action is merely luck. Smith, however, acknowledges that people generally give blame or praise based on the consequences, rather than the intention.<sup>82</sup> Smith discusses why we feel this way, explaining moral sentiments, not moral facts.<sup>83</sup> He concludes with a consequentialist argument, designed to show that our feelings, although irrational, are useful, and thus evidence of the divine wisdom.<sup>84</sup>

Smith's argument is that, because we can observe outcomes but not intentions, it is sensible to base human punishments on outcomes and leave the punishing (and rewarding) of intentions to God.<sup>85</sup> It is equivalent, in a less mathematical form, to my earlier discussion of punishing imperfectly informed criminals. If the court had the information that God has, it would know the *ex ante* probabilities facing the criminal. By basing its punishment on that information, it could (in a world of costly punishment) do better than if it based punishment on actual outcome. Because courts do not have that information, they are better off basing punishment on outcome.

For Smith, and similarly for Beccaria,<sup>86</sup> this provides a moral as well as a prudential argument for punishment according to outcome. It is the best that human beings can do, and God will take care of correcting the inevitable errors in both directions. For those of us who are concerned with providing justice without divine assistance, however, the prudential argument still leaves a moral problem.<sup>87</sup> Even if it

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<sup>81</sup> ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS*, 175-76 (E.G. West ed., 1976) (1759).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 178-93.

<sup>84</sup> *Id.* at 195.

<sup>85</sup> One striking difference between Smith's discussion of these issues and more modern discussions is that Smith is concerned not with the possibility that punishment by desert will provide arguments against punishing with special severity those who (happen to have) committed crimes with particularly heinous consequences, but with the possibility that it will provide arguments for punishing those who have not committed crimes but might, under other circumstances, have done so. He writes that, if we resented intentions as strongly as we resent actions, "Sentiments, thoughts, intentions, would become the objects of punishment; and if the indignation of mankind run as high against them as against actions; if the baseness of the thought which had given birth to no action, seemed in the eyes of the world as much to call aloud for vengeance as the baseness of the action, every court of judicature would become a real inquisition. There would be no safety for the most innocent and circumspect conduct. Bad wishes, bad views, bad designs, might still be suspected. . . ." *Id.*

<sup>86</sup> CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 65-66 (Henry Paolucci trans., 1963) (1764).

<sup>87</sup> *But see* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 42 (1881). Holmes wrote: "On the one side is the notion that there is a mystic bond between wrong and punishment; on the

is prudent to use selective punishment to provide selective deterrence, is it just to punish differently offenders who may be equally wicked, merely because one had the good luck to miss the intended target or to choose a less attractive victim?

Thomas Nagel discusses this problem at considerable length.<sup>88</sup> His analysis, applied to the sort of situation considered here, implies not only equal punishment for the murderer who succeeds and the murderer who fails, but also equal punishment for the person who, yielding to a particular temptation, commits murder and the person who would have committed murder if faced by the same temptation, but had the good luck never to be so tempted. After discussing the clash between such conclusions and our moral intuitions, Nagel concludes:

I believe that in a sense the problem has no solution, because something in the idea of agency is incompatible with actions being events, or people being things. . . . Eventually nothing remains which can be ascribed to the responsible self, and we are left with nothing but a portion of the larger sequence of events, which can be deplored or celebrated, but not blamed or praised.<sup>89</sup>

One possible answer to these problems is that Nagel and others are too quick to assume that what people deserve depends only on what they are. Nagel, following Smith and Kant, takes it for granted that differences in outcome due to factors beyond the agent's control cannot be morally relevant. To put it differently, they take it for granted that the answer to the question of "what ought to happen to you" can depend only on the answer to the question "what sort of person are you" and not on such extraneous issues as what consequences your actions have caused.

My point here is closely related to one raised by Robert Nozick in a different context. In discussing the problem of defining a just society,<sup>90</sup> he distinguished between ethics of desert and ethics of entitlement. The distinction can be shown with a simple example. Suppose we have a society in which everyone has what he or she deserves,

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other, that the infliction of pain is only a means to an end. . . ." Holmes argued that the reasonable man standard makes a less than reasonable defendant liable even though his action is not blameworthy. *Id.* at 50-51.

<sup>88</sup> THOMAS NAGEL, *MORTAL QUESTIONS* 24-38 (1979).

<sup>89</sup> *Id.* at 37.

<sup>90</sup> ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 155-64 (1974). Nozick puts the distinction in terms of patterned principles (of which "to each according to his moral merit" is one example) versus entitlement principles.

however that is correctly calculated. In this society, two people decide to bet a dollar on a flip of a coin. The loser pays the winner. If justice is a matter of desert, the society is now unjust. The winner did not deserve to win—which way the coin fell was a matter utterly unrelated to either party's moral worthiness. Because it was unrelated to moral worth, it cannot have increased what the winner deserved by a dollar and decreased what the loser deserved by a dollar. Yet most of us would say that it is just for the loser to pay off the voluntarily incurred debt.

Nozick deals with this problem by the idea of entitlement—a moral category different from desert. I am entitled to something if I have acquired it in a morally legitimate way from someone who legitimately owned it. Mutual assent, as in the case of the bet, is a morally legitimate form of transfer, and the starting situation was, by assumption, just, so the winner is entitled to the dollar. This simple example brings up an important tension in our moral intuitions. On the one hand, we feel as though reward and punishment ought to be deserved. On the other hand, we feel as though certain acts create obligations or entitlements, not because of what they tell us about the moral worthiness of those who take them but because of their consequences.

These two approaches to moral desert are ultimately grounded in two different ways of thinking about the moral problem. One approach considers the problem from the viewpoint of God judging mankind. Actual consequences are irrelevant—God can cancel them, if he wishes, with a wave of his hand. Desert is entirely a question of how good or bad a person is, and that is a matter that God is competent to judge.

The other approach assumes moral judgments are to be made within a society of equals. My opinion about how good or bad a person you are has no special status—there is no reason to believe that it is more accurate than anyone else's opinion, including yours. The consequences of your acts, on the other hand, are there to be observed by everyone. Thus a moral system that makes punishment and reward depend on outcomes seems more appropriate to such a society than one in which they depend on someone's opinion of moral merit.

Furthermore, a society of equals, unlike a society ruled by divine providence, faces a budget constraint. If my careless driving results in an accident that damages your car, somebody is going to have to pay for fixing it. Bad outcomes that occur without any wicked intention still result in costs that must be paid by someone. Wicked intentions alone, without bad consequences, do not. Again, it makes sense for the system of moral obligations to be based on outcomes, not merely intentions.

We are left with two different sorts of rules. One sort allocates punishments and rewards according to moral merit—a sort of divine report card. The other bases them on something more like a system of accounts. Certain acts under certain circumstances result in some people having obligations to others—obligations that may be entirely independent of moral merit.

While I have presented the former approach as theist and the latter as humanist, that is a description of the pattern of the rules, not the beliefs of those that hold them. Rules suitable to be applied by humans may seem appropriate to a theist considering human institutions. That is the position of both Smith and Beccaria. They reject punishment by moral desert not because it is inappropriate but because it is inappropriate to human courts and should therefore be left to divine justice. Similarly, one may believe in reward and punishment based on moral merit even if one does not believe in the existence of a God with the knowledge and power necessary fully to carry out such a program.

Seen from this standpoint, the *Payne* dissenters' claim that whether someone is executed should depend only on his blameworthiness seems problematic. One factor relevant to punishment is how bad particular criminals have revealed themselves to be, but an arguably more important factor may be how much damage they have done.



