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*PAYNE* AND SUFFERING—A PERSONAL REFLECTION  
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# PAYNE AND SUFFERING—A PERSONAL REFLECTION AND A VICTIM-CENTERED CRITIQUE

VIVIAN BERGER\*

## I. INTRODUCTION

JANUARY 2, 1992, marked the sixth anniversary of my intense involvement with capital punishment. In 1986 I was given a small grant, about one-third of my normal salary, to visit full-time at the NAACP Legal Defense and Educational Fund, Inc. (LDF). Julius Chambers, the Director Counsel of LDF, permitted me to select the type of work I wanted. I chose to become a member of the Capital Punishment Project.

During my tenure I took part in a number of significant cases.<sup>1</sup> The one that interested me the most, *Booth v. Maryland*, is the focus of this Article. In *Booth*,<sup>2</sup> in which I authored a brief amicus curiae for LDF in support of the petitioner, the United States Supreme Court in a five-to-four decision invalidated a state law calling for victim impact statements at sentencing trials in capital proceedings. *Booth* endured for a scant four years; it was overruled by a majority of six justices in *Payne v. Tennessee*,<sup>3</sup> handed down on the last day of the 1990-91 Term.

In the following pages, I will discuss some facets of the checkered career of the *Booth* principle in the Court and its sad, if predictable, substitution by the *Payne* principle. As a general matter, I conclude that the rule of *Payne* permitting victim impact evidence to influence

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1. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Lockhart v. McCree*, 476 U.S. 162 (1986). In *McCleskey*, which rejected a challenge to the entire death penalty system of Georgia, claimed to function in a racist manner, LDF represented the prisoner directly. In other cases, the Fund appeared as amicus curiae or (more frequently) "ghost-wrote" briefs, mooted oral arguments, and furnished all kinds of informal assistance.

2. 482 U.S. 496 (1987).

3. 111 S. Ct. 2597 (1991).

decisions on life or death both exemplifies and intensifies much that is wrong with the death penalty in its real-world operation.<sup>4</sup> Though probably favored by most victims' rights groups, this rule actually amounts to a step backward for their cause.

In an idiosyncratic vein, I will also consider from a personal vantage the special meaning that victim issues and, in particular, the murderer's effects upon survivors have held for me. Discovery of this extra-professional dimension to my capital work has been an unexpected offshoot of focus on these specific problems, which began as fortuitously as my overall entry into the field.

## II. *BOOTH V. MARYLAND*: THE PRINCIPLE ESTABLISHED

### A. *An Inauspicious Beginning*

Unlike many of the legal defense and civil liberties organizations, LDF does not make a habit of filing amicus curiae briefs. In death litigation, for example, the lawyers usually provide help behind the scenes to the prisoner's attorney or represent the defendant directly.<sup>5</sup>

*Booth* started out no differently. In November 1986, we knew that the case was pending before the Supreme Court. We also knew that the issue it raised—the admissibility at a sentencing hearing of facts about the particular victim and her family beyond what had come in earlier as part of the narrative of the crime—possessed the potential to affect our clients greatly. While not posing the type of challenge that risked destroying or radically altering capital punishment as a system,<sup>6</sup> the petitioner in *Booth* questioned an evidentiary practice that was extremely prejudicial and quite widespread and that might become universal if the Court placed an imprimatur upon it.<sup>7</sup> The Capital Punishment Project, therefore, wanted to have some input into the

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4. I confine my remarks to the role of victim impact evidence in capital settings and, therefore, do not comment upon its use or abuse in other contexts. See generally *Booth*, 482 U.S. at 509 n.12 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976)) ("our decision today is guided by the fact death is a 'punishment different from all other sanctions'"); see also *infra* note 39.

5. See *supra* note 1.

6. Cf. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (attack on entire operation of death penalty in Georgia rejected by Court); *Lockhart v. McCree*, 476 U.S. 162 (1986) (attack on death qualification of jurors in capital cases rejected by Court, partly because its acceptance might have required empaneling separate juries for the guilt and penalty phases).

7. In the mid-80s, before *Booth*, a few states expressly barred this type of evidence at sentencing trials in capital proceedings. See, e.g., GA. CODE ANN. §§ 17-10-1.1, -1.2 (Michie Supp. 1986); LA. CODE CRIM. PROC. ANN. art. 875(A)-(B) (West 1984); OKLA. STAT. ANN. tit. 22, § 982 (West 1986). Maryland, by contrast, made its admission mandatory. See *Booth v. Maryland*, 482 U.S. 496, 498 & n.2 (1987).

prisoner's brief in this very important case. I was assigned as the liaison to Booth's attorneys.

Unfortunately, Booth's defense team never saw eye to eye with ours. Although many death-sentenced inmates' lawyers welcome advice and help from "the experts," especially before the Supreme Court, others find our approaches intrusive and prefer to dispense with our aid. (Counsel for Booth were themselves professional defense attorneys.) Worse still, they did not completely cut off communications with our team until the eve of Thanksgiving break, just before the brief's due date. Nonetheless, under the circumstances, we believed we had no choice but to file an amicus brief of our own. I became its lead author.<sup>8</sup>

The pace of the next few days was frantic. A morning person, who virtually never does serious work after 7 p.m., I stayed at my desk for hours on end to meet the deadline and pulled my first all-nighter since college. When I finally entered my bedroom at six o'clock the following morning, at the very moment the alarm was ringing to waken my husband, I felt both bedraggled and pessimistic. Yet life goes on, as does death: the day after the filing of the brief, Texas executed Michael Wayne Evans. My attention turned to other matters and I shortly moved back to Columbia Law School.

### B. Booth's *Factual Setting*

My gloominess about Booth's prospects was grounded on more than physical exhaustion or even the generally decreased receptiveness to claims on behalf of capital defendants displayed by the Court in recent years.<sup>9</sup> For one thing, the facts of the crime were very ugly.

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8. Brief of *Amicus Curiae* NAACP Legal Defense and Educational Fund, Inc. in Support of Petitioner, *Booth v. Maryland*, 482 U.S. 496 (1987) (No. 86-5020). I do not, however, wish to exaggerate my role in framing our arguments, the substance of which I will discuss in connection with the Court's majority opinion. See *infra* text accompanying notes 25-31. Others (principally, Professor Anthony G. Amsterdam of New York University School of Law) provided invaluable assistance. The same is true of the brief I filed in *Ohio v. Huertas*. See Motion for Leave to File Brief and Brief of Murder Victims' Families for Reconciliation as *Amici Curiae* in Support of Respondent, *Ohio v. Huertas*, 111 S. Ct. 1031 (1991) (No. 89-1944). Since *Booth*, I have been involved, in a formal or informal capacity, in the three Supreme Court cases dealing with victim impact evidence or related prosecutorial argument. These are *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), *Huertas*, and *South Carolina v. Gathers*, 490 U.S. 805 (1989). I was not involved in a fourth, *Mills v. Maryland*, 486 U.S. 367 (1988), in which only a dissenting opinion treated the issue. See *id.* at 395-98 (Rehnquist, C.J., dissenting); see also *infra* text accompanying notes 63-67.

9. After a virtually unbroken series of Supreme Court victories, death-sentenced prisoners lost four significant cases in the 1982-83 Term. See *California v. Ramos*, 463 U.S. 992 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983); *Barefoot v. Estelle*, 463 U.S. 880 (1983).

Two young men, Booth and a friend, had entered the home of an elderly couple, Irwin Bronstein and his wife Rose (neighbors of Booth), robbed and gagged them, then repeatedly stabbed them in the chest with a kitchen knife. A son found the bodies two days afterward.<sup>10</sup>

Further, aside from the killers' brutality, the circumstances of the victims' lives tended to evoke an extra measure of compassion for them while enhancing revulsion toward the defendants. As related in the victim impact statement (VIS) read to the jury at the sentencing phase of Booth's trial,<sup>11</sup> the Bronsteins had been outstanding individuals with close ties to family and friends.<sup>12</sup> In addition, the son, daughter, son-in-law, and granddaughter interviewed for the report narrated in detail the sense of loss, emotional pain, somatic symptoms, depression, anger, fear, and shock caused them by the horrible murders.<sup>13</sup> The granddaughter also recounted how the crime had overshadowed her sister's wedding a few days later;<sup>14</sup> the son and daughter made various comments expressing impatience with court procedures and implying that Booth should be sentenced to death.<sup>15</sup>

Bad facts, of course, hardly guarantee appellate defeat—particularly in death penalty cases, which often present awful scenarios.<sup>16</sup> Yet *Booth* seemed a poor vehicle for us in another way as well, one that resisted frank discussion in the briefs or oral argument. It was a black-on-white killing, the paradigm of the “death-worthy” murder.<sup>17</sup>

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10. *Booth*, 482 U.S. at 497-98.

11. The complete VIS appears as an Appendix to the *Booth* opinion; it occupies more than five pages in the U.S. Reports. *See id.* at 509-15. At trial, defense counsel moved to suppress the VIS as irrelevant and inflammatory. After losing the motion, in hopes of muting the effect of the statement, he asked that the prosecutor read it aloud rather than call the contributors to it to testify before the jury. The prosecutor accepted the suggestion. *Id.* at 500-01.

12. They were globally described as “amazing.” More precisely, the document noted, they “were extremely good people who wouldn't hurt a fly.” Irwin Bronstein was characterized as a hard-working man; Rose Bronstein as “a woman who was young at heart.” *Id.* at 499 n.3, 510, 514.

13. For instance, the daughter stated that “she still cries every day” and “that wherever she goes she sees and hears her parents.” Among other things, the report described how, faced with the task of cleaning out the Bronsteins' house and observing the bloody carpet, “she felt like getting down on the rug and holding her mother.” *Id.* at 512.

14. *Id.* at 500, 511, 514.

15. For example, the interviewer from the State Division of Parole and Probation (DPP) wrote of the daughter: “She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this.” The son, on his part, opined that his parents “were butchered like animals [and he] doesn't think anyone should be able to do something like that and get away with it.” *Id.* at 508, 511-12.

16. *See, e.g., Sumner v. Shuman*, 483 U.S. 66, 79 n.7 (1987) (victorious defendant, an inmate serving a life sentence without possibility of parole, had been sentenced to death for incinerating a fellow prisoner with whom he had fought about opening a window close to their cells).

17. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 286-87, 291 n.7 (1987) (discussing study,

To acknowledge my concern that this irrelevant, invidious factor could possibly influence a legal decision on a major constitutional question is not to accuse the Court of bias. The Court has vacated capital penalties in other interracial settings, and sometimes for race-related reasons.<sup>18</sup> But the principal feature of the evidence at issue was the emphasis on who the victims were, its invitation to visceral reaction on their behalf over and above the predictable sympathy experienced by normal human beings when confronted with the horror of violent crime against innocent people. Like others, justices cannot wholly avoid "racially selective empathy"<sup>19</sup> or the familiar psychological tendency to feel a deeper measure of concern for a person who resembles oneself.<sup>20</sup>

I therefore feared the presence of invisible emotional baggage, whose extra weight might drag us down. I could only hope that the case would, at least, possess the virtues of its defects—in other words, that the very power of the VIS would strengthen our claim of its fundamental illegitimacy in the context of capital sentencing.

### C. *A Happy Ending*

Indeed, five members of the Court, writing through former Justice Powell, firmly rejected the Maryland Court of Appeals' incredible

assumed valid, by Professor David C. Baldus and others, showing that blacks who murder whites stand greatest chance of receiving death); see generally *Turner v. Murray*, 476 U.S. 28 (1986) (discussing risk of racial prejudice infecting capital sentencing proceeding in cases of interracial violence). *Payne*, which later overruled *Booth*, would present an even worse example of this genre. See *infra* text accompanying notes 98-99. There was also a wide gulf in social status between the middle-class Bronstein family and Booth and his accomplice, who committed the robbery preceding the murder in order to obtain money for heroin. See *Booth*, 482 U.S. at 497-98. A conversation with a family member, who happened to be one of my students, revealed that the victims had insisted on remaining in their changing neighborhood over the protests of their relatives.

18. See, e.g., *Ford v. Georgia*, 111 S. Ct. 850 (1991); *Turner*, 476 U.S. 28 (1986); *Furman v. Georgia*, 408 U.S. 238 (1972).

19. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1420 (1988); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 708 (1989); Sheri L. Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1020 n.27 (1988); see also Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420 (1988).

20. In the candid words of a Texas judge: "'When a white is killed, the whites are upset. When a black is killed, the blacks are upset. When a homosexual is killed of course the homosexuals are upset.'" Lisa Belkin, *Texas Judge Eases Sentence for Killer of Two Homosexuals*, N.Y. TIMES, Dec. 17, 1988, at 8. See generally *Hayes v. Lockhart*, 869 F.2d 358, 364 (8th Cir. 1989) (Heaney, J., dissenting from denial of reh'g en banc) (prosecutor made personal appeals to several individual jurors, referring to their own families, in order to promote identification with victim's family), *vacated for reconsideration in light of South Carolina v. Gathers*, 490 U.S. 805 (1989). In reading the VIS in *Booth*, I know I felt a special pang stemming from the fact that the Bronsteins and I shared an ethnic background. See *infra* text accompanying notes 207-21.

characterization of the VIS as a “relatively straightforward and factual description” of the murders’ effects on the Bronstein family.<sup>21</sup> This document, summarized above, actually contained numerous examples of three types of information referred to as “victim impact evidence” (although only one variety fits comfortably under that heading). The first consists of data about the personal qualities of the deceased. Naturally, it is usually flattering or, if not, pathetic and, thus, sympathy-evoking.<sup>22</sup> The second, aptly described by the name, deals with physical, psychological, or economic repercussions on the only victims left by murder: family and, less often, friends.<sup>23</sup> The third, opinions concerning the crime and the killer, generally amounts to a call to execute the defendant.<sup>24</sup>

With one exception—Justice Powell did not specifically address our claim that proof of this nature invites jurors to base death sentences on impermissible grounds like race<sup>25</sup>—the Court’s opinion essentially tracked and endorsed our arguments. LDF contended in its brief that,

21. *Booth v. Maryland*, 482 U.S. 496, 501 (1987) (quoting *Booth v. State*, 507 A.2d 1098, 1124 (Md. 1986)).

22. See, e.g., *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting) (VIS gave “thumbnail sketch of the victim’s difficult childhood and frequent encounters with correctional authorities”).

23. As stated by an official of Parents of Murdered Children and Other Survivors of Homicide Victims: “For any one person murdered there are at least 10 people who are affected.” See Tom Gibbons, *Victims Again*, A.B.A. J., Sept. 1, 1988, at 64, 67. See generally Katherine Miller et al., *A Group for Families of Homicide Victims: An Evaluation*, 83 SOC. CASEWORK: J. CONTEMP. SOC. WORK 432, 432 (1985) (“These people become the victims of the homicide along with the person murdered.”); *Off the Bench and Off the Cuff, Solace for the Families of Murdered Children* (interview by Hon. Marvin R. Halbert with Deborah Spungen, founder of POMC, Inc., Parents of Murdered Children), PA. L. J.-REP., Apr. 14, 1986, at 10 [hereinafter Spungen Interview]. In this essay, unless the context otherwise suggests, I use the word “victims” to indicate both the persons targeted by crime and those in a close relationship with them (though, as to the latter, I also employ such terms as “survivors” and “family members”).

24. The VIS in *Booth* also contained editorial remarks by its author. The DPP officer commented:

“It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them.”

*Booth v. Maryland*, 482 U.S. 496, 500, 515 (1987). Justice Powell’s breakdown of the kinds of victim impact evidence, *id.* at 502, differs slightly, but not in important respects, from mine.

25. See *Zant v. Stephens*, 462 U.S. 862, 885 (1983). In *Booth*, Justice White, who dissented, noted in passing: “[T]here is no showing that the statements in this case encouraged this, nor should we lightly presume such misconduct on the jury’s part.” 482 U.S. at 517 (White, J., dissenting) (citation omitted). The majority opinion did treat the broader issue of discrimination among victims, of which the race claim formed a part, see *infra* note 31 and accompanying text, as well as alluding generally to the risk of relying on constitutionally forbidden or wholly irrelevant factors. See *Booth*, 482 U.S. at 502.



for several related reasons, victim impact evidence violates the Eighth Amendment ban on practices creating an unacceptable risk of arbitrariness in capital punishment.<sup>26</sup>

For one thing, by venturing beyond the traditional inquiry into the defendant's character and record and the circumstances of the offense,<sup>27</sup> this kind of evidence introduces into the sentencing determination factors lacking any rational bearing on the acknowledged goals of the penalty: retribution and deterrence.<sup>28</sup> In addition, on account of its highly inflammatory nature, such information subverts the reasoned decision-making process required for the imposition of death; that problem especially afflicted the egregious "emotionally-charged opinions" regarding the conclusions the jury should draw from the proof in Booth's case.<sup>29</sup> Then, too, it opens the door to reciprocal evidence in rebuttal—and, thereby, to "[t]he prospect of a 'mini-trial' on the victim's character."<sup>30</sup> Finally, victim impact evidence tends to produce sentences grounded on the victim's or her family's perceived social or moral worth, a result the Court deemed disturbing since it is not only capricious but also invidious and discriminatory.<sup>31</sup>

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26. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). Throughout this piece, I draw—usually without attribution—on briefs I have written or co-authored.

27. See, e.g., *Stephens*, 462 U.S. at 879; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

28. See *Booth v. Maryland*, 482 U.S. 496, 502-06 (1987); see also *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Gregg*, 428 U.S. at 183. I am phrasing the argument in the terms used in LDF's brief. The Court, in speaking of the need for the penalty inquiry to focus on the defendant's "personal responsibility and moral guilt," see *infra* text accompanying note 41, was essentially saying the same thing. Earlier decisions had made clear that both the retributive and the deterrent efficacy of capital punishment hinge critically on these factors—especially on the defendant's intent. See *Enmund*, 458 U.S. at 799-801. These factors, in turn, are built into a death-selection standard revolving around the offender and the offense.

29. 482 U.S. at 508-09. See *supra* notes 15 & 24. Justice White tacitly conceded the impropriety of this evidence but stated: "[T]hat is obviously not an inherent fault in all victim impact statements and no reason to declare the practice of admitting such statements *per se* unconstitutional." *Id.* at 518-19 (White, J., dissenting). Nonetheless, as subsequent cases were to reveal, "kill the defendant" testimony, overt or veiled, surfaces often enough in connection with evidence about the family's loss and the victim's virtues to raise suspicion that once the latter is admitted at trial, the former tends to creep in as well—along with other types of misconduct. See, e.g., *infra* text accompanying notes 92, 98-99.

30. 482 U.S. at 506-07. The majority also expressed concern over the problems with counter-evidence of family suffering: "Presumably the defendant . . . rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered." *Id.* at 506. Justice White, predictably, responded along the lines of "tough luck." If a defendant (like Booth, in this case) made no rebuttal, this is "probably because he considered, wisely, that it was not in his best interest to do so." *Id.* at 518 (White, J., dissenting). Under the circumstances, wrote Justice White, the defendant should not be heard to complain of the results of his tactical decision. *Id.* at 518 n.3 (White, J., dissenting).

31. In regard to the latter point, Justice Powell wrote: "We are troubled by the implication

Before examining in greater detail some of the issues involved in *Booth*,<sup>32</sup> a task more profitably undertaken following treatment of the dissents and a synopsis of later decisions,<sup>33</sup> I want to stress that the Court's holding jibed with traditional rules of evidence. This fact warrants mention because of the penchant of many of *Booth*'s vocal detractors, both on and off the Court, to paint its principle as outlandish rather than simply incorrect.

Clearly, express or implied opinions about what sentence a defendant deserves fall well beyond the legal pale:<sup>34</sup> "Questions which would merely allow the witness to tell the jury what result to reach are not permitted."<sup>35</sup> Local law also routinely barred proof in homicide trials of the victim's character, good or bad,<sup>36</sup> as well as evidence of family bereavement.<sup>37</sup> Only recently has the passage of legislation al-

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that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions." *Id.* at 506 & n.8 (omitting citation to Justice Douglas's concurrence in *Furman v. Georgia*, 408 U.S. 238 (1972)).

32. Rather than aim for exhaustive coverage, I plan to emphasize those issues most relevant to a victim-focused critique of *Payne*.

33. There were two dissenting opinions. In one, authored by Justice White, Chief Justice Rehnquist and Justices O'Connor and Scalia joined. *Id.* at 515 (White, J., dissenting). In the other, written by Justice Scalia, the Chief Justice and Justices White and O'Connor joined. *Id.* at 519 (Scalia, J., dissenting).

34. See, e.g., *Payne v. Commonwealth*, 357 S.E.2d 500, 506 (Va.), *cert. denied*, 484 U.S. 933 (1987); *Rodriguez v. State*, 641 S.W.2d 669, 674 (Tex. Ct. App. 1983), *aff'd*, 710 S.W.2d 60 (Tex. Crim. App. 1986); *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987), *aff'd after remand*, 930 F.2d 922 (1991); *cf.* *State v. Rushing*, 464 So. 2d 268, 275 (La. 1985) (error to admit testimony that the killing was one of most vicious the policeman had seen since this was tantamount to opinion that alleged aggravating factor existed), *cert. denied*, 476 U.S. 1153 (1986). *But see Romine v. State*, 350 S.E.2d 446 (Ga. 1986), *cert. denied*, 481 U.S. 1024 (1987). Modern statutes tend to follow the approach of the common law in this area, barring such opinions from trial-type proceedings. See generally *Rules of Evidence for United States Courts and Magistrates*, FED. R. EVID. 704, advisory comm. note, 56 F.R.D. 183, 285 (the Federal Rules of Evidence preclude "admission of opinions that would merely tell the jury what result to reach"). Notably, the Maryland Code forbids introduction of sentencing recommendations in a capital penalty hearing. MD. CODE ANN. § 413(c)(iv) (1987). See *Lodowski v. State*, 490 A.2d 1228, 1271 (Md. 1985) (Cole, J., concurring), *vacated on other grounds*, 475 U.S. 1078 (1986).

35. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). See also *State v. Jiles*, 142 N.W.2d 451, 455 (Iowa 1966) ("no witness should be permitted to give his opinion directly that a person is guilty or innocent").

36. See, e.g., *State v. Oliver*, No. 49613 (Ohio Ct. App. Oct. 17, 1985) (LEXIS, States Library, Ohio File); *Fisher v. State*, 481 So. 2d 203, 225 (Miss. 1985); *Henderson v. State*, 218 S.E.2d 612, 614 (Ga. 1975). At times, a particular trait of the victim may be relevant and, therefore, admissible to prove an element of the crime, establish a defense, or rebut an argument by the defendant. See, e.g., *Booth v. Maryland*, 482 U.S. 496, 507 n.10 (1987), citing FED. R. EVID. 404(a)(2) (prosecution may show peaceable nature of victim to rebut charge that deceased was aggressor).

37. See, e.g., *People v. Levitt*, 203 Cal. Rptr. 276, 288 (1984); see also *Grant v. State*, 703 P.2d 943, 945-46 (Okla. Crim. App. 1985) (prosecutor's statement that manslaughter victim was

lowing or mandating victim impact testimony or written statements changed the landscape with regard to "good victim" or "sad family" information.<sup>38</sup> Thus, while most of the prior rulings were premised on non-constitutional doctrine, they do, at least, suggest the need for skepticism about the validity of introducing this highly prejudicial type of data into the sensitive capital arena.<sup>39</sup>

#### D. *The Disagreement Between the Majority and the Dissenters*

The principal analytical division between the camps centered on their respective views of the relevance of certain resulting harms in measuring "the defendant's 'personal responsibility and moral guilt'"<sup>40</sup> and, accordingly, his or her punishment. While Justices White, Scalia, and O'Connor and Chief Justice Rehnquist emphasized the "personal responsibility" prong, correctly noting that the criminal law frequently makes accountability or grading decisions turn on outcome more than intent,<sup>41</sup> Justice Powell's contingent stressed the

survived by 11-year-old daughter held to be harmless error); *People v. Bartall*, 456 N.E.2d 59, 72-73 (Ill. 1983) (prosecutor's summation on victims' rights held improper but harmless, in part because there had been "no presentation of irrelevant evidence about the grieving family"); *Wely v. State*, 402 So. 2d 1159, 1162 (Fla. 1981) (preference for non-family member testimony, whenever feasible, to identify the deceased).

38. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2606 (1991). A number of such statutes are listed in *Lodowski v. State*, 490 A.2d 1228, 1260 n.3 (Md. 1985) (Cole, J., concurring). Notably, even in the past decade, some decisional law, as well as statutes, see *supra* note 7, prohibited proof of the victim's moral or familial worth in capital proceedings. See, e.g., *Wiley v. State*, 484 So. 2d 339, 348 (Miss. 1986); *People v. Holman*, 469 N.E.2d 119 (Ill. 1984), *cert. denied*, 469 U.S. 1220 (1985); *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky.), *cert. denied*, 469 U.S. 861 (1984). Similarly, there have been cases banning negative evidence about the deceased, see, e.g., *State v. Gaskins*, 326 S.E.2d 132, 145 (S.C.), *cert. denied*, 471 U.S. 1120 (1985), or evidence of adverse effects on the relatives of the accused. See, e.g., *State v. Matthews*, 373 S.E.2d 587 (1988); *Coppola v. Commonwealth*, 257 S.E.2d 797 (Va. 1979).

39. See generally *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976). *But cf. McCleskey v. Kemp*, 481 U.S. 279, 347 (1987) (Blackmun, J., dissenting) ("The Court today seems to give a new meaning to our recognition that death is different.").

40. *Booth v. Maryland*, 482 U.S. 496, 502 (1987) (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

41. Thus, for instance, the law distinguishes between the would-be killer whose gun accidentally misfires, missing the target, and the one whose bullet attains its target; the law also differentiates between the speeding driver whose luck holds out and the one whose auto hits a pedestrian. See *Booth*, 482 U.S. at 516 (White, J., dissenting); *id.* at 519 (Scalia, J., dissenting) (remarking that moral guilt is identical, whether or not any harm ensues); see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 6.8(b) at 590 (2d ed. 1986) (accomplice is liable for all natural and probable consequences of offenses aided); *id.* § 6.8(a) at 587-88 (co-conspirator is liable for all reasonably foreseeable offenses committed by other conspirators in furtherance of conspiracy). Indeed, if the driver in the second example is merely negligent rather than reckless, he would likely commit no crime unless his behavior injured another. In many

“moral guilt” parameter. The dissenters, therefore, argued that the “full extent of the harm” caused by the murderer’s actions could be properly considered in the judgment on life or death.<sup>42</sup> Conversely, the majority held that whatever the pertinence of the “full range of foreseeable consequences” for liability in other criminal or civil contexts, it is not germane in the singular setting of a penalty hearing in a capital case.<sup>43</sup>

This discussion only scratched the surface of one of the most fundamental debates in criminal law: the relative importance of objective results of a person’s conduct, as opposed to subjective mental state, in assessing the degree of culpability.<sup>44</sup> Further exploration of the broad issue far exceeds the scope of this piece. In addition, I believe such examination would not be fruitful for present purposes. As previously noted, the basic split among the justices hinged less on the general role of harm in assessing guilt or punishment than on the kinds of specific harms that bear on a reasoned moral response<sup>45</sup> to the inquiry into whether a defendant should live or die. The division over the latter reflects divergent views about the propriety of the claims of victims and kin at a sentencing trial and, more deeply, different assumptions that can be made about their value as individuals.

Remarking that murderers rarely choose their victims in order to affect a person besides the target<sup>46</sup> and often are unacquainted with the victim (and, hence, unaware of her family status), Justice Powell expressed concern that reliance on a VIS could lead to imposition of a death sentence based on factors “wholly unrelated to the blameworthiness” of the defendant.<sup>47</sup> The majority, naturally, had to concede

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jurisdictions, assuming the appropriate mental culpability, he would be guilty of reckless endangerment even in the absence of harmful results. *See, e.g.*, N.Y. PENAL LAW §§ 120.20, .25 (McKinney 1987).

42. *Booth*, 482 U.S. at 516-17 (White, J., dissenting); *id.* at 519-20 (Scalia, J., dissenting).

43. *Id.* at 504. *See generally* *Tison v. Arizona*, 481 U.S. 137 (1987) (minimum requirement for death penalty eligibility is major participation in the felony committed plus reckless indifference to human life).

44. For a comprehensive treatment of the topic by a scholar who places prime significance on mens rea, *see* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

45. *See, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302 (1989); *California v. Brown*, 479 U.S. 538, 544 (1987) (O’Connor, J., concurring).

46. *But see, e.g.*, *State v. Morales*, 513 N.E.2d 267 (Ohio 1987) (murder committed as part of revenge plot against victim’s brother), *cert. denied*, 484 U.S. 1047 (1988); Roberto Suro, *Verdict Is Guilty in Cheerleading Trial*, N.Y. TIMES, Sept. 4, 1991, at A18 (woman convicted of trying to hire someone to kill mother of her daughter’s chief rival in cheerleading contest, in hopes that daughter of murdered woman would be too distraught to compete successfully). The Court did not deny that the presence of such an unusually vicious motive would enhance a defendant’s moral guilt.

47. *Booth v. Maryland*, 482 U.S. 496, 504-05 (1987).

that in some cases the killer will know beforehand information pertaining to the likely effects the crime will have upon survivors and that "a defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability in a constitutionally significant manner."<sup>48</sup> Nevertheless, Justice Powell concluded: "We . . . find that because of the *nature* of the information contained in a VIS, it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner."<sup>49</sup>

The dissenting opinions best point up the major quarrel between the opposing groups of justices. In the words of Justice White:

If anything, I would think that victim impact statements are particularly appropriate evidence in capital sentencing hearings: the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in . . . by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a *unique* loss to society and in particular to his family.<sup>50</sup>

Justice Scalia emphasized the popular support for "victims' rights." He noted that many "have found *one-sided* and hence unjust" the appearance of a "parade of witnesses" to testify to the extenuating aspects of the defendant's character and background, with no one to place upon the record "the full reality of human suffering" that the defendant has wreaked on others.<sup>51</sup> He summed up:

To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted.<sup>52</sup>

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48. *Id.* at 505.

49. *Id.* (emphasis added).

50. *Id.* at 517 (White, J., dissenting) (citation omitted) (emphasis added).

51. *Id.* at 520 (Scalia, J., dissenting) (emphasis added).

52. *Id.* Given the distressingly poor quality of representation in capital trials, most defendants have, at best, a trickle—not a parade—of witnesses in their behalf at the penalty stage. See, e.g., Vivian Berger, *Born-Again Death*, 87 COLUM. L. REV. 1301, 1306 (1987) (reviewing WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1987)). Of course, under the *Woodson-Lockett* line of decisions, defendants have the right to adduce all relevant mitigating evidence. See *Blystone v. Pennsylvania*, 494 U.S. 299, 304-05 (1990). Because Justice Scalia (alone on the Court) rejects the legitimacy of this branch of doctrine, see *Walton v. Arizona*, 110 S. Ct. 3047, 3067-68 (1990), one

The foregoing passages highlight the two entwined themes that lie at the heart of the anti-*Booth*, now *Payne*, critique: first, the significance of the *victim's* uniqueness, and second, the inequity of prohibiting the same focus, at the punishment phase, on his or her qualities and relationships as is placed upon the defendant's. The *Booth* majority answered the challengers' points obliquely. Justice Powell initially noted precedent stressing the need to treat the *defendant* as a "uniquely individual human bein[g]." <sup>53</sup> In addition, he intimated that attention paid to other claimants risked distracting the sentencing body "from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." <sup>54</sup>

The unfairness that troubled Justice Powell did not involve the traditional imbalance between the roles of defendants and victims at sentencing trials; it involved a different kind of asymmetry that a revised regime would spawn. This asymmetry would consist of the greater exposure to execution facing killers of valued citizens or individuals with vocal families, as contrasted with killers of miscreants or of persons lacking articulate relatives. <sup>55</sup> Equally disturbing, the new system would also compel a novel and perverse form of "balance." For just as the state would be permitted to call the deceased's kin to testify to her upright character and the misery caused by her loss—so, too, "in appropriate cases the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from [her] family." <sup>56</sup>

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might ask whether he would tolerate "unequal time" for victims' advocates, if his position were to prevail and limits were placed on defense efforts to individualize the defendant. In *Payne*, he suggested that his answer was yes. *Payne v. Tennessee*, 111 S. Ct. 2597, 2613 (1991) (Eighth Amendment gives the states broad leeway to decide "what constitutes aggravation and mitigation of a crime").

53. *Booth v. Maryland*, 482 U.S. 496, 504 (1987) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

54. *Id.* at 507.

55. See *Booth v. State*, 507 A.2d 1098, 1129 (Md. 1986) (Cole, J., concurring). Justice White, as is his wont, see *supra* note 30, replied with the kiss-off that life is tough:

The Court's reliance on the alleged arbitrariness that can result from the differing ability of victims' families to articulate their sense of loss is a makeweight consideration: [n]o two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator.

*Booth v. Maryland*, 482 U.S. 496, 517-18 (1987) (White, J., dissenting). With regard to distinctions among murderers based on the character of the victim, Justice White simply repeated his basic premise: except for impermissible factors such as race, the state may "include as a sentencing consideration the particularized harm" stemming from the crime. *Id.* at 517.

56. *Booth*, 482 U.S. at 507; see generally *id.* at 518 (White, J., dissenting) ("no doubt a

The ramifications of dwelling on the excellent personal traits or community standing of the deceased or the pain and suffering of her survivors have been alluded to before<sup>57</sup> and will be developed further.<sup>58</sup> But first I will summarize *Booth's* brief and troubled tenure on the Court. Despite my strong emotional and intellectual investment in the decision, I did not fool myself for long that it would endure the onslaughts against it.

### III. FROM *BOOTH* THROUGH *PAYNE*: THE PRINCIPLE ATTACKED, EXPANDED, SIDESTEPPED, AND REVOKED

#### A. *A New Justice—A New Beginning?*

*Booth* was Justice Powell's valedictory; he retired at the end of the 1986-87 Term. While hardly a defense mainstay, Justice Powell had become (together with Justice O'Connor) the swing vote on capital cases during the eighties.<sup>59</sup> His replacement by Justice Kennedy, a conservative from the Ninth Circuit, did not bode well for death-sentenced prisoners.

One year after the decision in *Booth*, the Court handed down *Mills v. Maryland*.<sup>60</sup> Although the five-justice majority held for *Mills* on a ground unrelated to the present discussion,<sup>61</sup> the dissenters on that

capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement").

57. See *supra* note 31 and text accompanying notes 30-31.

58. See *infra* text accompanying notes 119-203. To be sure, a "good victim" and a "sad family" typically correlate with each other. In the words of Justice Scalia: "I see no basis for drawing a distinction for Eighth Amendment purposes between the admirable personal characteristics of the particular victim and the particular injury caused to the victim's family and fellow citizens. *Indeed, I would often find it impossible to tell which was which.*" South Carolina v. Gathers, 490 U.S. 805, 823 (1989) (Scalia, J., dissenting) (emphasis added). These respective types of evidence do, however, pose some issues warranting independent treatment—if only because a "bad victim" may also leave a grieving family. See *infra* text accompanying notes 176-80. (In the words of a Georgia adage, even a snake has a mother.)

59. Between 1982 and 1987, when he retired, Justice Powell cast a crucial vote for the prisoner in these five-to-four decisions: *Gray v. Mississippi*, 481 U.S. 648 (1987) (Powell, J., concurring in part and in judgment); *Booth v. Maryland*, 482 U.S. 496 (1987) (majority opinion by Powell, J.); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). More often, his ballot was critical to the state's victory. *E.g.*, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (majority opinion by Powell, J.); *Tison v. Arizona*, 481 U.S. 137 (1987); *California v. Brown*, 479 U.S. 538 (1987); *California v. Ramos*, 463 U.S. 992 (1983).

60. 486 U.S. 367 (1988).

61. In an opinion by Justice Blackmun, the Court vacated the death sentence because of the substantial probability that reasonable jurors would have construed the judge's instructions, as set forth in a verdict form, to bar their consideration of any mitigating evidence unless they unanimously agreed on the existence of particular mitigating circumstances. This result would have violated the *Woodson-Lockett* line of precedent. See *supra* text accompanying notes 27 and 52.

point were forced to address a second argument—that the trial court had erroneously admitted statements regarding the deceased, Paul Brown. Joined now by Justice Kennedy as well as Justices O'Connor and Scalia, Chief Justice Rehnquist rejected the *Booth* contention too.<sup>62</sup>

The disputed matter consisted of a written interview with Brown's brother and sister-in-law. Brown had been Mills's cellmate; the defendant stabbed him to death with a "shank" or homemade knife.<sup>63</sup> Unlike the VIS in *Booth*, the memorandum here was short—a scant three paragraphs—and contained only one type of victim impact evidence, a "thumbnail sketch" of Brown's background and characteristics.<sup>64</sup> Notably, it did not mention family grief or express survivors' views respecting punishment. It did not even praise the victim. Rather, it gave the "barest of details" about Brown's difficulties as a child in foster care and then as a runaway and inmate of juvenile correctional facilities. In the words of the brother:

Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure, he committed crimes, but he wasn't violent. He did what he had to do to survive and he got involved with a lot of bad people.<sup>65</sup>

In voting to affirm, the dissenters hedged. In part, they relied on the sparseness of the challenged statements.<sup>66</sup> More ominously, especially now that Justice Kennedy swelled their ranks, they asserted their continued belief that they continued to believe *Booth* had been wrongly decided.<sup>67</sup> They did, however, stop short of a call for overruling *Booth*.

### B. *The Line Holds, and Inches Forward*

Twelve months later, the same five-person majority, this time writing through Justice Brennan, clearly affirmed and slightly expanded

62. *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting). Justice White, who authored the principal dissent in *Booth*, concurred in *Mills* because he agreed with the Court's disposition of the main issue. *Id.* at 389 (White, J., concurring).

63. That is all the majority opinion said of the crime. *See Mills*, 486 U.S. at 369. The dissenters added nothing further.

64. *See supra* note 22.

65. 486 U.S. at 396-97 (Rehnquist, C.J., dissenting) (citation omitted).

66. The Chief Justice remarked cryptically: "I do not interpret *Booth* as foreclosing the introduction of all evidence, in whatever form, about a murder victim . . ." *Id.* at 398.

67. *Id.* at 397.



*Booth's* holding in *South Carolina v. Gathers*.<sup>68</sup> *Gathers* fell between the two previous decisions on a spectrum of both the apparent heinousness of the murder and the egregiousness of the victim impact evidence.

As in *Mills*, the crime was intra-racial—though black-on-black, not white-on-white—and the information in question pertained solely to the victim's personal qualities. In addition, the deceased, Richard Haynes, had been one of life's losers rather than a pillar of his community: an unemployed, self-anointed preacher with a history of mental problems.<sup>69</sup> But as in *Booth*, the record revealed a murder of extreme brutality. *Gathers* and his three companions had set upon Haynes, a stranger, at a park bench when the latter declined to talk to them. The four assaulted the defenseless Haynes with their feet, a bottle, and an umbrella. They rummaged through his personal belongings (mainly items of religious significance), vainly searching for something to steal. Some time later, the defendant himself administered the coup de grâce with a knife.<sup>70</sup> With respect to the victim-related matter, the evidence was—unlike in *Booth* and *Mills*—oral instead of written, and presented to the jury in the form of prosecutorial argument. It occupied a midway position in both length and probable effect.

Specifically, the contested portion of the State's sentencing summation concerned two documents admitted at the trial on guilt or innocence: a tract entitled *The Game Guy's Prayer* and a voter's registration card. These were simply a few of the objects Haynes had been carrying at the time of the crime, and neither had been read earlier to the jurors or otherwise referred to in terms of content.<sup>71</sup> Nonetheless, at the penalty hearing, the prosecutor recited the lengthy and sentimental prayer in full<sup>72</sup> and dwelt on the victim's religiousness.<sup>73</sup> The prosecutor also used the card to urge that Haynes had “believed

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68. 490 U.S. 805 (1989).

69. *Id.* at 810.

70. *Id.* at 807. The defendant even inserted the umbrella in the victim's anus. *Id.*

71. *Id.*

72. The following excerpts convey its flavor:

“Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. . . . I only ask you for the stuff to give you one hundred percent of what I have got. . . . And help me to take the bad break as part of the game. . . . Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square.”

*Id.* at 808-09.

73. Included in the prosecutor's closing remarks was the following: “Of course, he is now with the angels now [sic], but this defendant Demetrius *Gathers* could care little about the fact that he is a religious person.” *Id.* at 808.

in” the Charleston community: “He took part.”<sup>74</sup> Simply put, in defiance of *Booth*, the comments suggested that the defendant “deserved a death sentence because the victim was a religious man and a registered voter.”<sup>75</sup>

In a terse opinion, Justice Brennan not only endorsed *Booth*'s central tenets but also readily extended their purview to statements by the prosecution, as opposed to surviving relatives.<sup>76</sup> He refused to widen the loophole left open in *Booth* for proof pertaining directly to the circumstances of the offense<sup>77</sup> to encompass the substance of the documents since it almost surely passed unnoticed during the frantic quest for loot. The “purely fortuitous” nature of the papers, which had no bearing on the decision to kill the victim, Brennan reasoned, could furnish nothing relevant to Gathers’ “moral culpability.”<sup>78</sup>

In a separate concurrence, Justice White joined Justice Brennan’s opinion because he felt that “[u]nless [*Booth*] is to be overruled, the judgment below must be affirmed.”<sup>79</sup> Justice Scalia, in a dissent not joined by any other justice, accepted this oblique invitation and issued

74. *Id.* at 809. Immediately beforehand, the State’s attorney characterized the card as “something that we all treasure.” He continued: “Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter’s registration card.” *Id.*

75. *Id.* at 810 (quoting South Carolina Supreme Court).

76. *Id.* at 811.

77. See *Booth v. Maryland*, 482 U.S. 496, 507 n.10 (1987).

78. *Gathers*, 490 U.S. at 812. Indeed, even if Gathers had read the tract or the card, his greater awareness would not have increased his blameworthiness—unless one thinks, contrary to *Booth*, that murdering a person of known good character should serve as a basis for a sentence of death. That conclusion would be particularly troubling here. The Court has stated that religious or political affiliations of the defendant (invidious as well as capricious distinctions) may not constitute aggravating factors. See *Dawson v. Delaware*, 112 S. Ct. 1093 (1992); *Zant v. Stephens*, 462 U.S. 862, 885 (1983). By the same token, the ban applies to the use of similar criteria in the case of victims. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (discrimination in capital sentencing with respect to the victim’s race would be impermissible).

But this prohibition should not bar heavier punishment for persons who knowingly choose peculiarly vulnerable victims: for instance, high governmental officials, see, e.g., 18 U.S.C. § 351 (1988), or elderly persons. See generally U.S. SENTENCING GUIDELINES § 3A1.1 (augmenting sentence if defendant knew or should have known that victim “was unusually vulnerable due to age, physical or mental condition”). These situations implicate special considerations of retribution or deterrence or both. Also, they typically rest on prior legislative judgments rather than “ad hoc and post hoc” assessments by individual sentencing bodies of the loss caused by particular deaths. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2629 (1991) (Stevens, J., dissenting). Legislative identification—at least, in fairly general terms—should be required in capital cases of those aggravating circumstances that pose a significant risk of inviting unduly subjective or capricious reactions by the sentencer. *But cf.* *Gregg v. Georgia*, 428 U.S. 153 (1976) (facially upholding Georgia scheme, which permitted reliance on nonstatutory as well as statutory aggravating factors). I would include under that heading the status or qualities of the victim.

79. 490 U.S. at 812 (White, J., concurring).

the first unambiguous call to abandon *Booth*.<sup>80</sup> Also dissenting, Justice O'Connor, the Chief Justice, and Justice Kennedy indicated that they "st[oo]d ready to overrule" *Booth*, if the Court would do so, but believed they could "reach a proper disposition" in *Gathers* without resorting to such action.<sup>81</sup>

In an effort to confine *Booth* to its purportedly "central holding" barring proof at penalty hearings of harm to surviving family members,<sup>82</sup> their dissent focused on salvaging a place at trial for the primary victim—the deceased person. Invoking the now-familiar themes of victim uniqueness and the one-sidedness of a judgment based only on the defendant's character and background, Justice O'Connor proposed that the jurors be permitted to hear information on the victim's "personal characteristics".<sup>83</sup>

Nothing in the Eighth Amendment precludes the community from considering its loss in assessing punishment nor requires that the victim remain a faceless stranger at the penalty phase of a capital trial. That the victim in this case was a deeply religious and harmless individual who exhibited his care for his community by religious proselytization and political participation in its affairs was relevant to the community's loss at his demise, just as society would view with grief and anger the killing of the mother or father of small children.<sup>84</sup>

### C. *The Court Ducks*

On the first day of the 1990-91 Term, the Court granted the State's petition for certiorari in *Ohio v. Huertas*, another *Booth*-related case.<sup>85</sup> By this time, Justice Brennan had retired—to be replaced by the enigmatic Justice Souter. Even without the expected additional recruit to their ranks, the critics of *Booth* outnumbered its supporters;

80. *Id.* at 823-24 (Scalia J., dissenting). Discussion of his views on the claims of stare decisis in the present context falls beyond the scope of this essay.

81. *Id.* at 813-14 (O'Connor, J., dissenting).

82. *Id.* at 814 (O'Connor, J., dissenting). Insofar as one can distinguish between evidence about the victim's personal qualities and evidence about the familial harm resulting from his or her demise, *but see supra* note 58, the former threatens the integrity of death sentence proceedings no less than the latter. Thus, I believe they erred in their view of what was central to *Booth*'s concern.

83. *Gathers*, 490 U.S. at 819 (O'Connor, J., dissenting).

84. *Id.* at 821 (citation omitted). Having advanced the propriety of dwelling on Haynes's religious and political conduct, Justice O'Connor, nonetheless, asserted: "It would indeed be improper for a prosecutor to urge that the death penalty be imposed *because* of the race, religion, or political affiliation of the victim." *Id.* (emphasis in original); *see also supra* note 78.

85. 111 S. Ct. 39, *granting cert. to* 553 N.E.2d 1058 (Ohio 1990).

the decision's viability depended wholly on Justice White's fidelity to precedent. It appeared that we, as Huertas's advocates, would have to hold on to Justice White's reluctant vote while persuading the newcomer either of the merits of our position or of the virtues of stare decisis. Yet in the end, we avoided both of those difficult tasks by convincing an unknown complement of justices to dodge the issues by dismissing the writ as improvidently granted.<sup>86</sup> Rather than make bad law for us, the case made no law at all.

The Court's ideological makeup notwithstanding, *Huertas* actually should have been fairly easy to win. For one thing, the death sentence was somewhat puzzling—except, perhaps, for the presence of victim impact testimony. Resembling a heat-of-passion manslaughter more than an aggravated murder scenario, the killing grew out a love triangle involving Huertas, his sometime girlfriend Elba Ortiz (both Hispanics), and her current boyfriend, Ralph Harris, Jr. (an African-American, later the victim). All three had been close since high school. The fatal stabbing, committed in a haze of intoxication, occurred after the defendant attempted to woo Ortiz away from Harris and she replied that she was spending the night with Harris.<sup>87</sup> While hardly excusable, Huertas's act seemed comprehensible and neither venial nor especially heinous.

Equally favorable to Huertas, the record contained, in oral as well as written form,<sup>88</sup> samples of all three types of evidence condemned in *Booth*. In addition to praising her son's character,<sup>89</sup> the victim's mother, Elizabeth Harris, described not only her own sense of loss but also her grandson's: "I hate to take him to the graveyard. He always wants to go. He think[s] he [is] going to see his dad."<sup>90</sup> Although not as extensive as similar comments in *Booth*, this "good victim" and "sad family" information—conveyed in a plainly emotional tone—

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86. 111 S. Ct. 805 (1991) (per curiam). In various papers, Huertas mounted a strong claim that his triumph in the Ohio court had rested on adequate and independent state law grounds. See, e.g., Respondent's Brief in Opposition at 3 n.1, *Ohio v. Huertas*, 111 S. Ct. 805 (1991) (No. 89-1944); Motion to Dismiss Certiorari as Improvidently Granted, *Huertas* (No. 89-1944). Much of the oral argument, too, revolved about arcane points of local law (as respondent's counsel had hoped and planned). See Transcript of Oral Argument, *Huertas* (No. 89-1944). Although the Court did not frankly dispose of the matter on the basis of lack of jurisdiction, doubts on this score very likely influenced the course that was, in fact, adopted. See Tony Mauro, *Commentary: Courtside*, MANHATTAN LAW., Apr. 1991, at 14.

87. See *State v. Huertas*, 553 N.E.2d 1058, 1061 (Ohio 1990).

88. A pre-sentence investigation report summarizing an interview with the victim's parents was introduced at the penalty phase, as was the witness's live testimony. *Id.* at 1062.

89. For example, she stated: "'Oh God, how proud I was, a child that never give me no problem, no nothing, no drinking, no smoking, nothing but go to church and come back [sic]. . . .'" *Id.*

90. *Id.*

must have produced a poignant effect.<sup>91</sup> Most egregiously, the State called the victim's father to testify that he wanted the defendant to "go to the chair."<sup>92</sup> That error, in itself, ought to have compelled affirmance,<sup>93</sup> and it apparently constituted the main ground on which the Ohio Supreme Court upset the sentence.<sup>94</sup>

Finally, even if one had assessed Huertas's personal prospects as poor before the Court, his case seemed a likelier vehicle for limiting the rule of *Booth* and *Gathers* than for abolishing it entirely. The question presented implicated the reach of these precedents, not their existence: specifically, whether their ban applied to admission of victim impact evidence against a defendant who "intimately knew" the deceased and his family and thus was aware of the trauma the murder would probably cause them.<sup>95</sup> The State ultimately urged overruling—yet only half-heartedly, in the alternative.<sup>96</sup> Put simply, the more I became immersed in *Huertas*, the less I could envision its sounding the death knell for *Booth*.

I was, of course, correct about that. But immediately after the dismissal of the writ, I began to watch the advance sheets for signs of

91. *Id.*

92. See Joint Appendix at 146, *Ohio v. Huertas*, 111 S. Ct. 805 (1991) (No. 89-1944).

93. See *supra* text accompanying notes 34-35.

94. See *State v. Huertas*, 553 N.E.2d 1058, 1065 (Ohio 1990).

95. See *Ohio v. Huertas*, 111 S. Ct. 39, *granting cert. to* 553 N.E.2d 1058 (Ohio 1990). I do not believe, however, that a loss in *Huertas* based upon this factual distinction would have salvaged much of *Booth*. Among other things, the foreseeability of harm to survivors known to the killer does not provide a principled ground for admitting evidence about the virtues of the deceased or, a fortiori, relatives' opinions that the defendant deserves to die. I am also doubtful that, absent a motive to injure the family, see, e.g., *supra* note 46 (citing cases), the killer's prior acquaintance with people who will predictably mourn the victim increases the former's moral culpability. *But cf.* *Booth v. Maryland*, 482 U.S. 496, 505 (1987) (intimating contrary view). After all, "[e]very defendant knows, if endowed with the mental competence for criminal responsibility, . . . that the person who will be killed probably has close associates, 'survivors' who will suffer harms and deprivations from the victim's death"; judges and jurors know this, too. *Payne v. Tennessee*, 111 S. Ct. 2597, 2630 (1991) (Stevens, J., dissenting) (quoting *id.* at 2615 (Souter, J., concurring)). For these reasons, coupled with the loss of the primary victim, society punishes criminal homicide in the first place.

In any event, a decision in *Huertas* limiting *Booth* in the manner suggested would have raised difficult practical issues about the precise amount of knowledge of secondary victims sufficient to permit the admission of victim impact evidence. For example, should the fact that Booth may have seen the Bronsteins' children and grandchildren once in a while at a distance have lifted the ban on proof of their pain? Or if Mills's cellmate, Brown, had mentioned his brother to Mills, should that have opened the door to proof of the brother's sadness when Brown was killed? Given these problems, one would not have expected the Court to adopt a rule turning on such hairline differences.

96. Petitioner's Brief on the Merits at 49-51, *Ohio v. Huertas*, 111 S. Ct. 805 (1991) (No. 89-1944). Others, to be sure, preferred that course. See, e.g., Brief of Washington Legal Foundation et al. as *Amici Curiae* in Support of Petitioner, *Huertas* (No. 89-1944) [hereinafter WLF Brief]; Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Huertas* (No. 89-1944).

renewed attention to the subject by the justices. Sadly, my interest did not go "unrewarded" for long.

#### D. *An Unhappy Ending*

Four weeks later, the Court again agreed to hear a capital case raising issues under *Booth* and *Gathers*. Indeed, the Court reached out to do so. Fishing in the certiorari pool, the justices hooked a petition from hell.<sup>97</sup> *Payne v. Tennessee*<sup>98</sup> involved a gory black-on-white murder of a young mother, Charisse Christopher, and her two-year-old daughter, Lacie, by the drug-crazed and sexually driven defendant. During his frenzy, Payne inflicted forty-one knife wounds on Christopher alone; he also attacked and almost killed her three-year-old son—Lacie's older brother, Nicholas.

Clearly, this crime fell on the opposite end of the spectrum from Huertas's "manslaughter-plus." It was the stuff of hideous nightmares rather than romance gone awry and withered friendship. Capitalizing upon that horror at the sentencing phase, the State introduced a color videotape of the gory murder scene featuring the corpses and their wounds.<sup>99</sup> The state also called Mary Zvolanek, Christopher's mother, to testify to the reaction of Nicholas to these events:

"He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie."<sup>100</sup>

This brief vignette, much less than appeared in the *Booth* VIS, comprised the sum of the actual evidence of victim impact. But as in *Gathers*, the closing arguments served as powerful "testimony": not, as there, to the victims' goodness but instead to the suffering of their

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97. *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

98. The facts of the guilt and penalty trials are taken from the Court's opinion in *Payne*, 111 S. Ct. at 2601-03, and the opinion of the court below. See *State v. Payne*, 791 S.W.2d 10, 11-14, 17-20 (Tenn. 1990). The Christophers lived across the hall from Payne's girlfriend, Bobbie Thomas. Payne had been visiting Thomas's apartment, waiting for her to return from a trip, on the weekend when the murders occurred.

99. See Transcript of the Evidence, vol. 11 at 1489-92, *State v. Payne* (Crim. Ct. of Tenn. at Memphis, Feb. 9, 1988) (Nos. 87-04408, 87-04409, 87-04410).

100. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2603 (1991).

survivors, especially Nicholas.<sup>101</sup> Further, the prosecutor strongly implied that a grownup Nicholas would wish to see the murderer of his family killed: “[T]here is something that you can do for Nicholas. . . . He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.”<sup>102</sup> Thus, the State essentially called on the jury to sentence the defendant to death to satisfy the imputed desires of an absent (and not yet competent) witness.

Unfortunately, from Payne’s standpoint as a litigant urging constitutional error, this pseudo-evidence was less blatant than the senior Harris’s testimony that Huertas should “go to the chair.”<sup>103</sup> But from the vantage of the Court’s activists, *Payne* closely resembled *Huertas* in one respect critical to them: the petition had not called into question the continued existence of *Booth* and *Gathers*. (It hardly could have, because the defendant had sought review.) Nor, however, had Tennessee requested their reconsideration. Undaunted, and eager to return to the fray, six members of the Court rewrote the application for certiorari—ordering the parties to brief and argue whether *Booth* and *Gathers* should be overruled. The justices also placed the matter on an expedited briefing schedule so that *Payne* could be heard in April during the final session of the Term.<sup>104</sup> Now, no knowledgeable

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101. One of the two trial prosecutors poignantly portrayed a lonely Nicholas, whose “mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby,” and who “doesn’t have anybody to watch cartoons with him, a little one.” *Payne*, 111 S. Ct. at 2603. Toward the end of her summation, responding to the defense point that Payne had led an “exemplary life” for 20 years (he had no prior criminal record or history of alcohol or drug abuse, he worked with his father as a painter, and he had been a good son), *id.* at 2602-03, she asserted that Christopher and Lacie had also lived “exemplary lives”; she did not, however, elaborate. See Transcript of the Evidence, *Payne*, *supra* note 99, vol. 11, at 1596-97. Rather, she proceeded to stab a large diagram of Nicholas with the murder weapon while saying “this is what [Payne] did to them.” *Id.* at 1597; *State v. Payne*, 791 S.W.2d 10, 20 (Tenn. 1990). The Tennessee Supreme Court condemned her conduct as “improper argument, an improper, unprofessional act and an improper use of exhibits,” but found that it was harmless error. *Id.*

102. See *Payne*, 111 S. Ct. at 2603.

103. See *supra* text accompanying note 92.

104. See *Payne v. Tennessee*, 111 S. Ct. 1031 (1991); Linda Greenhouse, *Court to Review a Bar on Statements from Victims’ Families*, N.Y. TIMES, Feb. 16, 1991, at 13. Justice Stevens, dissenting with Justices Marshall and Blackmun, characterized the majority’s actions as “both unwise and unnecessary.” *Payne*, 111 S. Ct. at 1031 (Stevens, J., dissenting). He also remarked that, regardless, review of the claimed *Booth* error would be “inappropriate” because the decision of the court below rested on the alternative ground that any violation was harmless. *Id.*; see also *State v. Payne*, 791 S.W.2d 10, 18-19 (Tenn. 1990). Notably, however, one of the prosecutors told me at the oral argument that the State had not regarded a death sentence as a foregone conclusion despite the hideous nature of the crime. This was because of Payne’s good record and his solid family background.

observer could doubt that the days of the earlier decisions were numbered,<sup>105</sup> with an endpoint of June or early July 1991.

For *Booth's* defenders, a further challenge arose from the fact that the media hounds had scented blood—a circumstance compounded by then Attorney General Richard Thornburgh's plan to argue before the Court in support of the State and counter to *Booth*.<sup>106</sup> The Attorney General even adopted the unusual tactic of airing his position on television talk shows.<sup>107</sup> We were, of course, at a disadvantage in soundbite debates on the complicated moral and social issues underlying the legal questions (especially when attractive, articulate survivors added their voices to the chorus against us).<sup>108</sup> While these considerations did not openly influence courtroom proceedings, they could not help but cast a shadow over the oral argument in *Payne*.<sup>109</sup> To what extent they may have subtly affected the newcomer, Justice Souter, we cannot know.

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105. See, e.g., Walter Shapiro, *What Say Should Victim Have?*, TIME, May 27, 1991, at 61.

106. This was only his second such appearance before the Court. His first was in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), which upheld drug testing of railroad employees in certain situations. See generally Shapiro, *supra* note 105 (making tie between Thornburgh's involvement and usefulness of *Payne* as political symbol for Bush administration).

107. See, e.g., *Nightline: Victim Impact Statements* (ABC television broadcast, June 10, 1991), available in LEXIS, Nexis library, Omni File [hereinafter *Nightline*]. After the argument, he also held a press conference outside the Court. It is, perhaps, not overly cynical to speculate that the Senate campaign which Mr. Thornburgh was plainly contemplating at this time may have fueled his zest for media exposure. See Steve Daley & Christopher Drew, *Thornburgh, Old Foe May Try for Senate*, CHI. TRIB., Apr. 11, 1991, at 1. When *Payne* came down, Justice Stevens commented sadly on the undoubted popularity of the course the majority had chosen. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2631 (1991) (Stevens, J., dissenting).

108. Some of these, like Roberta Roper (the mother of a murdered daughter), have channeled their anguish into a career of victim advocacy and have, thus, acquired great skill in public speaking. Yet I felt uneasy contending with victims not on that score but mainly for psychological reasons: my empathy made me feel protective rather than intellectually aggressive. Even apart from such personal sentiments, one tends to pull one's punches for fear of seeming insensitive and, thereby, "turning off" the audience.

109. *Payne's* counsel began his argument by trying to get the Court to focus on the apparently least controversial, because apparently least justifiable, aspect of the state's conduct—the imputation to Nicholas of a desire to see the murderer die. See *Argumentis Heard, Capital Punishment—"Victim Impact" Evidence*, 49 CRIM. L. REP. 3033, 3034 (1991) [hereinafter *Argumentis Heard*]. If this maneuver was aimed at diverting the Justices from the divisive problems of victim worth and effects on survivors, it utterly failed (although I do not fault the attorney). The Court showed scant interest in the subject. Ultimately, piling insult on injury, the majority wrote in a footnote in *Payne* that "[n]o evidence" of family members' characterizations or opinions about the crime, the defendant, or the proper sentence had been presented at the trial in this case. *Payne*, 111 S. Ct. at 2611 n.2; see also *id.* at 2612-13 (O'Connor, J. concurring); *id.* at 2614 (Souter, J., concurring). Although technically true because the challenged matter involved argument rather than evidence, *Gathers* made such a distinction irrelevant. But if the Court just meant to convey that it considered the claim meritless (possibly because the remarks were veiled), it should have said so: *Payne's* contention was hardly frivolous.



In any event, his vote was not decisive because Justice White joined with him, the Chief Justice, and Justices O'Connor, Scalia, and Kennedy to bury *Booth*.<sup>110</sup> Writing for the Court, Chief Justice Rehnquist penned an anti-*Booth* discourse—naysaying almost word for word the arguments made by Justice Powell.<sup>111</sup> Justice O'Connor echoed him briefly;<sup>112</sup> Justice Souter, at greater length.<sup>113</sup>

For present purposes, I stress once more the critical division between the now-majority camp and the dissenters: their disagreement over the need for the victim to play a personal role at the sentencing phase to ensure both recognition of the singular loss caused by her death and parity with the defendant's treatment as a quintessential human being. On the one hand, the Court's opinion spoke of *Booth's*

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110. The nine members of the Court produced six opinions in the case. See *Payne*, 111 S. Ct. 2597 (1991); *id.* at 2611 (O'Connor, J., concurring); *id.* at 2613 (Scalia, J. concurring); *id.* at 2614 (Souter, J., concurring); *id.* at 2619 (Marshall, J., dissenting); *id.* at 2625 (Stevens, J., dissenting). Virtually all of Justice Scalia's concurrence and Justice Marshall's dissent were devoted to the issue of stare decisis, as were parts of the majority opinion and Justice Souter's. See *id.* at 2609-11; *id.* at 2617-19 (Souter, J., concurring). Justice Marshall's jeremiad on this subject became his swan song: on the day that *Payne* came down, he announced his intent to resign from the Court. See Michael Kranish, *Marshall To Retire from High Court; Great-grandson of Slave a Civil Rights Architect*, BOSTON GLOBE, June 28, 1991, at 1. He has since done so. See Richard Berke, *Thomas Vote Delayed Until Tuesday*, N.Y. TIMES, Oct. 2, 1991, at A20. The unusual force and bitterness with which he expressed his views, as well as the fact that they constituted his parting thrust, ensure that others will give them their deserved attention. The arguments about precedent, however, exceed the purview of this Article.

111. See generally text accompanying notes 25-31, 44, 46-49, 53-56 (summarizing Court's opinion in *Booth*). By embodying the substance of prior dissents, *Payne* simply projects a reverse image of *Booth*. Because I have canvassed both sides' basic contentions in reviewing the earlier cases, I will not repeat them here.

112. She focused on the theme of the victims' uniqueness: "Murder is the ultimate act of depersonalization. . . . It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. *The Constitution does not preclude a State from deciding to give some of that back.*" *Payne*, 111 S. Ct. at 2612 (O'Connor, J., concurring) (citation omitted) (emphasis added).

113. His turgid opinion dwelt primarily on the general foreseeability (and hence, in his view, moral relevance) of consequential harms to survivors. See *supra* note 95. He also went off on a singular detour, arguing that—because much victim impact evidence comes in with respect to guilt-phase issues—*Booth's* objective will not be met without requiring the seating of a separate sentencing jury. He concluded that this ostensibly vital measure would too gravely impose on the states to warrant retaining the rule of *Booth*. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2617 (1991) (Souter, J., concurring). But Justice Souter's dilemma is false. Evidence germane to guilt or innocence will be admitted, possibly subject to limiting instructions, for the jury to consider in that context. At the penalty phase, the same jurors can hear the case; and the prosecution, as *Gathers* held, see *supra* text accompanying notes 77-78, will simply be forbidden to use the proof pertaining to victims for ends unrelated to the grounds for admission. Further, to the extent that such proof "is routinely and properly brought to the attention of the jury," improper introduction of additional evidence along these lines may often amount to harmless error. See *Payne*, 111 S. Ct. at 2630 (Stevens, J., concurring). As Justice Stevens correctly stated: "[W]e should not be concerned with the cases in which victim impact evidence will not make a difference. We should be concerned instead with the cases in which it will make a difference." *Id.*

having "unfairly weighted the scales in a capital trial" by barring evidence of the deceased's individuality while giving the murderer free rein to offer proof of his own condition.<sup>114</sup> On the other hand, Justice Stevens's dissent challenged the majority's notion of an appropriate balance and equity in this process<sup>115</sup> and ridiculed the claim that so "obvious" a fact as the victim's uniqueness "requires [any] evidentiary support."<sup>116</sup>

Ironically, the victims'-rights stance of the *Booth* dissenters, who ultimately carried the day in *Payne*—though superficially honoring the dead and their survivors more than Justice Powell's approach—actually threatens victim interests in a number of serious respects. This is particularly true when the deceased does not hail from central casting: a stereotypical blameless victim with whom everyone can identify. One might question whether, even at a symbolic level, the *Payne* principle vindicates victims as cultural icons rather than (formerly) flesh-and-blood people.<sup>117</sup> At the very least, the rejection of *Booth* will pose tangible problems for victims in the real-world setting of capital trials.

#### IV. VICTIMS' RIGHTS, VICTIMS' WRONGS:<sup>118</sup> WHY *PAYNE* IS BAD FOR VICTIMS

##### A. Honoring Victims With "The Right Stuff"

Developing his argument against the propriety of demonstrating the deceased's uniqueness, Justice Stevens captured the essence of why *informed* concern for victims counsels a skeptical view of *Payne*:<sup>119</sup>

114. See *Payne*, 111 S. Ct. at 2607.

115. See *id.* at 2627-28. In general, Justice Stevens repeated the substance of the arguments made in *Booth*—most of which I will not recapitulate. See *supra* note 111; see also *Payne*, 111 S. Ct. at 2620 & n.1 (Marshall, J., dissenting) (footnote response to majority's contentions by reference to *Booth* and *Gathers* opinions).

116. 111 S. Ct. at 2631 (Stevens, J., dissenting). I will mention further arguments by members of the Court in the context of my critique of *Payne*. See *infra* text accompanying notes 119-202.

117. See generally Shapiro, *supra* note 105, at 61 ("The significance of *Payne* is more societal in terms of what it says about the proper role of the crime victim in the criminal-justice system.") (quoting lawyer for conservative Washington Legal Foundation).

118. See Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985).

119. I do not claim that most professed champions of victims share this view. But victims of crime and their survivors do not speak with a single voice. See, e.g., Motion for Leave to File Brief and Brief of Murder Victims' Families for Reconciliation as *Amici Curiae* in Support of Respondent, *Ohio v. Huertas*, *supra* note 8 (survivors urge retention of rule of *Booth* and *Gathers*); Marie Deans, *Murder Most Foul, but Vengeance Kills the Soul*, SAN JOSE MERCURY NEWS, July 17, 1983, at 4C (daughter-in-law of homicide victim founded group in opposition to capital punishment); Henderson, *supra* note 118, at 938 n.3, 954-55 (author, a victim of violent crime, criticizes much of current "victims' rights" agenda).

What is not obvious . . . is the way in which the character or reputation [of the victim] 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. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black.<sup>120</sup>

Chief Justice Rehnquist purported to answer the criticism:

As a general matter . . . victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.<sup>121</sup>

He drew support for that proposition from the facts of *Gathers*, which involved the killing of an unemployed, mentally handicapped man—"perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being."<sup>122</sup>

The proffered examples, though hardly dispositive, do warrant passing mention. First, the "hardworking, devoted parent" figures more prominently in victim impact evidence and argument than any other characterization I have seen in reported cases.<sup>123</sup> I doubt the

120. *Payne v. Tennessee*, 111 S. Ct. 2597, 2631 (1991) (Stevens, J., dissenting) (citation omitted).

121. *Id.* at 2607 (emphasis in original). The internal quote appears to be taken (inexactly) from *Booth's* quotation of language in *Woodson*. See *id.* at 2606-07.

122. *Id.* at 2607.

123. See *supra* text accompanying note 121. See, e.g., *Hayes v. Lockhart*, 869 F.2d 358, 363 (8th Cir.) (Heaney, J., dissenting from denial of reh'g en banc) (prosecutor argued that victim died his "[f]irst day on the job trying to support his family"), *vacated*, 491 U.S. 902 (1989); *Morrison v. State*, 551 So. 2d 435, 439-40 (Ala. Crim. App. 1989) (prosecutor argued that victim was a "hard-working woman in a family-run business"), *cert. denied*, 495 U.S. 911 (1990); *Hill v. Thigpen*, 667 F. Supp. 314, 341 (N.D. Miss. 1987) (deceased portrayed as a "good provider and a good family man"), *modified*, 891 F.2d 89 (5th Cir. 1989), *vacated*, 111 S. Ct. 28 (1990). The following excerpt from the state's penalty summation in *Clemons v. Mississippi*, 494 U.S. 738 (1990), is a typical specimen:

Here you have a man twenty-four years of age, in the prime of life. A three-year-old child. Holding down two jobs. Trying to make it in this world as an honest, law abiding human being for his family. Trying to—aspiring to be a supervisor in another county. . . .

[W]e can look at what Matthew Shorter told us of his son. That he worked two jobs. He had a degree from Alcorn University. He was striving to get a higher education. And he had a son, a three-year-old son. . . . And I think if you look at what he

Chief Justice knew that, but it is interesting that he chose as an illustration of "benign" practice so mined a pit of rhetorical ore. Second, the remarkable thing about *Gathers* is the State's attempt to show that this pathetic creature's killer deserved death less because of the weakness he preyed on<sup>124</sup> than because of his target's religiosity and claimed community spirit.<sup>125</sup> In any event, if paeans to the deceased's virtues are not aimed at inviting jurors to make some sort of comparative judgments (whether among various victims or between the victim and the defendant),<sup>126</sup> why do prosecutors never dwell on the dead person's vices? That is hardly an idle question. Presumably, the fact that one victim beat her children or dropped out of school in the ninth grade would reveal her "uniqueness as an individual human being" as much as another's devotion to her family or graduation at the top of her class.<sup>127</sup>

Whatever the state's *purpose*, however, the predictable *effect* of relying on such proof is that which Justice Stevens condemned: to enhance certain victims by identifying them as worthier than others of society's highest measure of concern.<sup>128</sup> This stark truth reveals the moral bankruptcy not only of the victim-uniqueness contention but

told you Arthur was doing, I think you can say that he properly instilled that work ethic in Arthur.

Record on Appeal at 1192, *Clemons* (No. 88-6873), quoted in Motion for Leave to File Brief and Brief of Murder Victims' Families for Reconciliation as *Amici Curiae* in Support of Respondent, in *Ohio v. Huertas*, *supra* note 8, at 37-38 n.14.

124. See generally *supra* note 78 (known vulnerability of victim may appropriately aggravate sentence).

125. See *supra* text accompanying notes 72-75 and note 74. The prosecutor, therefore, tried to the maximum extent possible to depict *Gathers* as a "contributor to society."

126. At best, this type of evidence encourages the sentencing body to choose up sides with the usually more attractive victim and her family against the defendant—on the basis of the former's greater "value" rather than, properly, the heinousness of the particular crime or of the latter's general character. See *Byrne v. Butler*, 845 F.2d 501, 510 (5th Cir.), *cert. denied*, 487 U.S. 1242 (1988); *Brooks v. Kemp*, 762 F.2d 1383, 1439 (11th Cir. 1985) (en banc) (Clark, J., concurring in part and dissenting in part), *vacated on other grounds*, 478 U.S. 1016 (1986). During oral argument in *Payne*, the Attorney General of Tennessee answered a question by Justice O'Connor about whether moral culpability includes the victim's characteristics by conceding: "When they go only to the point of showing that the victim's life was worth more than the defendant's, that's going too far." *Arguments Heard, supra* note 109, at 3034.

127. Notably, Professor Ilene Nagel, a United States Sentencing Commissioner who describes herself as "very sympathetic to victims' rights" has indicated that she could not justify making distinctions along these lines in ordinary (non-capital) sentencing. See Symposium, *Equality Versus Discretion in Sentencing*, 26 AM. CRIM. L. REV. 1813, 1835 (1989), quoted in Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 249 n.87 (1991).

128. Rejection of such discrimination does not, of course, depend on believing that capital punishment actually protects or vindicates lives to a greater degree than a sentence of imprisonment. In my opinion, neither retribution nor deterrence warrants imposing the death penalty. See Richard Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1224-25 (1981).

also of the hue and cry for parity with the attention paid the defendant. When Justice Powell commented that "our system of justice does not tolerate" invidious distinctions among victims,<sup>129</sup> he was implicitly invoking the single relevant notion of equality: the political equality of all persons enshrined in the equal protection clause.<sup>130</sup> By inviting sentencers to calibrate the penalty to the personal or societal value of the victim,<sup>131</sup> as they perceive it, the *Payne* principle turns the concept of evenhandedness on its head.

Conversely, that ideal is in no way offended by the pre-*Payne* focus on the killer alone. Apart from the fact that the criminal procedural guarantees in the Bill of Rights do not incorporate a theory of state-individual balance,<sup>132</sup> in the particular setting at issue (the sentencing phase of a capital trial) the prosecution can "counteract[] the mitigating evidence"<sup>133</sup> by specific rebuttal, where this is available,<sup>134</sup> and by

129. See *supra* note 31.

130. Because of the modern emphasis on the anti-discrimination component of the Fourteenth Amendment (referred to originally as a prohibition on drawing lines on the basis of "class" or "caste" or "race"), many people do not know that the phrase "equal protection of the laws" also requires the states to safeguard everyone's lives, liberty, and property, to the same full extent, against criminal or tortious invasions. With regard to the former, see, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 537 (1866) (Rep. Stevens) (race); *id.* at 674 (Sen. Sumner) (race); *id.* at 704 (Rep. Fessenden) (caste); *id.* at 1095 (Rep. Hotchkiss) (class); *id.* at 1227 (Sen. Sumner) (caste or color); *id.* at 2766 (Sen. Howard) (class); *id.* at 3035 (Sen. Henderson) (race). With regard to the latter, see, e.g., *id.* at 1225 (Rep. Wilson) (State that does not accord these protections to "all men violates its duty, because every person has this due him for his allegiance to the Government"); *id.* at 1182 (Rep. Pomeroy) (everyone should have law's safeguards "weighed out in equal and exact balances"); *id.* at 1094 (Rep. Bingham) ("all men are equal in the rights of life and liberty before the majesty of American law"). See generally Jacobus ten Broek, EQUAL UNDER LAW (1951) (detailing history and meaning of "equal protection of the laws").

131. Sentencers may also be led to consider, illegitimately, the worth of the spokespersons for the deceased—her family and friends. See *supra* notes 55, 126.

132. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2627 (1991) (Stevens, J., dissenting). For example, the state must prove the accused's guilt beyond a reasonable doubt; the accused may remain silent and adduce no evidence at all. Compare *In re Winship*, 397 U.S. 358 (1970) with *Brooks v. Tennessee*, 406 U.S. 605 (1972). The defendant may seek a new trial if she is convicted; the prosecution may not retry her if she is acquitted. See, e.g., *United States v. Ball*, 163 U.S. 662 (1896) (setting forth both rules). This constitutional "tilt," in part, reflects the reality that governments have vastly superior resources at their command and, therefore, do not begin on an even plane with defendants. See Abraham Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960). Notably, too, the Court has often repeated (if not honored) the doctrine that although a sentencer's discretion to impose the death sentence must be carefully cabined, "the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." *McKoy v. North Carolina*, 110 S. Ct. 1227, 1234 (1990) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) (emphasis in original)).

133. See *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J., dissenting) (emphasis added).

134. See, e.g., *State v. Huertas*, 553 N.E.2d 1058, 1064 n.2 (Ohio 1990) (state challenged defense evidence that Huertas was a good father by eliciting testimony from his wife that he never paid child support).

proof of aggravating factors, which it must introduce regardless.<sup>135</sup> The prescribed "debate on the appropriateness of the capital penalty" occurs not "with *one side* muted," as Justice Scalia alleged in *Booth*,<sup>136</sup> but rather with *both sides* arguing about the one individual whose future hinges on the outcome.<sup>137</sup> Such a proceeding is no more skewed than a funeral centered on the deceased. In contrast, the post-*Payne* toleration of witnesses to the victim's life being permitted to share a podium with witnesses to the defendant's life produces a superficial symmetry pleasing to the public eye, yet out of place in the idiosyncratic moral construct of the modern sentencing trial.

In the passage quoted from Justice Stevens's dissent in *Payne*,<sup>138</sup> he obliquely raises the subject of race—the topic evaded by the *Booth* majority,<sup>139</sup> which ought to figure in any discussion of the problems with victim impact evidence. Even more troubling than death sentences that are entirely arbitrary, in the sense that a strike of lightning is freakish,<sup>140</sup> are those imposed on invidious grounds. When the personal worth of the killer's target operates as the lightning rod, caprice<sup>141</sup> combines with discrimination<sup>142</sup> to make the result doubly disquieting. But when an institution of justice fosters either overt or hidden use of constitutionally forbidden criteria such as race, social standing, religion, or sexual orientation, it cannot be defended as just. Unfortunately, the type of proof sanctioned by *Payne* risks enlarging the role of this kind of consideration in capital penalty determinations.

Reported decisions, in addition to *Gathers*, already reveal egregious examples of attempts to exploit the victim's piety.<sup>143</sup> The prosecution

135. See *Payne*, 111 S. Ct. at 2627 (Stevens, J., dissenting).

136. See *Booth*, 482 U.S. at 520 (Scalia, J., dissenting) (emphasis added).

137. Cf. *Payne*, 111 S. Ct. at 2627 (Stevens, J., dissenting) (fairness argument is "classic *non sequitur*" because the victim is not on trial).

138. See *supra* text accompanying note 120.

139. See *supra* text accompanying note 25.

140. See *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

141. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2629-30 (1991) (Stevens, J., dissenting).

142. Cf. *Moore v. Zant*, 722 F.2d 640, 653 n.4 (11th Cir. 1983) (Kravitch, J., concurring in part and dissenting in part) (invoking "spectre" of statute listing as aggravating factor that "victim of the murder was a valuable member of society and of her family"), *on reh'g en banc*, 809 F.2d 702 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987).

143. See, e.g., *Daniels v. State*, 561 N.E.2d 487 (Ind. 1991) (prosecutor mounted life-size photo of victim in full military uniform and stressed that he had been army chaplain); *Stare v. Huertas*, 553 N.E.2d 1058 (Ohio 1990) (victim's mother mentioned son's churchgoing habits); *Vela v. Estelle*, 708 F.2d 954, 962 (5th Cir. 1983) (witness testified that deceased was choir member at his church), *cert. denied*, 464 U.S. 1053 (1984); cf. *People v. Holman*, 469 N.E.2d 119, 134-35 (Ill. 1984) (prosecutor dwelt on "religious moral fiber" of victim's mother), *cert. denied*, 469 U.S. 1220 (1985). Remarking on the similar strategy in *Gathers*, the LDF amicus brief noted: "It is not unduly cynical to suggest that none of this would have occurred had the victim

is, of course, unlikely to argue explicitly that the murderer deserves death because the deceased had money or status or was white.<sup>144</sup> Yet characteristics like the articulateness of survivors frequently correlate closely with wealth and social position, thereby serving as surrogates for parameters nobody deems appropriate. So, too, victim attributes urged by the state, such as being a steady and dependable employee<sup>145</sup> or “a good provider,”<sup>146</sup> import a certain community status, as well as purely personal traits.<sup>147</sup>

Much worse, however, from the vantage point of particular survivors than sentencing trials revolving about the deceased’s virtues<sup>148</sup> are ones that, in the post-*Payne* world, will either ignore devalued victims or, worst of all, provide a forum for airing their defects. In the course of discussing these issues, immediately below, I will also elaborate on the special problem of minority victims—above all, African-Americans—who, as second-class citizens generally, predictably become second-class victims.

### B. Dishonoring Victims With “The Wrong Stuff”

The *Booth* majority raised the specter that sanctioning victim impact evidence would logically entail admitting similar proof in re-

adhered to non-orthodox religious views, and had in his possession not an angel, a bible, and the Game Guy’s Prayer, but a voodoo doll, a satanic tract, and a blessing written by the Ayatollah Khomeini.” Brief *Amici Curiae* of the NAACP Legal Defense and Educational Fund, Inc. and the American Jewish Congress, at 60, *South Carolina v. Gathers*, 490 U.S. 805 (1990) (No. 88-305).

144. By contrast, because Americans accord unambivalent esteem to religious devotion or its appearance, prosecutors show no hesitation in extolling the pious nature of victims. (I cannot, for instance, remember a presidential candidate who professed to atheism or agnosticism.) *But cf. supra* note 143 (suggesting that people do not respect cults or non-traditional religions).

145. See *Byrne v. Butler*, 845 F.2d 501, 510 (5th Cir.), *cert. denied*, 487 U.S. 1242 (1988).

146. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2607 (1991).

147. In *Huertas*, the Washington Legal Foundation claimed that the facts of the case at bar proved that jurors exposed to victim impact evidence can, nonetheless, impose death even “when the victim is not wealthy or socially prominent.” WLF Brief, *supra* note 96, at 12. But caste and class are relative concepts. The type of evidence and argument in question does not redound only to the benefit of murdered members of the Rockefeller clan or of the leading family in town. Rather, it serves more broadly to separate the “sheep” from the “goats,” the socially acceptable from the marginal or outcast elements of society. In any event, I do not contend that such information invariably taints the sentencing process but simply that it has the pernicious tendency to heighten the influence of invidious factors. Some have urged that it may, to the contrary, “personalize the victim for the jurors” in a way that makes it more probable that they will empathize with survivors with whom they might otherwise feel they have very little in common. See Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Huertas*, *supra* note 96, at 15 n.7. While such an effect may occur occasionally (surely, no one can prove the opposite), experience counsels that it is more likely to tip the balance in favor of death when it pertains to “folks like us,” from the perspective of the jurors. See *supra* note 21 and accompanying text.

148. For discussion of the reasons why certain survivors prefer to bury, not praise, their dead and, hence, do not want to come to court even to discuss their loved one’s goodness, see *infra* text accompanying notes 186-202.

sponse and, thus, inviting "a 'mini-trial' on the victim's character."<sup>149</sup> Such a prospect is "more than simply unappealing" or potentially distracting to the jury, as the Court's opinion noted.<sup>150</sup> By leading ineluctably to critical scrutiny of past lives, the *Payne* rule will allow the most profound insult—decimation of the victim's memory<sup>151</sup>—to be added to the ultimate injury, death. Furthermore, departure from *Booth* will harm not only specific individuals but also victims as a group by encouraging sentencers to base their penalty determinations on factors like race and societal standing.

Justice White underestimated the expansive scope of evidence that an anti-*Booth* regime would yield. The dissent, while conceding the defendant's undoubted right to adduce "relevant evidence in rebuttal,"<sup>152</sup> seemed to consider this possibility quite remote. The White opinion focused on the situation presented: a penalty hearing at which the prosecutor offered proof of the victim's virtues and the suffering endured by the family. Surmising that Booth himself had refrained from attempting to challenge the VIS for tactical reasons—presumably, from fear of offending the jurors<sup>153</sup> and on account of its obvious truth—the dissenters failed to address the very different situation of the tarnished victim: the person whose "uniqueness" as a human being the state's attorney will likelier seek to suppress than tout.

In a nutshell, although few defense counsel may have the temerity to assail the Bronsteins or their survivors, more will surely dare to attack the drunk, addicted, insane, unorthodox, friendless, immoral, or criminal victim. It is precisely when a victim's life has not been blameless that the defense will try to impugn it. What *Booth's* opponents did not appreciate is that the same principle of relevance that makes a victim's personal, familial, and social worth pertinent evidence in aggravation makes his or her worthlessness in these respects pertinent evidence in mitigation "in the sense that [it] might serve 'as a basis for a sentence less than death.'"<sup>154</sup> The *Payne* principle not only allows defendants to counter proof of a victim's good character and of family members' grief with evidence and argument that the deceased was, in truth, neither good nor grieved; it also allows defen-

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149. See *supra* text accompanying notes 30, 55-56; *Gardner v. Florida*, 430 U.S. 349 (1977).

150. See *Booth v. Maryland*, 482 U.S. 496, 507 (1987).

151. See WILLARD GAYLIN, *THE KILLING OF BONNIE GARLAND* 15 (1983) (author stresses importance of leaving "immortality of memory" intact).

152. 482 U.S. at 518 (White J., dissenting).

153. *Id.* at n.3.

154. *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).



dants to place the character of a victim on trial even if the prosecution did not.<sup>155</sup>

Thus, besmirching the deceased's memory whenever feasible has now become an unavoidable, even if highly distasteful, duty of defense attorneys.<sup>156</sup> Lawyers might risk being held ineffective unless they endeavor to show "that the victim was of dubious moral character, was unpopular, or was ostracized from [her] family."<sup>157</sup> Lest the reader suspect that I am painting in overly garish colors an advocate's portrait of a conjectural parade of horrors, consider the claim advanced by the Washington Legal Foundation in its *Huertas* amicus brief to demonstrate the supposed fairness and evenhandedness of the anti-*Booth* approach: "An individual convicted of murdering a drug dealer, for example, could make a reasonable claim in mitigation that his act actually *benefitted* society by ridding the community of a merchant of violence and death."<sup>158</sup> I would have thought that only Charles Bronson or Clint Eastwood could rejoice at such a prospect!

155. This conclusion follows from constitutional doctrine that a defendant may not be prevented from offering evidence relevant to the issues in a criminal trial. See *Chambers v. Mississippi*, 410 U.S. 284 (1973). The same rule applies at a capital sentencing hearing. See *Green v. Georgia*, 442 U.S. 95 (1979).

156. See, e.g., Georgia Sargeant, *Victim Impact Testimony Allowed by Supreme Court in Death Penalty Hearings*, TRIAL, Oct. 1991, at 19, 85 (quoting past president of South Carolina Trial Lawyers' Association, who represents only capital defendants: "If [victim impact evidence is] admitted and I have to undermine the victims' credibility to protect my clients, I will. It's ugly and I don't want to, but I'll do whatever I have to do."). The temptation to smear crime victims is ever-present in criminal trials, whether legally sanctioned or not, because such tactics are often effective in gaining acquittals. Bobbie Lee Cook, a well-known lawyer who has represented more than 350 murder defendants, describes the jurors' concerns as follows: "'Number one, should the victim have been killed? Did he deserve to die? . . . And secondly, was your man the right man for the job?'" Mark Curriden, *Bobbie Lee Cook—Georgia Maverick*, A.B.A. J., Mar. 1989, at 68.

The put-the-victim-on-trial technique operates, of course, in other contexts as well as murder—most notably, in rape prosecutions—and has produced a vast literature. See, e.g., Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977) (focusing on admission of evidence of victim's prior sexual acts); cf. Joan L. Brown, Note, *Blaming the Victim: The Admissibility of Sexual History in Homicides*, 16 FORDHAM URB. L.J. 263 (1988) (describing tendency to blame female homicide victims on account of their sexual activity).

157. *Booth v. Maryland*, 482 U.S. 496, 507 (1987). Indeed, in this new regime, a prosecutor would presumably incur a duty under *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Bagley*, 473 U.S. 667 (1985), to provide the defendant with information of potential use in attacking the victim, although irrelevant to guilt or innocence. Cf. *supra* note 36 (victim's traits may sometimes be relevant to a particular charge or defense).

158. WLF Brief, *supra* note 96, at 17 (emphasis in original). In response to questioning during oral argument in *Payne*, the Attorneys General of both Tennessee and the United States opined that defendants should not be allowed to denigrate victims. *Arguments Heard, supra* note 109, at 3034-35. Unlike the Washington Legal Foundation, they failed to realize that *Booth's* abandonment would demand reciprocal rejection of rules of evidence protecting victims.

In sum, by inviting lawyers "to argue the victim's worthlessness in mitigation,"<sup>159</sup> *Payne* ill serves the needs of victims while debasing the dignity of the process. Its new and perverse balance of irrelevance<sup>160</sup> hardly advances the ideal of parity extolled so highly by *Booth's* detractors. To the contrary, as I have noted, it exacerbates inequalities that subvert reliability in the determination of sentences.

Earlier, I mentioned prosecutors' efforts to enhance victims on the basis of class and caste.<sup>161</sup> Now I turn to the flip side of the situation: evidence and argument by defendants, designed to smear or disparage victims on these and other invidious grounds (as well as, in a related vein, the system's often more casual treatment of cases involving black victims). As opposed to particularized, haphazard denigration of targets of crime, which injures individuals or their memories, attacks founded on status factors (and similarly rooted insensitivity or neglect) harm society as a whole. In many communities, perhaps all, appeals to group-based animosities frequently fall on receptive ears. Not surprisingly, the sensitive and volatile setting of a murder prosecution provides opportunities to capitalize on such divisions in especially damaging ways.

Although perhaps most widely acknowledged with respect to race,<sup>162</sup> the phenomenon of certain wrongs being taken less seriously because of who the victim is also occurs in relation to other variables. For instance, religious and political dissidents, gay people, homeless drifters, prostitutes, and drug addicts may not be regarded as true victims,<sup>163</sup> or their assailants as real criminals, by judges and jurors from (typically) white and middle-class backgrounds. One trial judge unabashedly admits that he sentences according to the victim's perceived societal worth. Explaining why he had imposed a relatively lenient term on a man who killed two homosexuals, he stated: "I put prosti-

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159. See *Moore v. Zant*, 722 F.2d 640, 653 n.4 (11th Cir. 1983) (Kravitch, J., concurring in part and dissenting in part), *on reh'g en banc*, 809 F.2d 702 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987).

160. Cf. *Payne v. Tennessee*, 111 S. Ct. 2597, 2625-26 (1991) (Stevens, J., dissenting) (even-handed justice requires that both prosecution and defense be denied the use of irrelevant evidence of victim's character).

161. See *supra* text accompanying notes 138-47.

162. See *supra* note 17 and accompanying text; text accompanying note 20.

163. See, e.g., *State v. Oliver*, No. 49613 (Ohio Ct. App. Oct. 17, 1985) (LEXIS, States Library, Ohio file) (defendant unsuccessfully attempted to introduce specific instances of deceased's homosexual activity); Henderson, *supra* note 118, at 951 ("[v]ictims' are not prostitutes [who have been] beaten senseless by pimps or 'johns,' [or] drug addicts mugged and robbed of their fixes"). Even socially mainstream women who claim "date rape" constitute such a suspect class. See SUSAN ESTRICH, *REAL RAPE* (1987).

tutes and gays at about the same level . . . and I'd be hard put to give somebody life for killing a prostitute."<sup>164</sup>

For every similar opinion aired, an untold number of unexpressed biases are available for counsel to exploit—if given the opening. *Payne*, regrettably, furnishes both sides just that chance on a silver platter. In the past, for example, conscientious courts prevented lawyers from engaging in tactics such as those attempted by counsel in *State v. Butler*.<sup>165</sup> There, in order to tarnish the victim, a young white woman, in the eyes of the jury, the defendant sought to adduce proof of her social and sexual relations with African-American men. The judge, appropriately, refused to admit this irrelevant and prejudicial evidence.<sup>166</sup> But that option is now foreclosed.<sup>167</sup>

Frank appeals to racial prejudice by the defense or the prosecution<sup>168</sup> constitute less of a problem, however, than the pervasive devaluation of victims of color in potentially capital proceedings. Summarizing the findings of a recent study of murder cases in one judicial circuit in Georgia, a *New York Times* reporter wrote: "By both prosecuting their killers more vigorously and tending more assiduously to their bereaved survivors . . . the system places a premium on white lives over black."<sup>169</sup> The existence of gross disparities between the number of death penalties imposed for murdering whites in contrast to blacks, in Georgia<sup>170</sup> and elsewhere,<sup>171</sup> has been docu-

164. Belkin, *supra* note 20.

165. 290 S.E.2d 1 (S.C.), *cert. denied*, 459 U.S. 932 (1982).

166. See Brief of the South Carolina Public Defenders' Ass'n and the South Carolina Death Penalty Resource Center as *Amici Curiae* in Support of Respondents at 42-44, *South Carolina v. Gathers*, 490 U.S. 805 (1989) (No. 88-305) (discussing facts from trial record not contained in reported decision).

167. While the court could, presumably, still bar him from making explicitly racial arguments, see *supra* text accompanying note 78, it would likely have to allow evidence about her sexual history in order to shed light on her "character." *But cf.* Brown, *supra* note 156 (urging enactment of legislation extending protection of rape shield laws to deceased victims of sexual crimes). Few attorneys would not manage to convey to the jurors the race of the men with whom she consorted.

168. See *supra* text accompanying note 144.

169. David Margolick, *In Land of Death Penalty, Accusations of Racial Bias*, *N.Y. TIMES*, July 10, 1991, at A1 (discussing report on discriminatory application of capital punishment in Chattahoochee Judicial Circuit).

170. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 353-56 (1987) (Blackmun, J., dissenting) (discussing Baldus study of Georgia); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 *STAN. L. REV.* 27, 54-92 (dealing with Georgia, as well as Florida and Illinois).

171. See Michael A. Kroll, *How Much Is a Victim Worth?*, *N.Y. TIMES*, Apr. 24, 1991, at A25. In 1990, a government report reviewed and critiqued previous literature on the subject in order to determine (as required by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(o)(2), 102 Stat. 4181, 4392-93 (1988)) "if the race of either the victim or the defendant influences the likelihood that defendants will be sentenced to death." U.S. GENERAL ACCOUNT-

mented in great detail; therefore, I do not belabor the point. For present purposes, I emphasize only that the rule of *Payne*, which encourages attention by the sentencer to differences among victims instead of to their common humanity, will make a bad situation worse.<sup>172</sup>

Simply put, the anti-*Booth* regime goes far toward legitimating rather than merely tolerating—which is bad enough<sup>173</sup>—the infliction of death on racial grounds. Even apart from express or tacit negative treatment of black victims or family members, any suggestion that some lives count for more because their possessors were white (or pious or socially respectable or heterosexual) would necessarily imply that others count for less because their possessors were African-American (or irreligious or disreputable or homosexual). At the very least, *Payne* will tend to reinforce the widespread view among black citizens

ING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 1 (1990); see *id.* App. I (listing studies relied on). In pertinent part, the GAO Report concluded:

Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision.

In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks [footnote omitted]. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies.

The race of victim influence was found at all stages of the criminal justice process . . . .

*Id.* at 5-6.

Until September 6, 1991, no white prisoner had been executed for killing a black for approximately half a century. See David Margolick, *Rarity for U.S. Executions: White Dies for Killing Black*, N.Y. TIMES, Sept. 7, 1991, at 1. For discussion of the often minimal concern shown for the feelings of black survivors, see *infra* text accompanying notes 181-84.

172. See, e.g., Kroll, *supra* note 171 (under *Payne*, the words "'Equal Justice Under Law' will have one meaning for those who kill upper-class white people and another for those who murder poor whites, Hispanics and blacks"). Bryan Stevenson, a capital defense attorney, summarized the problem as follows:

Fifty percent of the people who are victimized by violent crime in this country are black. Most of the people who are victims of violent crime and homicide in this country are poor. Those are not the people whose cases end up before sentencing juries in a capital trial. You're already 11 times more likely to get the death penalty if the victim is white than if the victim is black. So why do we want to legitimate that by then allowing victim members or survivors to come into the courtroom and appeal to those same basic class and race issues that have already made our system unreasonable and unjust?

*Nightline*, *supra* note 107, at 9.

173. *But cf.* *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (State's maintenance of capital system with awareness of racist consequences would not violate equal protection, absent motive to keep it *because of* expected effect).

that the predominantly white system of criminal justice<sup>174</sup> has dealt them an unequal hand.<sup>175</sup>

### C. *Payne's Effects On Family Members And Other Survivors*

I have not yet focused directly on the consequences to family and friends of allowing victim impact evidence. It should, however, be obvious that the now permissible vilification of deceased persons who have led unsavory lives will hurt or embarrass the victim's survivors. Drug dealers have mothers too, and sometimes fathers, fiances, or siblings, whose reactions to their deaths do not necessarily reflect society's.<sup>176</sup> A murdered reprobate<sup>177</sup> may have loved ones who are as devoted as those of a school board president. Even the murderer often does; otherwise, one would not see capital defendants' relatives testifying at penalty trials.

These associates of the victim will themselves be victimized by seeing the latter smeared in the courtroom and, perhaps, being forced to participate as hostile witnesses in the destruction of her memory.<sup>178</sup> Further, many will understand the sole purpose of this unseemly exercise—to demonstrate that the person they mourn is not considered a

174. See, e.g., JOINT CENTER FOR POLITICAL STUDIES, BLACK ELECTED OFFICIALS: A NATIONAL ROSTER 127, 142 (1989) (discussing lack of black representation among Georgia's elected district attorneys and paucity of black Superior Court judges); Rorie Sherman, *Is Mississippi Turning*, NAT'L L.J., Feb. 20, 1989, at 1 (small numbers of black judges in Mississippi, Alabama and Louisiana). Compare *Batson v. Kentucky*, 476 U.S. 79 (1986) (prosecutor's use of peremptory strikes to remove black jurors on account of race is violation of equal protection) with *Edwards v. Scroggy*, 849 F.2d 204, 207 (5th Cir. 1988) (prosecutor's strategy for jury selection in capital case was to "get rid of as many" blacks as possible via peremptory challenges); see generally *Dobbs v. Zant*, 720 F. Supp. 1566, 1576-78, 1576 n.22 (N.D. Ga. 1989) (detailing racist expressions and beliefs of jurors who sat on capital case).

175. See Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); Bill Winn, *Racism Concern Is Nothing New in Columbus*, COLUMBUS LEDGER-INQUIRER, Aug. 14, 1988, at B-11; cf. Elizabeth Coady, *When Life Is Cheap*, ATLANTA J. & CONST., Feb. 16, 1991, at B1, B10 (black families and clergy in Atlanta organized Mothers of Murdered Sons because of perceived indifference by white judicial system to the victimization of blacks).

176. Cf. *supra* text accompanying note 158 (WLF Brief's claim that murderer of drug dealer could argue status of victim as mitigating factor).

177. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2607 (1991).

178. See Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 20 (1987). In some cases, the bad character of the deceased will have come out at the trial on guilt because it relates to a material issue such as, for instance, self-defense. See MCCORMICK ON EVIDENCE § 193 (Edward W. Cleary 3d ed. 1984). But, as Justice Stevens said about victim impact evidence generally, we should focus our concern on the cases in which it makes a difference. See *Payne*, 111 S. Ct. at 2630 (Stevens, J., dissenting). Further, repetition or elaboration of the originally hurtful evidence can only increase the pain to survivors.

“death-worthy” victim.<sup>179</sup> Regardless of their comprehension, however, gratuitous emphasis on the victim’s negative qualities—particularly when cast in terms of blaming the dead—threatens to intensify the guilt that survivors often feel for not doing enough to protect their loved one and perhaps prevent the tragedy.<sup>180</sup>

As noted earlier, African-Americans constitute a special subset of inconsequential victims. Official inattention to black families amounts to a scandal in many communities. Elected local district attorneys, many of whom regard high-profile capital cases as the surest route to a judgeship, cater to certain bereaved relatives while ignoring or slighting others. Not surprisingly, well-known whites attract prosecutorial interest; poor and obscure blacks do not. Thus, for example, in the Chattahoochee Circuit in Georgia, the district attorney asked the father of a white victim, a prominent contractor, if he wanted the death penalty. Upon receiving an affirmative answer, the prosecutor said this was all he needed to know. After obtaining the desired sentence, he was rewarded with a \$5,000 campaign contribution in the next judicial election.<sup>181</sup>

Similar stories abound with respect to such favored survivors.<sup>182</sup> By contrast, when the victim is black, the authorities often ignore the family.<sup>183</sup> Frequently, parents, siblings, and spouses hear about the

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179. In the eloquent words of Charlotte Williams (addressed to the analogous problem of unwillingness to find defendants guilty of violent crimes against “bad” victims):

If the victim was involved in a crime at the time of his maiming or murder, does that make justice less important? Should jurors refuse to convict even when the evidence is overwhelming, because a black victim brought his fate upon himself, or because his life was useless or because he was “subhuman”? I don’t think the victim’s loved ones would share that view.

Charlotte Williams, *The New Jim Crow*, WASH. POST, Sept. 22, 1991, at C8. See generally Sandra S. Fox, *Families in Crisis: Reflections on the Children and Families of the Offender and the Offended*, 25 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 254, 257 (1981) (mourning process of survivors made more difficult when discovery of perpetrator confirms involvement of dead relative “in illegal or unethical activities”).

180. See M. Virginia Sprang et al., *Psychological Changes After the Murder of a Significant Other*, 125 SOC. CASEWORK: J. CONTEMP. SOC. WORK 159, 161 (1989); Kilpatrick & Otto, *supra* note 178, at 16. Such guilt tends to affect parents of victims the most. See Rosemary Masters et al., *Helping Families of Homicide Victims: A Multidimensional Approach*, 1 J. TRAUMATIC STRESS 109, 119 (1988).

181. Transcript of Hearing at 38-39, *Davis v. Kemp*, Super. Ct. of Butts County, Ga. (Oct. 21, 1988) (No. 86-V-865) [hereinafter *Davis Hearing*]; Clint Claybrook, *Slain Girl’s Father Top Campaign Contributor*, COLUMBUS LEDGER-INQUIRER, Aug. 7, 1988, at B1. The father also gave \$3,000 to the campaign for district attorney of the prosecutor who tried the case. See *Davis Hearing* at 38-39.

182. See Transcript of Hearing at 67-69, 152-53, 155-56, *State v. Brooks*, Super. Ct. of Muscogee County, Ga. (Sept. 12, 1990) (Nos. 3888 & 54604) [hereinafter *Brooks Hearing*].

183. See *Nightline*, *supra* note 107, at 10 (comment by Bryan Stevenson); *Brooks Hearing*, *supra* note 182, at 177-78, 184-85, 199-200, 203, 205-07, 212-13, 221-22, 227-29.

disposition of proceedings involving their loved one's murder in the media or "from the street."<sup>184</sup> Needless to say, it is unlikely that state attorneys or police officers ever consult those disfavored relatives about the penalty they would desire. In the post-*Payne* world—where prosecutors will have even greater motivation to woo the "worthy" bereaved—the above-described disparities in treatment can only increase, thereby fueling existing fires of racial resentment.<sup>185</sup>

Finally, most people, including supporters as well as opponents of the rule of *Payne*, would likely acknowledge that a mini-trial on the deceased's character may cause both reputational damage and familial suffering when that character is less than sterling. But few victims' rights advocates (many of whom strongly endorse victim impact evidence)<sup>186</sup> recognize its potential to harm survivors of the blameless, not only the tainted.

Indeed, especially in cases of unimpeachable victims, prosecutors will put pressure on family members to testify to their relatives' "outstanding personal qualities"<sup>187</sup> and to the pain produced by the murder. Although some witnesses might view the experience as cathartic, others will not.<sup>188</sup> The latter may wish to avoid appearing in court at all or, as to those who must take the stand at the hearing on guilt, avoid reappearing at the penalty phase. Importuned by the state's attorney—and likely believing they owe the dead a duty to speak, whether they wish to do so or not<sup>189</sup>—vulnerable parents, children, and siblings will have no real choice in the matter.

For reluctant participants,<sup>190</sup> the need to dwell once more on their loss can only lead to renewed hurt and impede the healing process.<sup>191</sup>

184. See *Brooks Hearing*, *supra* note 182, at 177-78, 200, 206.

185. See *supra* text accompanying notes 174-75.

186. See Henderson, *supra* note 118, at 986; see, e.g., *Nightline*, *supra* note 107, at 9-12 (Roberta Roper); Spungen Interview, *supra* note 23, at 10 (Deborah Spungen).

187. See *Booth v. Maryland*, 482 U.S. 496, 499 (1987).

188. See Henderson, *supra* note 118, at 979-80.

189. In the words of Dorothea Morefield, the mother of a murdered son: "[W]hat about the survivor who cannot bear to go to the trial—who cannot face the judge or jury—who cannot or will not cry on demand? Will they be made to feel guilty or inadequate? You better believe they will." Speech by Dorothea Morefield at Conference of Death Penalty Litigators, Airlie House, Warrenton, Va. 2, 9 (Aug. 3, 1991) (on file with author). A study of 1,182 families of homicide victims in New York City reports that members are "often tortured by conflicting desires. They feel they must attend the proceedings in order to see 'justice done.' However, the hearings are usually painful for them." Masters et al., *supra* note 180, at 111, 116. See, e.g., *Booth v. Maryland*, 482 U.S. 496, 513 (1987) (victim's daughter attended trials of both the defendant and co-defendant "because she felt someone should be there to represent her parents").

190. The record suggests that the mother in *Huertas*, for example, would have preferred not to testify. See, e.g., Joint Appendix, *Ohio v. Huertas*, *supra* note 92, at 137 (in response to emotional outburst by Ms. Harris at the sentencing trial, defense counsel conceded: "I know you

Yet even survivors who are willing or eager to attend the proceedings and lay their misery before the jury frequently find that they must compete as victims with the defendant's family, mourning the possible execution of a son or grandson, father, or brother.<sup>192</sup> Overmatched in the pain-and-suffering derby, surviving kin who fail to "win" a sentence of death will incur guilt.<sup>193</sup> Dorothea Morefield, the mother of a murder victim<sup>194</sup> as well as a proponent of *Booth*, stated: "Victims need help, they need consideration, they need understanding. What they do not need are situations that add to their feelings of guilt or inadequacy."<sup>195</sup> Paradoxically, however, for certain people winning can prove as bad as losing. While desire for revenge may prevail in the short run, the passage of time may diminish this longing: retaliation might be the first, but not the last or definitive, impulse.<sup>196</sup> In that event, the relatives whose victim impact evidence helped to procure a capital sentence may come to regret that "they played a part in someone's death—something so totally unspeakable when it happened to them."<sup>197</sup>

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don't want to talk about it any more . . .'); *id.* at 162 (victim's parents stated to presentence investigator that they were "tired of rehashing over [sic] the details and wished that people would leave them alone"). Notably, the Harrises expressed the desire to be left in peace even when interviewed outside court in connection with the writing of the VIS.

191. Repeated confrontations with the criminal justice system "disrupt[] the working through process for the survivors." Masters at al., *supra* note 180, at 116.

192. See, e.g., Morefield, *supra* note 189, at 6 (describing a defendant's mother's testimony "on her pain and anguish at finding her son in this situation"). In *Booth*, the defendant delivered an allocution to the jurors emphasizing the "terrible effect" of the prosecution on him and his family, as evidenced by the attempted suicide of his wife, his grandfather's death, and the anticipated death of his grandmother in the event he were sentenced to die. See Joint Appendix, *Booth v. Maryland*, 482 U.S. 496 (1987) (No. 86-5020). In a variation on this theme, Huertas's counsel elicited from the victim's mother at the penalty trial that Huertas's grandparents (who had raised him) were terribly hurt because of "what their son did to [her] son." See Joint Appendix, *Ohio v. Huertas*, *supra* note 92, at 135. The prosecutor then brought out that the victim's demise could not have hurt Huertas's family as much as her, since "they still have Eddie; and I don't have Ralph"—thereby expressly creating a contest of weeping families. See generally *Brooks v. Kemp*, 762 F.2d 1383, 1439 (11th Cir. 1985) (en banc) (in penalty summation, prosecutor compared suffering of victim's and defendant's families), *vacated on other grounds*, 478 U.S. 1016 (1986).

193. See Morefield, *supra* note 189, at 8; *supra* text accompanying note 180.

194. See *supra* note 189.

195. Morefield, *supra* note 189, at 8. According to Ms. Morefield: "Had the parole board released my son's killer I would have assumed it was some failure on my part—maybe I didn't write eloquently enough of my pain, maybe I didn't speak strongly enough of my grief. Maybe it was because I didn't cry." *Id.*

196. See Henderson, *supra* note 118, at 996; see generally Hall, *supra* note 127, at 243-45 (studies regarding victim attitudes "seem almost equally supportive of both vindictiveness and forgiveness claims").

197. Morefield, *supra* note 189, at 8. The fact that death is, arguably, deserved in the former case will not necessarily mitigate the pain and regret of the witness. At times, even when a family



Thus, we see that *Payne* encourages the prosecution to urge mourning family and friends to present their grief in a forum ill-suited to respond to it, yet holding out a seductive (if illusory) capacity to do so. Too many victims, like Justice O'Connor,<sup>198</sup> view the criminal court as a place for society to "give . . . back" a portion of what the dead or their loved ones lost. This is impossible.<sup>199</sup> The system is not equipped to nurture victims or their representatives.<sup>200</sup>

Above all, the penalty phase of a capital trial cannot function as a substitute therapeutic environment. Acknowledging that truth in no way implies a cold or complacent attitude toward the victims of the gravest offenses. To the contrary, such a posture permits frank focus on the actual purpose of the proceeding: to determine the "personal responsibility and moral guilt" of the defendant.<sup>201</sup> At the same time, it avoids cruelly raising the expectation of succor from an inappropriate source, only to disappoint many when the system turns upon them or their dead, wholly ignores them, or (at best) offers merely partial or temporary relief. The *Payne* majority, therefore, made a word of promise to victims' ears that reality will surely break to the hope.<sup>202</sup>

member continues to want the murderer to die, the latter's death does not bring peace. See, e.g., Speech by Dorothea Morefield, Manila, The Philippines 7 (Nov. 29, 1989) (on file with author) (a victim's father, whose son's murder destroyed his life, attempted suicide on day after execution of killer); cf. Masters et al., *supra* note 180, at 115 (some survivors wish for murderer's execution in order to put a halt to "disturbing revenge fantasies").

198. See *supra* note 112.

199. For example, "[f]amilies expect a ritualistic expression of regret and concern from the court, but it does not come." George S. Getzel & Rosemary Masters, *Serving Families Who Survive Homicide Victims*, 65 SOC. CASEWORK: J. CONTEMP. SOC. WORK 138, 140 (1984). Surviving parents may also "evidence a magical wish that caring, considerate police and courts can bring back their dead children. . . . The reality of the criminal justice system, however, cannot be dismissed." *Id.* at 143.

200. See Spungen Interview, *supra* note 23, at 10-11; Gibbons, *supra* note 23, at 68 (quoting Roberta Roper); Sprang et al., *supra* note 180, at 162 ("Family members of murder victims are victimized twice: first by the criminal and second by the system"). When victims become aware of this fact, they experience anger. See Miller et al., *supra* note 23, at 434-35. Notably, survivors who feel guilty about the murder, see *supra* note 180 and accompanying text, are already disposed to displace that guilt, in the form of rage and blame, onto "'society' and especially society in the persons of police, prosecutors and judges." See Masters et al., *supra* note 180, at 119. Those actors should, at least, refrain from inflicting further harm through gratuitously insensitive treatment. See, e.g., Sprang et al., *supra* note 180 (describing middle-of-the-night call from police morgue: "'Your son's been fatally shot. Please pick up his belongings.'"). Finally, there are limited ways officials can help victims without infringing on the rights of defendants. See, e.g., Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (among other things, granting victim right to receive physical protection and restitution from the defendant as well as pertinent information from the authorities); Masters et al., *supra* note 180 (describing New York City Victim Services Agency's pilot program of outreach and counseling); Miller et al., *supra* note 23 (describing similar support group in Hartford, Connecticut).

201. See *supra* text accompanying note 40.

202. See WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 8.

I turn now to some final thoughts about the topic of this essay, which derive from my own background. Since law review articles typically deal in ostensibly objective analyses,<sup>203</sup> I do so quite hesitantly—hoping that individual pain, growth, and reflection, experienced in a context different from anything touched upon thus far, can yield modest further insight.

## V. EPILOGUE

### A. *The Road Taken*

It would be tempting to claim that abolitionist sentiment caused me to choose to spend my tour at LDF wholly on death penalty cases. But it would also be untrue. When I joined the Capital Punishment Project, I had no feelings about the subject and little inherent interest in it—so little, in fact, that I used to skip over the long and arcane Supreme Court opinions in the area. I opted for capital litigation solely because my expertise in criminal law, developed both as a prosecutor and an academic, ensured a quicker start-up time than if I had picked some other field in which LDF's attorneys labored, such as Title VII or voting rights. And, indeed, I chose well. I crammed a lot of enriching experience into that year and brought it back to Columbia with me, as I continued to litigate, write, speak, and lobby against execution.

Yet who can tell if the road not taken might have proven "as just as fair?"<sup>204</sup> Like capital lawyering, anti-discrimination work attracts fine people with excellent skills. Among them, too, I would surely have found wonderful friends and valued colleagues and shared important goals and tasks, as I did defending death-sentenced prisoners. Even on that different track, I would perhaps have argued in the Supreme Court—as I did after leaving the Fund<sup>205</sup>—because the opportunity is not uncommon in any of LDF's specialties.

With hindsight, however, I believe that in certain ways the road I took has, for me (as for the poet, Robert Frost), "made all the difference."<sup>206</sup> This is because it led to my past as well as my future, ena-

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203. But some authors have broken with convention. Witness, for example, Professor Susan Estrich's courageous recounting of her rape. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1087-88 (1986).

204. ROBERT FROST, *THE POETRY OF ROBERT FROST* 105 (Edward C. Lathem ed. 1969) (from the poem "The Road Not Taken").

205. *Saffle v. Parks*, 494 U.S. 484 (1990).

206. FROST, *supra* note 204, at 105.

bling me to gain perspective on a troubling aspect of my background. To that subject I now turn.

### B. *Earlier Roads: Walking in Other People's Shoes*

Born in the forties in New York City, I grew up in what was then a benign environment. I was comfortably housed, well educated. I played with my friends in safe streets and enjoyed clean neighborhood parks. The same had been true of my parents thirty-odd years before, a continent away in Vienna, Austria. Yet the journey that eventually brought them here as Jewish refugees fleeing from Hitler, over a rough and indirect route with a pit stop in Poland and an extended stay in England, changed more than their physical surroundings; it altered their emotional and spiritual landscape.

I, of course, knew only their transplanted selves. Guests on my soil, orphaned by Auschwitz, they possessed—and were possessed by—a vision of life that I could not share or even fathom. I spent my childhood trying to escape it. I resisted overt discussion of the past while secretly, morbidly, drawn to its horrors. A strange Lethe<sup>207</sup> instantly drowned tales I had been unable to avoid: unwillingly hearing, I simply unheard. Cherished and sheltered by my family, I nevertheless believed the world a dangerous place. My mother identified with her parents, and I with her. Twice removed from death and destruction, I had no name or explanation for the shadows hovering around my life. But by virtue of merely existing, I felt a sense of obligation.

Years later, I came to know that the fate which saved the fortunate from annihilation<sup>208</sup> frequently left them<sup>209</sup> and their children<sup>210</sup> guilt-

207. In Greek mythology, Lethe was the river of forgetfulness in Hades.

208. My own parents, who fled the Holocaust in central Europe only to endure bombing in London, fortuitously averted death again on the last leg of their voyage. After finally succeeding in getting American visas, with great effort they booked places on a ship sailing to New York City. At the eleventh hour, however, Cook's travel agency (then notorious for inefficiency) called to say a mistake had been made—there was no room on the boat in question! One can imagine their consternation. Cook's assured them they could go on the next trip, a few days later. Having no choice, they accepted this offer; their journey was, happily, uneventful. But when they arrived in New York, my parents found their relatives in mourning. The first ship, the City of Benares, had been torpedoed and sunk at sea.

209. The literature about the Holocaust and its survivors is immense. See, e.g., BRUNO BETTELHEIM, *SURVIVING AND OTHER ESSAYS* (1979); HERMAN LANGBEIN, *MENSCHEN IN AUSCHWITZ* (1972); Judith S. Kestenberg & Milton Kestenberg, *Psychoanalyses of Children of Survivors from the Nazi Persecution: The Continuing Struggle of Survivor Parents*, 5 *VICTIMOLOGY* 368 (1982).

210. For examples of studies of the second generation, see HELEN EPSTEIN, *CHILDREN OF THE HOLOCAUST: CONVERSATIONS WITH SONS AND DAUGHTERS OF SURVIVORS* (1979); Russell E. Phillips, *Impact of Nazi Holocaust on Children of Survivors*, 32 *AM. J. PSYCHOTHERAPY* 370 (1978); Kestenberg & Kestenberg, *supra* note 209. In this section, I draw heavily on Epstein's book as

ridden<sup>211</sup> as much as grateful, in addition to creating a host of other reactions and symptoms common to disaster survivors.<sup>212</sup> Understanding that I and my family were not alone, I confronted my personal demons and, like many of the second generation, sought to repay the debt of the living by "doing good" through both volunteer and professional work.<sup>213</sup> Even death penalty litigation did not strike me as inconsistent with my visceral identification with victims. Although meriting grave punishment, the murderer was, typically, a victim, too: of poverty, racial discrimination, mental illness, or retardation, and emotional and physical abuse or neglect.

Yet, long after my accidental conscription into the *Booth* case,<sup>214</sup> I began to question why I was maintaining such deep involvement with victims' advocates' banner issue—and, of course, on the "wrong" side. It was as if I had chosen to wave a red flag of defiance before them. By this point, I had also learned that survivors of ordinary

well as on my own experience. *E.g.*, compare EPSTEIN at 26, 179 (the children forget painful stories) and EPSTEIN at 209 (the parents convey sense of danger) with this Article's text accompanying note 207.

211. See Yael Danieli, *Countertransference in the Treatment and Study of Nazi Holocaust Survivors and Their Children*, 5 VICTIMOLOGY 355, 357 (1980); EPSTEIN, *supra* note 210, at 177. As often, poetry conveys a message more sharply than prose:

Both my parents died in camps  
 I was not there to comfort them  
 I was not there they were alone  
 my mind refuses to conceive  
 the life the death they must have known  
*I must atone because I live*  
 . . . [N]one shall say in my defence  
 had I been there to comfort them  
 it would have made no difference[.]

KAREN GERSHON, *SELECTED POEMS*, 11 (1966) (excerpt from "I Was Not There") (emphasis added).

212. See Masters et al., *supra* note 180, at 113. Commenting on the vogue of Holocaust exploitation and popularization, Bruno Bettelheim bitterly noted: "Suddenly, everyone began calling himself a survivor. . . . [S]ome who had spent the war on a Kibbutz or in a fancy apartment in Manhattan, now claim that they too have survived the Holocaust, probably by proxy." BETTELHEIM, *supra* note 209, at 96. I take his point. Indeed, in other settings as well, "victimhood" has come to carry an odd cachet—as people suddenly declare themselves afflicted with hitherto unknown syndromes like "codependency." See Cynthia Heimel, *It's Now, It's Trendy, It's Codependency*, PLAYBOY, May 1990, at 43. By sharing with the reader a bit of my own and my family's experience, I in no way intend to diminish the suffering of those who endured the camps. But I wish to stress that mere residence in a comfortable apartment in New York City did not insulate my mother and father from the agony caused by their parents' murders.

213. One Holocaust survivor's daughter who did volunteer work similar to mine described her emotional impulse as follows: "I was very aware that my roots had been hacked away mercilessly in Europe and that no one had cared. For most of my adolescent life "caring" about others, especially those persecuted or less fortunate than myself motivated me to help and to represent the good." EPSTEIN, *supra* note 210, at 308.

214. See *supra* text accompanying notes 5-8.

homicides undergo forms of rage, grief, fear, guilt, fatigue, numbing, and other symptoms of post-traumatic stress disorder remarkably similar to those of victims of mammoth catastrophes such as the Holocaust and Hiroshima.<sup>215</sup>

These later-discovered analogues to my family's emotional history only intensified my desire to grasp more thoroughly the vice of victim impact evidence. The fact that *Booth* advanced the interests of capital clients did not, to me, explain my reflexive support of its principle, given that I had been bombarded with victims' viewpoints since my childhood. Nor could I rationalize this stance as a distancing from survivors' voices. True, I had shut my ears to them earlier, but I had come to terms with my background. I now realize that personal absorption with mass murder arising out of group bias sensitized me from the beginning to the social divisiveness, not to speak of immorality, of valuing some lives over others. Far from clashing, head and heart readily concurred in embracing *Booth* and rejecting *Payne*; experience ratified legal insight.

Recall that the Nazis preyed on people they considered unworthy of life: Jews, Gypsies, homosexuals. The perceived sub-human status of the targets ostensibly justified any manner of outrage against them. Transported and later tattooed like cattle, victims were rated against one another in the fashion of animals. Camp commanders directed the younger and healthier captives rightward, to work; the old and weak, leftward, to die.<sup>216</sup> While there is clearly no moral equivalence between genocide and capital punishment as practiced in the United States,<sup>217</sup> the former by its very extremity highlights the need to resist *all* officially encouraged invidious distinctions founded on a person's class or caste. To countenance a capital sentencing procedure that allows "those to discriminate who are of a mind to discriminate,"<sup>218</sup> as does *Payne* with respect to victims, is to permit "grading" of humans, which Nazism (if nothing else) should brand as utterly beyond the pale. For a victim's status assumes no greater legitimacy as a basis

215. See Masters et al., *supra* note 180, at 113-18. Homicide survivors, in particular, "differ greatly in their reactions to death from individuals who grieve the loss of a loved one who died nonviolently. . . . [M]ourning for families of murder victims is more profound, more lingering, and more complex than normal grief." Sprang et al., *supra* note 180, at 159.

216. The Nazis were not the sole predators to engage in such selections. See STANLEY ELKINS, *SLAVERY* 100 n.29 (1976).

217. I make this obvious observation only because I have heard certain opponents of the death penalty compare it to the Holocaust. That offends me, though I am sure no offense is intended. Cf. BETTELHEIM, *supra* note 212 (resentment at expansion of concept of "Holocaust survivor"). One could, however, say that the system's discriminatory features reflect "the obnoxious thing in its mildest and least repulsive"—yet still, deeply repellent—form. See Boyd v. United States, 116 U.S. 616, 635 (1886).

218. See *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

for the lawful act of sparing or condemning a murderer than for the lawless murder itself.<sup>219</sup>

Furthermore, the impetus behind *Booth's* overruling, the idea that victims must be treated as unique in the context of capital penalty hearings, loses what little meaning it has when one reflects on the murder of millions. Suspend practical objections briefly to imagine a series of Nuremberg trials at which relatives appeared to extol their loved ones. Otto Frank might have spoken of his daughter Anne's diary<sup>220</sup> or read from it to the court or jurors.<sup>221</sup> Perhaps my mother would have described her own mother's artistic bent or her father's gregarious nature. My father, on his part, could have discussed his mother's deep devotion to him and his father's success as a business lawyer. But naturally there were some who died with their whole family, others who had become estranged or orphaned for unrelated reasons, and still others—thieves, dropouts, mentally retarded, emotionally ill, or merely unlikable—who would have gotten no encomia and, possibly, no recognition at all.

Can anyone seriously claim that a concentration camp guard who killed Anne Frank would have deserved execution more, on account of his victim's goodness or talent, than one who killed a disreputable inmate? Or should her murder evoke greater concern from the jury on account of Mr. Frank's eloquence in articulating his loss? (For those who feel that *any* such person should receive death, I could hypothesize similar crimes by an eighteen-year-old, loyal to his friends, an altar boy and a good student, heavily influenced by Nazi teachers, which many might consider a closer issue on the matter of sentence.) I have, of course, previously raised such rhetorical questions regarding current actual cases and intimated the same answer.

Yet, in extending my purview beyond "run-of-the-mill" murders and trials, I have attempted to underscore the moral absurdity of

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219. The proliferation of hate crime statutes, *see, e.g.*, OHIO REV. CODE ANN. § 2927.12 (Anderson 1987), makes it plain that we have a broad societal consensus on the need to deter victim-discriminatory offenses. *But cf.* *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992) (St. Paul hate crime ordinance held facially invalid under First Amendment). Regrettably, neither the 20th century's mega-horror of state persecution of Jews and other unpopular minorities nor the current plague of random, private incidents of this nature, to which those statutes are addressed, has instilled the lesson that killing *defendants* because of who their victims were or were not—in the sense of distinguishing among their different religions, races and so forth—assumes some of the odiousness of killing *victims* for those reasons. *Cf.* *McCleskey v. Kemp*, 481 U.S. 279 (1987) (imposing prohibitively high standard of proof on defendants seeking to establish discrimination in capital sentencing).

220. *See ANNE FRANK, THE DIARY OF A YOUNG GIRL* (1972).

221. Because we are not bound by history in this scenario, we can also conjure up jurors—although, to be sure, not German ones. (The actual proceedings took place before a multi-national panel of judges.)

ranking victims and their relatives—whether expressly<sup>222</sup> or implicitly.<sup>223</sup> If not six or sixty, then six million deaths should make the point that the grave is the ultimate equalizer. Justice O'Connor voiced a related truth in *Payne*<sup>224</sup> but drew the wrong conclusion from it. I hope that, when the dust settles and victims' groups turn their attention to new causes, many capital jurisdictions will voluntarily adhere to *Booth*. Equally, I hope that more survivors will come to endorse it by recognizing *Payne's* approach as a fraud on themselves and on those whose shoes they have donned.

## VI. CONCLUSION

Not all victims' rights proposals actually advance victims' interests. In the words of Professor Lynne N. Henderson, herself a target of violent crime, many "are problematic at best and may actually be psychologically destructive to the victim."<sup>225</sup> The rule of *Payne* constitutes one such misguided effort. It plays well to the television cameras; it operates poorly in the courtroom. Worst of all, from my vantage, it denigrates victims while falsely promising help to their mourners. Private forums will better serve to mend hearts and honor the dead.

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222. See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597, 2631 (1991) (Stevens, J., dissenting) (speaking of victim impact evidence as "intended to identify some victims as more worthy of protection than others").

223. See *supra* text accompanying notes 144-47 (tacit appeals to impose death because of victim's race or social or financial standing); cf. *McCleskey v. Kemp*, 481 U.S. at 355-56 (Blackmun, J., dissenting) ("What we have held to be unconstitutional if included in the language of the statute, surely cannot be constitutional because it is a *de facto* characteristic of the system.').

224. See 111 S. Ct. at 2612 (O'Connor, J., concurring) (citation omitted) ("[Murder] transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person.').

225. Henderson, *supra* note 118, at 938 n.3, 955.

