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Payne v. Tennessee: Rejection of Precedent, Recognition of Victim Impact Worth

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NOTES

PAYNE V. TENNESSEE: REJECTION OF PRECEDENT, RECOGNITION OF VICTIM IMPACT WORTH

The United States constitutional system imparts upon the states the responsibility for delineating those crimes which contravene state law, developing practices and procedures for the trial of such crimes, and establishing appropriate punishments for their commission.[1] Those state laws which regulate criminal acts and impose responsive penalties are subordinate to the overriding provisions of the United States Constitution.[2] The United States Supreme Court has held that where a state imposes the death penalty for a particular crime, the threshold requirements of the Eighth Amendment[3] must still be met before the death penalty may be imposed.[4] Beyond those

1. Payne v. Tennessee, 111 S. Ct. 2597, 2607 (1991); *accord* Rochin v. California, 342 U.S. 165, 168 (1952).

2. *Payne*, 111 S. Ct. at 2607; *accord Rochin*, 342 U.S. at 168.

3. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The prohibitions of the Eighth Amendment are directly applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 666 (1962).

4. *See* McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987). Those requirements include the establishment of rational criteria that guide the sentencing authority in judging whether the circumstances of the case meet the minimum findings necessary to impose the death penalty. In addition, the sentencing authority must consider relevant information offered by a defendant, and a state may not restrict the sentencing authority's ability to consider relevant circumstances that could cause it to decline to impose the death penalty. *Id.* Specifically, a jury must make an "*individualized* determination" as to whether the defendant ought to be executed based upon "the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983); *see also* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (holding that the Eighth Amendment requires the "consideration of the character and record of the individual offender and the circumstances of the particular offense").

This Note takes no position on the relative merits, inadequacies or moral controversies surrounding the imposition of the death penalty. As noted by the plurality opinion of Justices Stewart, Powell and Stevens in *Gregg v. Georgia*, "[d]espite the continuing debate . . . over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction." Gregg v. Georgia, 428 U.S. 153, 179 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). At least thirty-five states have enacted statutes providing for the death penalty under certain circumstances. *Id.* at 179-80 n.23.

requirements, however, the Court will defer to the states and allow them to develop new and alternative practices, procedures, and devices relevant to the death penalty punishment in capital cases.[5] One such practice, the use of victim impact information, has been adopted by state legislatures[6] and utilized by prosecutors[7] to inform the sentencing authority in capital cases about the harm resulting from a particular crime.

The Supreme Court first addressed the issue of victim impact information in the 1987 case of *Booth v. Maryland*.[8] In *Booth*, the Court held that the Eighth Amendment absolutely prohibited a jury from considering victim impact statements in capital sentencing proceedings.[9] The Court reasoned that such evidence was irrelevant to the defendant's blameworthiness, thereby creating an impermissible risk that the decision to impose the death penalty would be an arbitrary one based upon factors of which the defendant was not aware.[10] While holding that victim impact statements were per se inadmissible during sentencing, the Court failed to specify whether other types of victim-related information were admissible. The Court explained that its holding would not render such information irrelevant if it related directly to the circumstances of the crime.[11]

Two years later, in *South Carolina v. Gathers*,[12] the Court was faced with statements made by the prosecutor, rather than by the victim's survivors, which characterized the victim's personal qualities.[13] The Court found the statements to be indistinguishable from those presented in *Booth*, and concluded that allowing the jury to impose a death sentence upon such a basis would be inequitable since the defendant was unaware of the personal attributes of the victim when he made his decision to kill.[14] Thus, the *Gathers*

5. *See* California v. Ramos, 463 U.S. 992, 1000-01 (1983). "Within the constitutional limitations defined by [case law], the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990).

6. *See, e.g.*, Booth v. Maryland, 482 U.S. 496, 498-99 (1987), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991); *infra* notes 85-87 and accompanying text.

7. *See, e.g.*, *Payne*, 111 S. Ct. at 2603; *infra* text accompanying notes 24-26; *see also* South Carolina v. Gathers, 490 U.S. 805, 808-10 (1989), *overruled by Payne*, 111 S. Ct. at 2597; *infra* text accompanying notes 112-13.

8. 482 U.S. 496 (1987).

9. *Id.* at 509. A victim impact statement describes the crime's effect upon the victim or the victim's family, and is often contained in a presentence investigation report. *See id.* at 498-99. It is read into the record during the sentencing phase of a criminal trial. BLACK'S LAW DICTIONARY 1567 (6th ed. 1990).

10. *Booth*, 482 U.S. at 502-05; *see* discussion *infra* part II.A.

11. *Booth*, 482 U.S. at 507 n.10.

12. 490 U.S. 805 (1989).

13. *Id.* at 811; *see* discussion *infra* part II.B.

14. *Gathers*, 490 U.S. at 811.

Court extended *Booth* to preclude prosecutorial comment regarding a victim's personal characteristics.[15]

Both *Booth* and *Gathers* were narrow majority decisions involving highly critical dissents,[16] and both evoked widespread criticism across the country from victims' rights groups assailing the exclusion of victim information in the sentencing process.[17] Partially in response to these concerns, manifested by federal and state legislation on the subject,[18] and in part reflecting the change in the personnel on the Supreme Court,[19] the Court agreed to reconsider the issue of victim impact information in *Payne v. Tennessee*.[20]

In *Payne*, the defendant stabbed a woman and her two-year-old daughter to death, and critically wounded the woman's three-year-old son.[21] Pervis Tyrone Payne was convicted in the Shelby County Criminal Court on two counts of first-degree murder and one count of assault with intent to commit

15. *See* Payne v. Tennessee, 111 S. Ct. 2597, 2604 (1991).

16. *See id.* at 2611 (noting that *Booth* and *Gathers* were "decided by the narrowest of margins, over spirited dissents").

17. *See infra* notes 169-72 and accompanying text.

18. In recent years, Congress and a majority of the states have passed legislation allowing the sentencing body to take into account the ramifications of the harm caused by the defendant's criminal acts. *Payne*, 111 S. Ct. at 2606.

19. *See id.* at 2622 (Marshall, J., dissenting) (claiming all that has changed since *Booth* and *Gathers* were decided is the Court's personnel). Justices Powell, Brennan, Marshall, Blackmun, and Stevens formed the majority in *Booth*; Chief Justice Rehnquist and Justices White, Scalia, and O'Connor dissented. Booth v. Maryland, 482 U.S. 496, 497 (1987). In *Gathers*, Justices Brennan, Marshall, Blackmun, Stevens, and White constituted the majority, and Chief Justice Rehnquist and Justices Scalia, O'Connor, and Kennedy dissented. South Carolina v. Gathers, 490 U.S. 805 (1989). Justice Powell's replacement, Justice Kennedy, voted in favor of overruling *Booth*, but Justice White voted to reaffirm the precedent. David O. Stewart, *Four Spirited Dissenters*, A.B.A. J., Sept. 1991, at 40. Prior to the decision in *Payne*, Justice Brennan, a noted liberal of the Court, was succeeded by Justice Souter, who helped give the Court a solid conservative majority. Dawn Ceol, *Souter's Ideas Give Session Solidly Conservative Slant*, WASH. TIMES, July 1, 1991, at A10. As a result, the *Booth* and *Gathers* dissenters became the majority in *Payne*: Chief Justice Rehnquist was joined by Justices White, Scalia, O'Connor, Kennedy, and Souter in overruling the *Booth* and *Gathers* decisions. *Payne*, 111 S. Ct. at 2601. Justices Marshall, Blackmun, and Stevens became the dissenters in *Payne*. *Id.*

20. 111 S. Ct. 1031 (1991). The Court had agreed to hear another case, *Ohio v. Huertas*, earlier in the term to address the continued viability of *Booth* and *Gathers*, but the case was dismissed following oral argument when the Justices determined that certiorari had been improvidently granted. *See* State v. Huertas, 553 N.E.2d 1058 (Ohio), *cert. granted*, 111 S. Ct. 39 (1990), *cert. dismissed*, 111 S. Ct. 805 (1991).

21. *Payne*, 111 S. Ct. at 2601-02. Charisse Christopher, a divorced mother, was alone with her two children, Lacie, age two, and Nicholas, age three, when Pervis Tyrone Payne entered their Millington, Tennessee, apartment. When Charisse resisted Payne's sexual advances, he became violent. Neighbors heard "blood curdling" screams and called the police. Upon their arrival, the police discovered Charisse and her children lying on the kitchen floor in pools of blood. Charisse and Lacie were both found dead, having sustained multiple knife wounds. Nicholas survived, despite several knife wounds completely penetrating his body. *Id.*

murder, based upon overwhelming and relatively uncontroverted evidence.[22] During the penalty phase of the trial, four witnesses testified on the defendant's behalf as to his good character.[23] For the State, the mother of the slain woman testified about the traumatic effect of the murders upon the woman's surviving son, Nicholas, stating that he cried for his mother and sister and did not understand why they did not come home.[24] The prosecutor, in his closing argument, reminded the jury that when Nicholas grew up he would want to know that justice had been done.[25] He further argued that Nicholas would never again have his little sister to play with or his mother to sing him a lullaby or kiss him goodnight.[26] The jury subsequently returned a death sentence.[27]

On appeal before the Supreme Court of Tennessee, Payne alleged that the grandmother's testimony about the effect of the murders upon her grandson constituted victim impact evidence, admitted in violation of the Supreme Court's holding in *Booth v. Maryland*.[28] The defendant also argued that *Booth* similarly prohibited the prosecutor's closing remarks regarding the victim.[29] The court rejected Payne's contentions and found that the grandmother's testimony, though technically irrelevant, did not create a constitutionally unacceptable risk that the death penalty would be imposed in an arbitrary manner.[30] The court further ruled that the prosecutor's closing argument regarding Nicholas' physical and mental condition was directly relevant to the defendant's personal responsibility and moral guilt.[31]

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22. *Id.*

23. *Id.* at 2602. The defendant's girlfriend testified that she met Payne at church, that he was a caring man, and that it was inconsistent with Payne's character to have committed the crimes of which he was accused. A clinical psychologist also testified that the defendant was borderline mentally retarded and that he was "the most polite prisoner he had ever met." Finally, Payne's parents reported that their son had no previous convictions or history of substance abuse, and that he was a "good son." *Id.* at 2601-03.

24. *Id.* at 2603.

25. *Id.*

26. *Id.*

27. *Id.*

28. State v. Payne, 791 S.W.2d 10, 17 (Tenn. 1990), *aff'd*, 111 S. Ct. 2597 (1991).

29. *Id.* at 18. This case was originally tried more than one year before the Supreme Court handed down its decision in *Gathers*. Griffith v. Kentucky, 479 U.S. 314 (1987), however, directs that *Gathers* be applied retroactively. The Tennessee Supreme Court considered this, but found that the prosecutor's comments during his closing argument did not violate either the *Gathers* or *Booth* decisions. *Payne*, 791 S.W.2d at 19.

30. *Id.* at 18.

31. *Id.* The Tennessee Supreme Court stated:

> When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and

In arriving at its determination, the Tennessee Supreme Court referred to *Booth* and *Gathers* and reasoned that it was an insult to society to allow the defendant to present an unlimited number of witnesses to testify as to his good character, while at the same time forbidding the sentencing authority from considering similar evidence regarding the victim and the harm caused to the victim and his remaining family.[32] The court concluded that even if it were to accept the argument that the victim impact evidence presented violated the Eighth Amendment as interpreted by the Supreme Court, it would still be admissible under the harmless error analysis.[33]

The United States Supreme Court granted certiorari in *Payne v. Tennessee*[34] to reconsider its holdings in *Booth* and *Gathers*.[35] The majority, led by Chief Justice Rehnquist, ruled that evaluation of the harm resulting from the act(s) of a defendant had long been a significant determinant in selecting the appropriate punishment to fit a particular crime, and victim impact evidence was merely another measure of informing the sentencing body about such harm.[36] Reasoning that *Booth* and *Gathers* had "unfairly weighted the scales in a capital trial" by allowing the defendant unbridled authority to

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mental condition of the boy he left for dead is surely relevant in determining his "blameworthiness."

Id. at 19.

32. *Id.* The court rationalized:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of [the] Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

Id.

33. *Id.* That is, based upon the overwhelming evidence presented during the guilt phase of the trial, a death sentence was the only rational punishment available; therefore, the victim impact evidence was harmless beyond a reasonable doubt. *Id.* Despite its implicit hostility towards the Supreme Court's prior rulings, the Tennessee court's comments generally evidenced what was becoming a common means of evading the *Booth* and *Gathers* doctrine: "harmless error" analysis. *See infra* notes 146-54 and accompanying text. This issue arose during the oral arguments before the United States Supreme Court following the grant of certiorari. At that time, Justice White asked Tennessee Attorney General Charles W. Burson whether it was necessary for the Supreme Court to overrule *Booth* in order for the State to win. 59 U.S.L.W. 3762 (1991). Burson replied that while *Booth* was broad enough to cover the victim impact evidence presented in this case, the Court could find that its admission was harmless error. *Id.* This is significant, as the majority ultimately decided to overrule both *Booth* and *Gathers*. Such a result suggests factors other than the merits of the case, including public opinion and a change in the make up of the Court, may have influenced the Court's decision to hear the case in the first instance. *See infra* text accompanying notes 183, 202, 207, 219.

34. 111 S. Ct. 1031 (1991).

35. Payne v. Tennessee, 111 S. Ct. 2597, 2604 (1991).

36. *Id.* at 2605.

present mitigating evidence as to his own character,[37] the majority held that a state has a legitimate interest to counter such evidence by presenting relevant victim impact evidence.[38] To the extent *Booth* held to the contrary, it was overruled.[39] The majority also reasoned that fairness to the prosecutor required a rejection of the *Gathers* extension.[40]

In a strongly worded dissent, issued on the same day as his retirement, Justice Marshall sharply criticized the majority for not adhering to precedent and for treating lightly the doctrine of stare decisis.[41] "Power, not reason, is the new currency of [the] Court's decisionmaking,"[42] said Justice Marshall, criticizing the majority for overruling *Booth* and *Gathers* simply because the membership of the Court had changed.[43] Justice Stevens also issued a dissent, objecting to the majority's argument that victim impact evidence is necessary to balance the scales in a capital sentencing proceeding.[44] He argued that the character of the victim is not on trial and should, therefore, be irrelevant.[45]

This Note traces the development of the use of victim impact information during the sentencing phase of capital cases. This Note first examines the pertinent Supreme Court rulings as to the types of information which may or may not be considered by the sentencing authority during death penalty proceedings. Next, this Note discusses the relevance of *Booth v. Maryland* and *South Carolina v. Gathers* in the context of victim impact evidence and presents current legislation on the subject. This Note then analyzes the Supreme Court's decision in *Payne v. Tennessee*, its dramatic reversal of precedent, and its probable impact. This Note proposes that the Court's ruling that the Eighth Amendment erects no per se rule prohibiting a sentencing jury in a capital case from considering victim impact evidence, or precluding a prosecutor from arguing such evidence, is both a reflection of a change in the membership of the Court as well as an attempt to respond to public

37. *Id.* at 2607.

38. *Id.* at 2608-09.

39. *Id.* at 2609-11. The *Booth* decision also held that the admission of opinions of a victim's family regarding the crime itself, the defendant, and the sentence the defendant should receive violated the Eighth Amendment. *Booth*'s holding, that the use of opinions of a victim's family is prohibited, was not ruled upon, as no such evidence was presented in *Payne*. *Id.* at 2611 n.2.

40. *Id.* at 2609-11.

41. *See id.* at 2619 (Marshall, J., dissenting). Stare decisis is defined as the "[p]olicy of courts to stand by precedent and not to disturb settled point." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

42. *Payne*, 111 S. Ct. at 2619.

43. *Id.*

44. *See id.* at 2627 (Stevens, J., dissenting).

45. *Id.*

concern in the area of victims' rights, as codified in recent legislation. Finally, this Note concludes that while adherence to the doctrine of stare decisis is traditionally favored by courts, it is not an unyielding principle of law, particularly within the purview of constitutional adjudication.

I. EVOLUTION OF THE LAW IN THE REALM OF CAPITAL SENTENCING PROCEEDINGS

A. Judicial Developments: Evidence Relating to the Character of the Defendant and the Circumstances of the Crime

Prior to 1972, state capital punishment laws generally gave sentencing juries absolute and unbridled discretion to impose the death penalty.[46] The jury was not obligated to conform to any legal guidelines in arriving at its decision, and it was not furnished with any particular information about the defendant's character or background, aside from that necessary to support his innocence.[47] Determinations of the defendant's guilt and the appropriate penalty were made as part of the same deliberations.[48] Since that time, the Supreme Court has crafted a body of law relating to the types of information which may or may not be considered, or which must be considered, by a sentencing body during capital punishment proceedings.

The 1972 case of *Furman v. Georgia*[49] struck down statutes giving the sentencing judge or jury untrammeled discretion to impose the death penalty.[50] Because of the uniqueness of the death penalty, the Court in *Furman*[51] held that it could not be imposed pursuant to sentencing proce-

46. Eddings v. Oklahoma, 455 U.S. 104, 111 (1982); JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW: CASES AND MATERIALS 424 (1986).

47. KAPLAN, *supra* note 46, at 424.

48. *Id.* Under such statutes, the jury first ascertained whether the defendant was guilty and thus eligible for the death penalty. Then, during the same deliberations, the jury determined whether to impose a life sentence or the death penalty. *Id.*

49. 408 U.S. 238 (1972) (per curiam).

50. *Id.* at 239-40. The decision in *Furman* consisted of a brief disposition of the case, followed by five individual concurring opinions by Justices Douglas, Brennan, Stewart, White, and Marshall. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented. *Id.* Justices Brennan and Marshall rejected the death penalty statutes because they objected to capital punishment as cruel and unusual under any circumstances. *Id.* at 305 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring). Justices Douglas, Stewart, and White agreed that the statutes before the Court were invalid as applied, but left open the question of whether capital punishment may ever be imposed. *Id.* at 256-57 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 310-13 (White, J., concurring). The remaining four Justices would have held the death penalty was not unconstitutional per se. *Id.* at 403-05 (Burger, C.J., dissenting); *id.* at 407 (Blackmun, J., dissenting); *id.* at 414-18 (Powell, J., dissenting); *id.* at 465-66 (Rehnquist, J., dissenting).

51. Because five Justices wrote separate concurring opinions in *Furman*, the Court's holding is limited to the positions of those Justices who concurred on the narrowest grounds: Jus-

dures which created a likelihood that such a penalty would be applied in an arbitrary or capricious manner.[52] To ensure that discretion in the area of capital sentencing be exercised in a limited, directed, and informed manner, three Justices, in separate concurring opinions, intimated that there should be specific jury findings as to the circumstances of the crime and the character of the defendant.[53]

In a series of companion cases in 1976, the Court established that all sentencing discretion of judges and juries in capital cases should not be abrogated, but must be "directed and limited."[54] Recognizing that each defendant is an unique individual,[55] that the death penalty should be imposed consistently,[56] and that the death penalty is, by its irrevocable nature, markedly different from any other type of sentence,[57] the Court reasoned that a higher level of reliability and individualized consideration was required in capital sentencing cases.[58] Specifically, in *Woodson v. North Carolina*,[59] the Court stated that the jury must be allowed to take into account all of the pertinent aspects of the background and temperament of the convicted defendant and of the circumstances surrounding the crime in order to assess the defendant as a "uniquely individual human being[]."[60] The Court found that as a general proposition, the concerns expressed in *Furman* could be

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tice Stewart and Justice White. *See id.* at 255-57 (Douglas, J., concurring). The dissenting Justices viewed this position with concern, noting "[t]he decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; . . . the selection process has followed no rational pattern." *Id.* at 398-99 (Burger, C.J., dissenting).

52. *See id.* at 309-10 (Stewart, J., concurring); *id.* at 311-313 (White, J., concurring). Justice White concluded that because "the death penalty is exacted with great infrequency even for the most atrocious crimes . . . [there must be some] meaningful basis from distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313.

53. *See id.* at 256-57 & n.21 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 311-13 (White, J., concurring).

54. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). Decided at the same time were Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); and Woodson v. North Carolina, 428 U.S. 280 (1976).

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

56. *Proffitt*, 428 U.S. at 252 (plurality opinion of Stewart, Powell, and Stevens, JJ.).

57. A death sentence becomes irrevocable once carried out, while other sentences can be modified by various methods, including parole, probation, and correction of mistaken convictions. *E.g.*, *Gregg*, 428 U.S. at 182 (plurality opinion of Stewart, Powell, and Stevens, JJ.); *Woodson*, 428 U.S. at 305 (plurality opinion of Stewart, Powell, and Stevens, JJ.).

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

59. 428 U.S. 280 (1976).

60. *Id.* at 304.

met by a system which provided for a bifurcated sentencing proceeding[61] and which set forth standards to guide a capital sentencing jury's deliberations.[62] Those standards include the requirement that certain aggravating circumstances of the crime be proven by the prosecution in order for a jury to impose a death sentence.[63] The Court placed no limitations, however, upon the import accorded to relevant mitigating circumstances, which could be weighed independently by the jury.[64]

This stance was affirmed in 1978 in *Lockett v. Ohio*,[65] in which the Court ruled that a death penalty statute was cruel and unusual and, therefore, in violation of the Eighth Amendment, unless it allowed a sentencing authority to give independent mitigating weight to those factors which could lead to

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61. A bifurcated procedure is one in which the issue of the appropriate sentence to impose is not considered until the determination of guilt has been reached. *Gregg*, 428 U.S. at 190-91 (plurality opinion of Stewart, Powell, and Stevens, JJ.).

62. *Id.* at 195.

63. *See id.* at 197-98. Aggravating circumstances are defined as those circumstances which surround the commission of a crime and increase its enormity or injurious consequences or the defendant's guilt, but which are above and beyond the essential elements of the crime itself. BLACK'S LAW DICTIONARY 65 (6th ed. 1990).

The plurality approved the provisions of the Georgia statute in question, which permitted a jury to impose a death sentence only after finding beyond a reasonable doubt at least one of ten aggravating circumstances. *Gregg*, 428 U.S. at 196-97. In addition to approving Georgia's sentencing scheme, the joint opinions of Justices Stewart, Powell, and Stevens also approved the Florida scheme in Proffitt v. Florida, 428 U.S. 242 (1976), and the Texas scheme in Jurek v. Texas, 428 U.S. 262 (1976). The Florida death penalty statute was similar to that in *Gregg*, except that the trial judge, rather than a jury, was required to select from a prescribed list of eight statutory aggravating circumstances and seven mitigating ones, and then weigh them in order to determine whether the death penalty should be imposed. *Proffitt*, 428 U.S. at 247-53 (plurality opinion of Stewart, Powell, and Stevens, JJ.). By contrast, the Texas scheme attempted to limit the category of defendants eligible for the death penalty by restricting capital homicides to intentional and knowing murders committed in five particular situations. *Jurek*, 428 U.S. at 270 (plurality opinion of Stewart, Powell, and Stevens, JJ.). In upholding the Texas scheme, the joint opinions observed:

> While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose.

Id.

64. *See Gregg*, 428 U.S. at 197 (plurality opinion of Stewart, Powell, and Stevens, JJ.). Mitigating circumstances do not constitute a justification for the commission of the offense charged, but may be defined as circumstances to be considered in fairness and mercy as extenuating conditions of the crime, which reduce the defendant's degree of moral culpability. BLACK'S LAW DICTIONARY 1002 (6th ed. 1990).

The Georgia statute at issue in *Gregg* allowed the sentencing judge to consider "any mitigating circumstances . . . which may be supported by the evidence." GA. CODE ANN. § 27-2534.1(b) (Supp. 1975) (current version § 17-10-30(b) (Michie 1982)).

65. 438 U.S. 586 (1978).

the imposition of a penalty less severe than death.[66] Finally, in *Gardner v. Florida*,[67] a plurality of the Court ruled that a death sentence could not be imposed upon a capital defendant based upon a presentence investigation report containing information that the defendant had not had the opportunity to explain or refute.[68]

As a result of these cases, the Court afforded a convicted defendant an essentially unrestricted constitutional right to present mitigating evidence that could be weighed by the sentencing authority.[69] At the same time, the Court restricted the prosecution to a codified list of aggravating circumstances.[70] Beyond such limitations, however, the Court deferred to those substantive factors considered by state legislatures to be relevant to the capital sentencing determination.[71]

B. The Victims' Rights Movement and the Legislative Response

In recent decades, Americans began to sense that the criminal justice system had failed to grant victims a prominent role in the prosecution and disposition of criminal cases.[72] Victims surviving the initial impact of violent crimes often felt that they had to endure insensitivity and alienation at best, and degradation and maltreatment at worst, at the hands of the criminal

66. *Id.* at 604 (plurality opinion of Burger, C.J.). The Ohio statute, ruled by the plurality to be unconstitutional, did not allow the sentencing body to consider such mitigating characteristics as the defendant's age, character, prior record, role in the crime, and lack of specific intent to kill. *Id.* at 605.

67. 430 U.S. 349 (1977).

68. *Id.* at 358-62. A presentence investigation report outlines the results of an investigation into a convicted offender's background and is prepared to assist the sentencing authority in passing sentence. It typically contains information regarding the offender's criminal act(s), education, employment, social history, residence, medical history, home environment, financial and support resources, goals and ambitions, and previous criminal record, as well as a recommendation as to disposition of the case. BLACK'S LAW DICTIONARY 1184 (6th ed. 1990).

69. *See supra* notes 64, 66 and accompanying text; *see also* Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) (holding that a defendant in a capital trial must be allowed to introduce any relevant mitigating evidence, which courts then weigh against evidence of all the aggravating circumstances).

70. *See supra* note 63 and accompanying text.

71. *See* California v. Ramos, 463 U.S. 992, 1000-01 (1983). For example, some states have required certain aggravating circumstances to be proven in order to impose a death sentence, while others have limited the types of murders for which such a sentence may be imposed. *See supra* note 63.

72. Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989). This dissatisfaction with the current state of criminal justice stems from victims' perceptions that the system devotes an inordinate amount of its time and resources to protecting the rights of criminal defendants while largely ignoring the plight of the victim. *Id.*

justice system.[73] The result has been the growth of a national "victims' rights movement" that has achieved considerable success in spawning reforms to increase victim participation in criminal cases.[74]

One means of giving the victim an increased role in criminal trials has been the requirement in some jurisdictions that victim impact statements be included in certain presentence investigation reports, which a judge or jury may then employ in arriving at an informed punishment decision during sentencing proceedings.[75] The use of a victim impact statement is designed to increase victim participation at the post-trial stage of the criminal judicial process—once a defendant's guilt has been determined.[76] Victim impact statements utilized in the context of general criminal proceedings may include any or all of the following types of information: the circumstances surrounding the criminal act and the means by which that act was carried out; the victim's identity and personal characteristics; the impact of the crime upon the victim and the victim's family; and/or the opinion of the victim or the victim's family of the defendant and the form of punishment that should be imposed.[77]

In 1982, President Ronald Reagan endorsed the Final Report of the President's Task Force on Victims of Crime. This report called for over one hundred victim-oriented reforms aimed at state and federal legislatures and the judiciary.[78] In particular, the report stressed that every victim should be allowed to give some form of input during the sentencing of a criminal defendant.[79] In many states and in the federal system, comprehensive legislation was enacted encompassing a significant number of the reforms

73. Symposium, *Victims' Rights*, 11 PEPP. L. REV. xv, xv (1984) (Letter from Lois H. Herrington, Assistant Attorney General, U.S. Department of Justice, to Robert E. Palmer, Editor-in-Chief, *Pepperdine Law Review*).

74. Kennard, *supra* note 72, at 417-18; *see* Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1984) (providing an overview of the victims' rights movement).

75. Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 200 (1988). For a discussion of the definitional aspects of victim impact statements, see *supra* note 9. For a similar explanation regarding presentence investigation reports, see *supra* note 68.

76. Kennard, *supra* note 72, at 418 n.1.

77. Talbert, *supra* note 75, at 203.

78. *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, Final Report (1982).

79. *Id.* at 77. The report advanced the following position: "Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim." *Id.* at 76-77. The Task Force reasoned that when the court hears from the defendant's lawyer, his family and friends, his minister and others, simple fairness dictates that the victim, as the one who has suffered the harm of the defendant's crime, should be allowed a role during sentencing. *Id.* at 77.

recommended by the President's Task Force,[80] including requirements for the use of victim impact statements in certain presentence reports as a means of increasing victim participation in criminal cases.[81] Specifically, Congress passed the Victim and Witness Protection Act,[82] which amended the Federal Rules of Criminal Procedure to mandate the inclusion of such statements in specified presentence reports.[83] Today, similar legislation exists in forty-seven states and the District of Columbia.[84]

In the context of capital murder cases, at least one state responded to concerns that while a defendant was permitted to present unlimited mitigating evidence during sentencing, a victim, or the next of kin if the victim had died, was not permitted to rebut with aggravating evidence.[85] The Maryland legislature enacted a statute which mandated the introduction of a victim impact statement for the sentencing authority's consideration in any case in

80. In 1986, the Justice Department issued a follow-up report on the Task Force's recommendations, which indicated that nearly seventy-five percent of the initial recommendations had been implemented. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, FOUR YEARS LATER: A REPORT ON THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME iii (1986) (hereinafter U.S. DEPT OF JUSTICE). On the federal level, Congress enacted the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1501, 1512-15, 3146(a), 3579, 3580, 3663 (1988)), and the Victims of Crime Act of 1984, Pub. L. No. 98-473, §§ 1401-1410, 98 Stat. 2170 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C. (1988)). Similarly, as of 1985, thirty-one states had enacted wide-ranging laws codifying a significant number of the reforms recommended by the Task Force. *See* U.S. DEP'T OF JUSTICE, *supra*, at 4.

81. *See* Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPP. L. REV. 23, 51 (1984). Of all the recent reform efforts, "none has been as quickly accepted as the use of 'victim impact statements.'" *Id.*

82. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1501, 1512-15, 3146(a), 3579, 3580, 3663 (1988)).

83. The Victim and Witness Protection Act amended Federal Rule of Criminal Procedure 32(c)(2) to provide that the presentence report contain "information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense." § 3, 96 Stat. at 1249; *see* FED. R. CRIM. P. 32(c)(2)(C). The rules were amended again by The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 215(a)(5), 98 Stat. 2015. The relevant provision now provides that the presentence report shall contain "verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed." FED. R. CRIM. P. 32(c)(2)(D).

84. *See* Richard L. Slowinski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U. L. REV. 215, 216 n.10 (1990) (citing those jurisdictions which now require the inclusion of victim impact statements in designated presentence reports).

85. *See* Susan A. Jump, Note, Booth v. Maryland: *Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 GA. L. REV. 1191, 1199 (1987).

which the death penalty might be imposed.[86] The constitutionality of this statute was tested in *Booth v. Maryland*.[87]

II. SUPREME COURT TREATMENT OF VICTIM IMPACT INFORMATION PRIOR TO *PAYNE*

A. The Booth v. Maryland *Doctrine: Forbidding the Use of Victim Impact Statements During Capital Sentencing Proceedings*

In *Booth*, the Court addressed the broad issue of whether the Constitution permitted the consideration of victim impact evidence by a capital sentencing jury.[88] John Booth was convicted of first degree murder after robbing and killing an elderly couple in their home,[89] and chose to be sentenced by a jury rather than by a judge.[90] In accordance with Maryland law, a victim impact statement was prepared, providing the sentencing jury with two types of information.[91] First, it described the severe emotional impact of the crimes upon the victims' family, and the personal characteristics of the vic-

86. In 1983 the Maryland General Assembly enacted the following provision: "In any case in which the death penalty . . . is requested . . . a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted . . . ." MD. ANN. CODE art. 41, § 4-609(d) (1986). *But see, e.g.*, MASS. GEN. LAWS ANN. ch. 279, § 4B (West Supp. 1992) (excluding the use of victim impact evidence in capital cases).

87. 482 U.S. 496 (1987).

88. *Id.* at 501-02.

89. The defendant had been a neighbor of the victims Irvin Bronstein, 78, and his wife Rose, 75. Booth had entered their home with another individual to steal money in order to buy heroin. The victims were bound and gagged and stabbed repeatedly in the chest with a butcher knife; they were found dead by their son several days later. *Id.* at 497-98. The case involving both Booth and his accomplice was severed, and the accomplice was convicted of first degree murder in a separate trial for his role in the slayings. *Id.* at 498 n.1.

90. *Id.*; *see* MD. ANN. CODE art. 27, § 413(b) (1982).

91. The victim impact statement was part of a presentence report compiled by the Division of Parole and Probation (DPP), containing information supplied by the victim or the victim's family. The DPP prepared a victim impact statement pursuant to MD. ANN. CODE art. 41, § 4-609(c) (1986), directing that the statement shall:

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

Id. at § 4-609(c)(3); *Booth*, 482 U.S. at 498-99.

tims; second, it set forth the family members' opinions and characterizations of the crimes of the defendant.[92] The trial court rejected Booth's contention that the statement contained information that was irrelevant and unduly inflammatory, and that it should therefore be suppressed as violative of the Eighth Amendment.[93] Booth was subsequently sentenced to death.[94]

Booth appealed to the Maryland Court of Appeals, which affirmed the conviction and sentence.[95] The court found that the victim impact statement provided the sentencing authority with the full measure of the harm caused by the crime and did not inject an arbitrary factor into the sentencing determination.[96] The United States Supreme Court reversed, finding that the introduction of a victim impact statement during the sentencing phase of a capital trial violated the Eighth Amendment.[97] The Court reasoned that the information contained in a victim impact statement might not be related to a defendant's blameworthiness, and could therefore cause the sentencing body to consider factors which were irrelevant to the defendant's decision to

92. *Booth*, 482 U.S. at 498-500. The victim impact statement prepared in the case is set forth in its entirety in an appendix following the Court's opinion. *Id.* at 509-15. The statement contained the reports of Mr. and Mrs. Bronstein's son, daughter, and granddaughter, among others. The son said his parents were "amazing people" who were well-liked and had many friends. He remarked about the continuing effect of the loss of his parents upon him, and the difficulty he had in dealing with the means in which they had died. He felt that his parents were not killed, but were "butchered like animals." *Id.* at 510-12. Likewise, the daughter stated that she was constantly reminded of her parents and the viciousness of their murders. She believed the murderers to be worse than animals and incapable of rehabilitation. *Id.* at 512-13. Finally, the granddaughter stated that whenever she thought of her grandparents she could only dwell upon their death, and that their murders would haunt her for the rest of her life. *Id.* at 513-14.

93. *Id.* at 500-01.

94. *Id.* at 501. The jury sentenced Booth to death for the murder of Mr. Bronstein and to life imprisonment for the murder of Mrs. Bronstein. *Id.*

95. Booth v. State, 507 A.2d 1098, 1125 (Md. 1986), *rev'd*, 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

96. *Id.* at 1124. The Maryland Court of Appeals ruled that as a general principle, victim impact statements served an important state interest in revealing all of the harm caused by the crime. In Booth's case, the victim impact statement was "relatively straightforward" in its descriptions of the effects of the murders upon the victims' family, and passed constitutional scrutiny because it did not cause the jury to impose the death sentence "under the influence of passion, prejudice or any other arbitrary factor." *Id.*

97. *Booth*, 482 U.S. at 509. The Court was careful, however, to limit its holding to the capital setting, noting that the death penalty is a " 'punishment different from all other sanctions.' " *Id.* at 509 n.12 (quoting Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)). "[C]onsiderations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations. . . . We imply no opinion as to the use of [victim impact] statements in noncapital cases." *Id.*

kill.[98] In so doing, the jury's attention would be diverted away from the defendant's background and the circumstances of the crime.[99] The Court was particularly troubled by comments contained in the statement indicating that the family members did not feel that the defendant could be rehabilitated.[100] For these reasons, the Court held that victim impact evidence could not be admitted during sentencing at a capital trial because such evidence created an impermissible risk that the capital sentencing decision would be made "in an arbitrary and capricious manner."[101] In a caveat, however, the Court stated that information contained in a victim impact statement might be admissible if it "relate[d] directly to the circumstances of the crime."[102]

The decision in *Booth* was based upon a narrow majority of five Justices, and the four dissenting Justices spoke out strongly against the result. Writing for the dissent, Justice White argued that while there may have been faults with the victim impact statement in the case, a per se rule prohibiting their use in all capital sentencing proceedings was not necessary.[103] Justice White recognized that because determinations of sentencing considerations are "peculiarly questions of legislative policy," state legislatures should be accorded more deference.[104] In addition, Justice White argued that "[t]here is nothing aberrant in a juror's inclination to hold a murderer accountable not only for his internal disposition in committing the crime but also for the full extent of the harm he caused."[105] Justice White also noted that victim impact information was particularly relevant in capital cases because the

98. *Id.* at 504-05. Such factors include the emotion and grief of the family members or the relative worth of the victim(s). *Id.*

99. *Id.* at 505.

100. *Id.* at 508. This statement was made by the victims' daughter. *See supra* note 92.

101. *Id.* at 502-03. The Court also expressed concern that if the prosecution was allowed to introduce victim impact evidence during sentencing, the defense would have to be given the opportunity for rebuttal. Such an event could create a "mini trial" on aspects of the victim, diverting the jury's attention from its proper role of sentencing the defendant. *Id.* at 506-07.

102. *Id.* at 507 n.10.

103. *Id.* at 518-19 (White, J., dissenting). Chief Justice Rehnquist and Justices O'Connor and Scalia joined Justice White's dissent. *Id.* at 515.

104. *Id.* Justice White noted that the Court had previously recognized that sentencing considerations are " 'peculiarly questions of legislative policy.' " *Id.* (quoting Gore v. United States, 357 U.S. 386, 393 (1958)). In addition, the Court must consider that " '[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.' " *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

105. *Id.* at 516. For example, Justice White explained that someone who recklessly runs a red light and unintentionally kills a bystander is more deserving of punishment than an individual in the same circumstances who kills no one. Therefore, Justice White argued, if punishment can be augmented in noncapital cases as a direct result of the harm caused, the same standard should be equally applicable to capital cases. *Id.* at 516-17.

state has a legitimate interest in countering the defendant's mitigating evidence.[106] In a separate dissenting opinion, Justice Scalia argued that the majority's opinion, holding that the imposition of the death penalty should be based solely upon the defendant's personal responsibility and moral guilt, could not be reconciled with either societal practices or the opinions of the Court.[107] Justice Scalia also argued that the majority wrongly refused to recognize "victims' rights."[108]

B. The South Carolina v. Gathers *Extension: Prohibiting Prosecutorial Comment Regarding Victim-Related Information*

Two years after the *Booth* decision, the Court addressed the question of whether the introduction of victim-related information by a prosecutor during his closing argument to a sentencing jury considering the imposition of the death penalty violated the rule set forth in *Booth*.[109] In *South Carolina v. Gathers*, a jury convicted the defendant of murder for the killing of Richard Haynes, a self-proclaimed preacher.[110] Several items had been found scattered around the murder site, including two bibles, rosary beads, prayer cards, and a voter registration card.[111] During the closing argument of the sentencing phase of the trial, the prosecutor read from one of the prayer cards and inferred that the victim was a religious person.[112] He then pointed to the voter registration card and suggested that the victim was a profoundly

106. *Id.* at 517. Justice White dismissed the majority's concerns over the creation of a "mini trial" regarding the victim as fortuitous since no such event occurred at the trial level in *Booth*. *Id.* at 518.

107. *Id.* at 520 (Scalia, J., dissenting). Justice Scalia was joined in his dissent by Chief Justice Rehnquist and Justices White and O'Connor. *Id.* at 519.

108. *Id.* Justice Scalia noted that

> [r]ecent years have seen an outpouring of popular concern for what has come to be known as 'victims' rights'—a phrase that describes . . . the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society.

Id.

109. South Carolina v. Gathers, 490 U.S. 805, 811 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

110. 490 U.S. at 806. The evidence at trial showed that Demetrius Gathers and several companions encountered Haynes, a stranger, in a park, and brutally assaulted him. He was beaten and kicked repeatedly, a bottle was broken over his head, and he was ultimately stabbed to death. *Id.* at 807.

111. *Id.* The items were admitted into evidence without comment or objection during both the guilt and sentencing phases of the trial. *Id.* at 807-08.

112. *Id.* at 808-10.

good citizen because he voted.[113] The jury subsequently sentenced Gathers to death.[114]

On appeal before the South Carolina Supreme Court, Gathers challenged the prosecutor's comments regarding the characteristics of the victim. The court reversed the trial court, finding the comments regarding the victim's character "unnecessary to an understanding of the circumstances of the crime" and overly suggestive that Gathers "deserved a death sentence because the victim was a religious man and a registered voter."[115] The United States Supreme Court granted certiorari[116] and affirmed, reasoning that the prosecutor's comments were indistinguishable from those statements prohibited in *Booth*.[117] The Court ruled that the comments related directly to the victim's personal characteristics, and were thus inadmissible.[118] The Court wanted to ensure that the jury made its sentencing decision based upon Gathers' decision to kill and his blameworthiness, rather than upon the victim's personal characteristics.[119] Nor could the content of the prayer cards be considered circumstances of the crime within the purview of the *Booth* exception, as no evidence existed to show the defendant had read them; the fact that Haynes had been carrying them was seen as purely fortuitous.[120]

As with *Booth*, *Gathers* involved a five-four split of the Court. The dissenting Justices in *Gathers* attacked the *Booth* decision and argued it should be overturned.[121] Justice O'Connor, reiterating Justice White's dissent in *Booth*, contended that peculiarized societal harm resulting from a specific victim's death is a relevant sentencing consideration; she argued that a "rigid Eighth Amendment rule which excludes all such considerations is not supported by history or societal consensus."[122] Further, Justice O'Connor emphasized that just as it was necessary for the jury to consider Gathers' own background in order to make a unique, individualized assessment, so should

113. *Id.*

114. *Id.* at 806-07.

115. State v. Gathers, 369 S.E.2d 140, 144 (S.C. 1988), *aff'd*, 490 U.S. 805 (1989). The court held that the prosecutor had suggested that because the victim was a religious man and a registered voter, Gathers was more deserving of the death penalty. The court found this to be fundamentally unfair and in violation of the Eighth Amendment. *Id.*

116. 488 U.S. 888 (1988). In asking the Court to overturn a decision made only a year earlier, South Carolina may have been motivated by the change in the membership in the Court. *See supra* note 19.

117. *Gathers*, 490 U.S. at 810-11; *see supra* text accompanying notes 98-99, 102.

118. *Id.* at 810-12.

119. *Id.*

120. *Id.* at 811-12. The Court was careful to point out that while the items found at the murder site were in and of themselves relevant evidence, their *content* was not relevant. *Id.*

121. *Id.* at 813-14 (O'Connor, J., dissenting); *id.* at 823-24 (Scalia, J., dissenting).

122. *Id.* at 819-20 (O'Connor, J., dissenting).

the jury be able to consider information relevant to the victim's own unique identity in order to assess the amount of harm caused and the appropriate penalty.[123]

Justice Scalia, in his dissent, called for *Booth* to be overturned despite the traditional deference to the doctrine of stare decisis, noting that " '[w]hen convinced of former error, th[e] Court has never felt constrained to follow precedent.' "[124] He asserted, moreover, that *Booth* had no basis in the common law background of the Eighth Amendment, in societal tradition, or in present societal consensus.[125]

III. RECENT DEVELOPMENTS

A. State Supreme Court Cases Decided Since Gathers: *Controversy and Confusion*

The application of the *Booth* doctrine and the *Gathers* extension has been questioned by members of the United States Supreme Court and has defied consistent application in state courts as a result of various judicial efforts to ameliorate the per se rule.[126] State courts, in general, have carved out three means by which the rule of *Booth* and *Gathers* forbidding the use of victim impact information can be avoided. Victim impact information may be used when it directly relates to the circumstances of the crime, when it is brief and unemotional, and when it constitutes "harmless error."[127]

The first means is set forth in a footnote in *Booth* itself: if the victim impact evidence can be shown to "relate directly to the circumstances of the crime,"[128] that is, encompass factors about which the defendant was aware

123. *Id.* at 820-21.

124. *Id.* at 824-25 (Scalia, J., dissenting) (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

125. *Id.* at 825.

126. *See* Payne v. Tennessee, 111 S. Ct. 2597, 2611 (1991).

127. State courts have often attempted to prove several or all of these factors in order to buttress their assertion that *Booth* and *Gathers* were not controlling. *See, e.g.*, People v. Lewis, 786 P.2d 892 (Cal. 1990) (holding that evidence admitted during a capital sentencing proceeding regarding the impact of a victim's murder upon his family was so brief and insignificant that even though it was erroneously admitted, its inclusion was harmless error); People v. Stankewitz, 793 P.2d 23 (Cal. 1990) (holding that a prosecutor's closing comments during a capital sentencing proceeding which noted that the murder victim was a young girl who would never again speak with her family and friends and which asked the jury to consider how they would feel if they were the victim's family, were brief and mild and thus harmless beyond a reasonable doubt), *cert. denied*, 111 S. Ct. 1432 (1991). The Tennessee Supreme Court employed this method in its decision in State v. Payne, 791 S.W.2d 10 (Tenn. 1990), *aff'd*, 111 S. Ct. 2597 (1991); *see supra* notes 31-33 and accompanying text.

128. Booth v. Maryland, 482 U.S. 496, 507 n.10 (1987) (commenting that information similar to that contained in victim impact statements may be admissible if directly related to the circumstances of the crime), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

during the commission of the crime, the Supreme Court intimated that it may be admissible.[129] In *Coleman v. State*,[130] the Supreme Court of Indiana was presented with the issue of whether the testimony of a family member regarding the impact of the defendant's crimes upon a surviving victim violated the Eighth Amendment as interpreted in *Booth* and *Gathers*.[131] The defendant in *Coleman* was convicted of the murder of a young girl, the attempted murder of her niece, and of child molestation.[132] During sentencing, the victim's grandmother testified that the victim's surviving niece suffered nightmares following the crime.[133] The defendant was sentenced to death by the judge upon recommendation of the jury.[134] On appeal, the Indiana Supreme Court held that this testimony was straightforward and readily anticipated by the defendant as a result of his heinous attack on the two girls.[135] Because the testimony hardly encompassed " 'factors about which the defendant was unaware,' "[136] the admission of the testimony did not violate the Eighth Amendment.[137]

Second, some courts distinguish the nature of the victim impact information in *Booth*, which was very detailed, lengthy, and emotional, and hold that if the victim impact information is comparatively brief and detached, it may be admissible.[138] In *State v. Kills on Top*,[139] for example, the defendant was convicted by jury of robbery, aggravated kidnapping, and deliberate

129. *See infra* notes 130-37 and accompanying text; *see also* People v. Thomas, 561 N.E.2d 57 (Ill. 1990) (holding that a capital sentencing hearing where prosecutorial evidence was admitted relating to the victims' families was fair since there was no likelihood that the jury's focus had been shifted away from anything other than those factors of which the defendant was aware during the crime's commission), *cert. denied*, 111 S. Ct. 1092 (1991).

130. 558 N.E.2d 1059 (Ind. 1990), *cert. denied*, 111 S. Ct. 2912 (1991).

131. *Id.* at 1061.

132. *Id.* at 1060. Specifically, the defendant, Alton Coleman, approached two young girls and enticed them to accompany him into a wooded area. The girls were ten-year-old A.H. Turk and her seven-year-old niece, Tamika. The defendant cut off parts of the girls' clothing and bound their hands, mouths, and legs. He proceeded to viciously kick at and stomp on Tamika until her death, as A.H. looked on. Subsequently, A.H. was raped, strangled, and left for dead. She was later found alive. *Id.*

133. *Id.* The grandmother of Tamika, who was also the mother of A.H., testified that A.H. had become emotionally introverted and had frequent nightmares as a result of having been sexually molested and having watched the defendant stomp Tamika to death. *Id.* at 1062.

134. *Id.* at 1060.

135. *Id.* at 1062.

136. *Id.* (quoting Booth v. Maryland, 482 U.S. 496, 505 (1987)).

137. *Id.*

138. *See infra* notes 139-45 and accompanying text; *see also* People v. Pitsonbarger, 568 N.E.2d 783 (Ill. 1990) (holding that testimony regarding the victim's date of birth by her mother during the penalty phase of a capital trial, though improper, was isolated and inconspicuous, causing no likelihood that the jury's focus was shifted from proper considerations), *cert. denied*, 112 S. Ct. 204 (1991).

139. 793 P.2d 1273 (Mont. 1990), *cert. denied*, 111 S. Ct. 2910 (1991).

homicide.[140] During the penalty phase of the trial, the sentencing judge considered testimony from the murder victim's father about his son's character and the impact of his son's killing upon the family.[141] The defendant was sentenced to death.[142] On appeal before the Montana Supreme Court, the court distinguished the victim impact evidence admitted in the case from that presented in *Booth*.[143] While the statements in *Booth* were extended and passionate, the court in *Kills on Top* found that the father's testimony was neither lengthy nor emotional.[144] The admission of the statement, therefore, created no risk that the sentence was imposed under "passion, prejudice, or any other arbitrary factor" in violation of the Eighth Amendment.[145]

Finally, other state courts apply "harmless error" analysis to cases involving the use of victim impact information. According to this method, courts acknowledge that the use of victim impact information is improper, but because its use is isolated, inconspicuous, or unlikely to be highly prejudicial, courts consider its inclusion during sentencing to be harmless.[146] This form of analysis was used by the Supreme Court of Idaho in *State v. Fain*.[147] In *Fain*, the defendant was convicted of first degree murder, lewd and lascivious conduct with a minor, and first degree kidnapping.[148] During sentencing, a victim impact statement was presented containing information from the murder victim's parents which described the impact of the loss of their daughter upon the family and included their recommendations for a death

140. *Id.* at 1279. The evidence showed that the defendant, an American Indian, kidnapped his victim, robbed him, and physically restrained him in an automobile for several hours. The victim was extensively beaten and assaulted with a pipe, a tire iron, and a rock. Subsequently, the victim was forced into the trunk of the car where he was confined for several hours. The entire ordeal took over twelve hours. The victim ultimately died as a result of the torture and confinement. *Id.* at 1280-82.

141. *Id.* at 1305. The father testified that he had been deprived of a son, that he and his wife were undergoing counseling as a result, that his son was an honors graduate, and that his son left behind a wife and two children. *Id.*

142. *Id.* at 1279.

143. *Id.* at 1305.

144. *Id.*

145. *Id.* at 1305-06.

146. *See infra* notes 147-54 and accompanying text; *see also* State v. Paz, 798 P.2d 1 (Idaho 1990) (holding that the failure to exclude victim impact evidence regarding the victim's father's opinion that the defendant should get the death penalty was harmless error during capital sentencing proceeding because the error did not influence the decision to impose the death penalty), *cert. denied*, 111 S. Ct. 2911 (1991).

147. 809 P.2d 1149 (Idaho 1991), *cert. denied*, 60 U.S.L.W. 3841 (1992).

148. *Id.* at 1149. In *Fain*, the defendant kidnapped a nine-year-old girl off the street and took her to a remote area. There he began to molest her, and continued to do so after she fell and hit her head on a rock. The defendant then carried the victim to a ditch and held her head underwater until she died. *Id.* at 1150, 1153.

sentence.[149] The parents also provided similar information in their testimony during the sentencing hearing.[150] The defendant was sentenced to death and appealed to the Supreme Court of Idaho.[151] On his third appeal, the court found that the information provided during sentencing was clearly of the kind prohibited by *Booth*, and therefore it was an error for the trial court to admit it.[152] However, based upon the evidence and the nature of the crime, the Idaho Supreme Court ruled that the victim impact information, if it was considered at all, would not have played a decisive factor in the decision to impose the death sentence.[153] It was, therefore, "harmless beyond a reasonable doubt."[154]

B. Victim Impact Legislation and Capital Cases

In addition to the confusion and lack of consistency in state courts regarding victim impact evidence, many concerned citizens and victims rights groups,[155] as well as Congress,[156] began to respond to what they viewed as a gross inequity that had been created as a result of the *Booth* and *Gathers* decisions. One result has been the introduction of legislation in Congress providing for the use of victim impact information during capital sentencing proceedings.

In July 1991, the Senate passed the Violent Crime Control Act,[157] which contains an amendment that, as adopted, requires courts in capital cases to

149. *Id.* at 1151. The victim impact statement reported that the family felt a great sense of loss following the murder. Realizing that the defendant would appeal the conviction, the parents said they were sorry their daughter could not appeal her death. They reported being convinced of the defendant's guilt and recommended that the court impose a strict sentence. *Id.*

150. *Id.* at 1151-52.

151. Following the original imposition of the death sentence, the defendant appealed to the Supreme Court of Idaho. At that time, the case was remanded for further factual findings on issues not related to the scope of this Note. On the next appeal, the conviction was affirmed but the death sentence was vacated and remanded for resentencing. The district court subsequently reimposed the death sentence, and the Supreme Court of Idaho was asked to examine the reimposition of the death penalty. *Id.* at 1149.

152. *Id.* at 1152.

153. *Id.* There was no evidence that the victim impact statements diverted the trial court from its duty to consider the uniqueness of the individual being sentenced rather than the victim or her family. *Id.*

154. *Id.*

155. *See infra* notes 169-72 and accompanying text.

156. *See infra* notes 157-68 and accompanying text.

157. S. 1241, 102d Cong., 1st Sess. (1991). The Senate anti-crime bill would provide more funds for law enforcement and prisons, expand the federal death penalty to nearly fifty crimes, limit the number of habeas corpus appeals by death row inmates, stiffen penalties for crimes involving drugs and firearms, establish a waiting period of five working days for the purchase of handguns, and permit an exception to the exclusionary rule prohibiting the use of evidence

consider a victim impact statement when deciding whether the imposition of the death penalty in a particular case is justified.[158] Courts would be required to consider the victim's character and the effect of the crime upon the victim's family in federal capital sentencing hearings.[159] The amendment was designed to reflect the concerns of the American public that courts, in dispensing their sentencing decisions in capital cases, have failed to consider the harm caused to victims of violent crimes and the impact of such crimes upon their families.[160] In addition, in October 1991, the House approved the Omnibus Crime Control Act,[161] which provides that in a hearing to determine if a death sentence is justified, the government may present evidence

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obtained by illegal search and seizure. Joan Biskupic, *Senate Passed Crime Bill*, 49 CONG. Q. 2102, 2102-05 (1991).

158. 137 CONG. REC. S8553 (daily ed. June 25, 1991). The Grassley/Nickles Amendment No. 376 was proposed by Indiana Senator Charles E. Grassley, and endorsed by Oklahoma Senator Don Nickles, both Republicans. *Id.* It was approved by the Senate as part of the Violent Crime Control Act on June 25, 1991. *Id.* at D817. The pertinent section of the Act, as adopted in its entirety on July 11, 1991, provides that in cases to determine whether a sentence of death is justified, there shall be notice that the government seeks the death penalty, and in its notice, the government must specify the determinants that support the imposition of the death penalty. Those determinants:

> *[s]hall* include factors concerning the effect of the offense on the victim and the victim's family, and shall be based on a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, describes the necessary course of treatment for the victim and the victim's family, and contains any other information related to the impact of the offense on the victim and the victim's family that the court may require.

137 CONG. REC. S9986-87 (daily ed. July 15, 1991) (emphasis added).

159. 137 CONG. REC. S8553 (daily ed. June 25, 1991) (statement of Sen. Grassley). Senator Grassley, speaking before the Senate on June 25, 1991, described the purpose of the amendment as follows: "With this provision, we are going to . . . give a victim somewhat equal consideration in the court with the criminal." *Id.* at S8554.

160. *Id.* Senator Grassley reasoned that the amount of harm an individual causes does have a bearing upon his personal responsibility and is relevant in considering whether or not the defendant should receive the death penalty. He remarked that "[t]he law-abiding citizens of our Nation believe that in their sentencing decisions courts have failed to take into account not only the factors aggravating a defendant's moral guilt but also the amount of harm caused to innocent members of society." *Id.*

161. H.R. 3371, 102d Cong., 1st Sess. (1991). Like the Senate bill, the House legislation would broaden the federal death penalty to about fifty crimes, restrict death row inmate appeals, and allow prosecutors to use evidence obtained in violation of defendant's rights. Joan Biskupic, *House Panel Bucks Bush, GOP Over Anti-Crime Measure*, 49 CONG. Q. 2787, 2787 (1991). However, the House bill also contains provisions that bolster the rights of defendants. Specifically, the bill would permit convicted defendants to challenge their death sentences on the basis that they are racially motivated. It would also ensure that confessions obtained from defendants under coercion could not be admitted into evidence at trial. *Id.* The House Judiciary Committee crafted the anti-crime legislation, and approved it on September 26, 1991. *Id.* It was passed by the full House on October 22, 1991. *Status of Major Legislation, 102d Congress*, 49 CONG. Q. 3248, 3248 (1991).

regarding the effect of the offense upon the victim and the victim's family.[162] That evidence may be presented in the form of oral testimony or through victim impact statements.[163]

There are two significant differences between the Senate and House bills, however, as each relates to the introduction and use of victim impact evidence. First, the Senate bill makes the introduction of a victim impact statement *mandatory* during capital sentencing proceedings,[164] whereas the House Judiciary version merely *permits* the introduction of victim impact evidence.[165] Second, the House version includes a provision that the victim impact information may be excluded if its probative value is outweighed by the dangers of prejudice to the defendant or will mislead or confuse the jury.[166] The defendant is given the opportunity to rebut the evidence under both versions.[167] The differences between the two versions, each as part of larger crime bills, were reconciled by conference between the two chambers in November 1991, with the House language prevailing.[168]

Such legislation has also been spurred by the efforts of various victims' rights groups across the country following the *Booth* and *Gathers* decisions. These groups have noted that the *Booth* prohibition of victim impact statements is an extreme example of how the criminal justice system has lost touch with the concerns of citizens by favoring convicted defendants, while showing little or no regard for innocent victims.[169] Indeed, some have ex-

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162. 137 CONG. REC. H7961 (daily ed. Oct 16, 1991). Specifically, the Omnibus Crime Control Act provides that in a hearing to determine if a sentence of death is justified, there shall be notice that the government seeks the death penalty, and in its notice the government must specify the determinants that support the imposition of the death penalty. Those determinants "*may* include factors concerning the effect of the offense on the victim and the victim's family." *Id.* (emphasis added). The Act continues that

> [t]he information presented by the Government in support of factors concerning the effect of the offense on the victim and the victim's family *may* include oral testimony, a victim impact statement that identifies the victim of the offense and the nature and extent of harm and loss suffered by the victim and the victim's family, and other relevant information.

Id. (emphasis added).

163. *Id.*

164. *See supra* note 158.

165. *See supra* note 162.

166. 137 CONG. REC. H7961 (daily ed. Oct. 16. 1991). "[I]nformation may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *Id.*

167. The House and the Senate bills provide that "the defendant shall be permitted to rebut any information received at the hearing." *Id.*; 137 CONG. REC. at S9987 (daily ed. July 15, 1991).

168. *See infra* notes 243-50 and accompanying text.

169. 137 CONG. REC. S8554 (daily ed. June 25, 1991) (letter from John A. Collins, Eastern Regional Director, Citizens for Law and Order, to the Honorable Charles E. Grassley, United

pressed the belief that *Booth* and *Gathers* were wrongly decided.[170] This notion is based in part upon studies indicating that the Supreme Court's rulings have frustrated the laws in forty-eight states and the constitutions of four more, and in part upon public surveys revealing that seventy percent of Americans are of the opinion that victim impact information should be available to the sentencing authority in capital cases.[171] For these reasons, many victims' rights groups expressed the hope that the Supreme Court would recognize the inequity created by the previous Court decisions, and remedy the injustice in *Payne v. Tennessee*.[172]

IV. *PAYNE V. TENNESSEE*: RECOGNIZING THE IMPORTANCE OF VICTIM IMPACT INFORMATION DURING CAPITAL SENTENCING PROCEEDINGS

In *Payne v. Tennessee*,[173] the United States Supreme Court agreed to reconsider the issue of whether, under the Eighth Amendment, victim impact evidence and related prosecutorial comment may be admitted by the state during a capital sentencing proceeding.[174] The Court held that a state may legitimately determine that evidence about the character of the victim and

States Senator). The director of the Citizens for Law and Order, a Springfield, Virginia-based victims' rights organization, wrote a letter to Senator Grassley in support of his amendment. A portion of the letter asserted that "the criminal justice system has been out of balance—favoring the defendant and felon over the innocent victim. An outrageous example of this . . . has been the prohibition against . . . [victim] impact statement[s] at the sentencing phase of capital cases." *Id.*

170. *Id.* Additionally, the Victims' Constitutional Amendment Network, a Fort Worth, Texas, organization, argued that the *Booth* and *Gathers* decisions "demonstrate that equality eludes the innocent victim of crime and that those who are convicted of a heinous murder are protected by omitting pertinent information during the penalty phase of a capital murder trial." *Id.* at S8555 (letter from Linda Barker-Lowrance, Chairperson, Victims' Constitutional Amendment Network, to the Honorable Charles E. Grassley, United States Senator).

171. *Id.* (letter from Mr. David Beatty, Director of Public Policy, National Victim Center, to the Honorable Charles E. Grassley, United States Senator). The cited statistics were contained in a letter from a national victims' rights advocate, the National Victim Center. Further, the letter characterized the *Booth* and *Gathers* decisions collectively as a "gross miscarriage of justice," and noted that:

> Convicted murderers are allowed to parade weeping family and friends, not to mention an endless line of coaches, clergymen, psychologists and other witnesses in front of the court to attest to the offender's good character and what a tragic loss his demise would be to his family and community. All this in an attempt to solicit sympathy and mercy from the jury. Yet the court is not allowed to hear one word about the character of the innocent victim or the horrific consequences their death has had on surviving family members.

Id.

172. *Id.* at S8554-55.

173. 111 S. Ct. 2597 (1991).

174. *Id.* at 2604.

the effect of the crime upon his family is relevant to a sentencing jury's evaluation of whether to impose the death penalty; therefore, there is no per se bar against the admission of such victim impact evidence.[175] According to the *Payne* Court, *Booth* and *Gathers* were wrongly decided and were consequently overruled.[176]

A. Majority Opinion: The Eighth Amendment Erects No Per Se Bar to Victim Impact Evidence and Related Prosecutorial Comment

Chief Justice Rehnquist delivered the majority opinion.[177] The majority began its analysis by discussing the numerous inconsistencies that were present in the rule created by *Booth* and *Gathers*.[178] The *Booth* Court premised its decision upon the notion that since victim impact evidence does not generally reflect upon the defendant's blameworthiness, it must be excluded during a capital sentencing proceeding.[179] The majority found fault with this premise, noting that assessment of the harm resulting from a defendant's criminal acts has always been relevant in determining the proper punishment to fit a particular crime.[180] The Court reasoned that victim impact evidence is merely another measure of informing the sentencing body about such harm.[181] Thus, if during the course of a bank robbery a defendant fires a weapon and kills an individual, he may be sentenced to death; if the gun misfires he may not. In each instance the defendant's moral responsibility is equivalent, but his criminal responsibility for the resulting harm is vastly different.[182] The majority also noted that in recent years Congress and a vast number of states have enacted legislation similar to that which was struck down in *Booth*, enabling the sentencing authorities to consider information about the harm resulting from a defendant's criminal acts.[183]

Next, the majority discussed the *Booth* interpretation of the Court's prior requirement, as stated in *Woodson v. North Carolina*, that a defendant in a

175. *Id.* at 2609.

176. *Id.* at 2611.

177. *Id.* at 2597. Justice Rehnquist was joined by Justices White, O'Connor, Scalia, Kennedy, and Souter. *Id.*

178. *See id.* at 2605-09.

179. *Id.* at 2605.

180. *Id.*

181. *Id.*

182. *Id.* The Court is making use of an example given by Justice Scalia in his dissent in *Booth*. *See* Booth v. Maryland, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

183. *Payne*, 111 S. Ct. at 2606. The victim impact evidence presented in *Payne* was not admitted pursuant to any such legislation in Tennessee. The majority noted, however, that the admission of the evidence, and its effect during sentencing, was substantially the same as if the evidence had been introduced in accord with a legislative mandate. *Id.*

capital proceeding be treated as a "uniquely individual human being[]."[184] According to the majority, *Booth* incorrectly interpreted this requirement to mean that a capital defendant was entitled to receive individualized consideration during sentencing "wholly apart from the crime which he had committed."[185] In the view of the majority, this was a misreading of precedent which had "unfairly weighted the scales in a capital trial."[186] In this case, Payne presented the character testimony of his parents, his girlfriend, and a clinical psychologist, none of which related directly to the circumstances of the vicious crimes which Payne committed.[187] The majority ruled that a state has a legitimate interest in countering such evidence by presenting relevant victim impact evidence.[188] Therefore, the Court overruled *Booth* and *Gathers* to the extent that they prevented capital sentencing authorities from considering relevant victim impact evidence and related prosecutorial argument.[189]

The remainder of the majority's opinion focused on rebutting those arguments made against victim impact evidence in *Booth* and *Gathers*, as well as commenting on the doctrine of stare decisis. First, the *Booth* Court had argued that if victim impact evidence were allowed during capital sentencing proceedings, a "mini-trial" would in effect be needed in order for the defend-

184. Woodson v. North Carolina, 428 U.S. 280, 304 (1976); *see supra* text accompanying notes 55-60.

185. *Payne*, 111 S. Ct. at 2607. *Booth* posited that while the full range of consequences foreseeable to the defendant at the time of the commission of the crime may be relevant in civil and other criminal cases, it is not relevant in the special context of a capital sentencing proceeding. *Booth*, 482 U.S. at 504.

186. *Payne*, 111 S. Ct. at 2607. This comment reflects the concerns voiced by the Supreme Court of Tennessee, *see supra* notes 31-32 and accompanying text; the federal and state legislatures, *see supra* notes 82-86, 157-68 and accompanying text; and victims' rights movements across the country, *see supra* notes 169-72 and accompanying text. It also demonstrates the Court's underlying sense of fairness. *See, e.g.*, *Payne*, 111 S. Ct. at 2609 ("[T]here is nothing unfair about allowing the jury to bear in mind [the] harm at the same time as it considers the mitigating evidence introduced by the defendant."); *id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)) (" '[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained . . . .' "). The proper interpretation of *Woodson*, in the view of the majority, is that it was intended to describe a category of evidence which must be received: evidence demonstrating the individuality of the defendant. Its purpose was not to exclude a category of evidence entirely from consideration, such as that relating to victim impact. *See id.* at 2607.

187. *Id.* at 2608-09.

188. *Id.* The majority reflected upon this paradox by noting that under *Booth*, a defendant could introduce unlimited relevant mitigating evidence, but the State could not "offer[] 'a glimpse of the life' which a defendant 'chose to extinguish' . . . or demonstrat[e] the loss to the victim's family and to society. . . ." *Id.* at 2607 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

189. *See id.* at 2609, 2611.

ant to adequately rebut such evidence.[190] The majority in *Payne* rejected this argument, finding the situation to be no different from others where a party must address and respond to the evidence proffered.[191] The Court in *Booth* also had voiced concern that, by allowing victim impact evidence to be admitted during sentencing, the Court would implicitly be saying that one murderer may be more deserving of death than another, merely because of his victim's relative value to the community.[192] Again, the *Payne* majority was unpersuaded. In its view, victim impact evidence is designed to show the uniqueness of a particular victim, regardless of what the sentencing authority views as the societal loss incurred as a result of a victim's death.[193] The majority noted that the Due Process Clause of the Fourteenth Amendment[194] provides a means for relief should the evidence introduced prejudice the defendant and render the trial fundamentally unfair.[195]

Finally, the majority asserted that while adherence to precedent is traditionally favored because it provides predictability and encourages reliance upon judicial doctrines, the Court has never felt bound to adhere to the doctrine of stare decisis when controlling decisions are impracticable or lack sound thought or judgment, particularly in constitutional cases where " 'correction through legislative action is practically impossible.' "[196] In support of these tenets, the majority pointed out that the Court has reversed thirty-three constitutional decisions in whole or in part during its previous twenty terms.[197] The majority justified its decision to overrule *Booth* and *Gathers* by reasoning that those cases had been decided by scant majorities over vig-

190. Booth v. Maryland, 482 U.S. 496, 506-07 (1987).

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

192. *Booth*, 482 U.S. at 506 n.8.

193. *Payne*, 111 S. Ct. at 2607. The majority noted that the victim in *Gathers* was "an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being." *Id.*

194. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

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

196. *Id.* at 2609-10 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). The majority ruled that "*[s]tare decisis* is not an inexorable command." *Id.* at 2609. In a constitutional case, legislatures have great difficulty in correcting erroneous rulings. While the legislature can pass a law if the judiciary refuses to overrule a prior decision in nonconstitutional cases, it must amend the Constitution to effect a change in constitutional cases. This is because the United States Supreme Court is the final authority on the constitutionality of a law under the United States Constitution. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 146 (1803). Congress and the states are bound by the decisions of the Supreme Court. Thus, to overcome an adverse ruling, Congress or the states must either enact a new law pursuant to the Court's interpretation of the Constitution or amend the Constitution. *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting).

197. *Payne*, 111 S. Ct. at 2610 n.1.

orous dissents and had created uncertainty in the law rather than sound judicial precedent.[198]

B. Concurring Opinions: Booth *and* Gathers *Were Wrongly Decided, Unworkable, and Contradictory to Public Policy and Sentiment*

Justice O'Connor, in a concurrence joined by Justices White and Kennedy, posited that assuming victim impact evidence may be used by a state during a capital sentencing proceeding, there is nothing in the Eighth Amendment that calls upon states to treat such evidence in a manner distinct from other relevant evidence.[199] Although the Eighth Amendment prohibits the infliction of "cruel and unusual" punishments,[200] Justice O'Connor reflected that there is nothing implicit in the Amendment, or in the consciousness of society, which would prohibit sentencing juries from considering the victim's character or the harm caused to the victim's family.[201] In a reference to public policy, Justice O'Connor noted that most states have enacted legislation permitting the consideration of victim impact information,[202] and that the Constitution does not preclude a state from attempting to define the unique and special qualities of the deceased.[203] Justice O'Connor concluded by noting that *Booth* also addressed other information not presented in *Payne*—opinions of the victim's family regarding the defendant, the crime, and the proper sentence—information upon which the Court did not pass judgment.[204]

Justice Scalia mounted a defense in his concurrence, joined in part by Justices O'Connor and Kennedy, to Justice Marshall's dissenting opinion which strongly advocated continued deference to the doctrine of stare decisis.[205] Justice Scalia noted that Justice Marshall himself had in previous cases noted that the doctrine was not " 'an imprisonment of reason,' "[206] and that those concerned with public confidence in the justice system should remember that a decision contrary to the public's sense of justice, no matter how grounded in the principles of law, would " 'diminish respect for the courts and for law itself.' "[207] In this regard, Justice Scalia viewed the *Booth* deci-

198. *Id.* at 2610-11.
199. *Id.* at 2611 (O'Connor, J., concurring).
200. U.S. CONST. amend. VIII.
201. *See Payne*, 111 S. Ct. at 2611-12 (O'Connor, J., concurring).
202. *Id.* at 2612.
203. *See id.*
204. *Id.* at 2612-13.
205. *Id.* at 2613 (Scalia, J., concurring).
206. *Id.* (quoting Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting)).
207. *Id.* (quoting Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting)).

sion as an aberration, especially in light of the national victims' rights movement that had spoken against the injustice of *Booth*.[208] According to Justice Scalia, Justice Marshall's demand for special justification in order to set aside prior Court precedents was incorrect in view of the significant harm that society would continue to suffer were the *Booth* decision allowed to stand.[209]

Justice Souter also delivered a concurring opinion, joined by Justice Kennedy, in which he agreed with the majority opinion that *Booth* and *Gathers* should be overruled.[210] He declared that both cases were poorly reasoned and that their continued application would lead to inconsistent and uncertain results.[211] *Booth* had issued a blanket prohibition against the consideration of victim impact evidence, except in those situations where the evidence was linked directly to the circumstances of the crime and was relevant to the defendant's decision to kill.[212] According to Justice Souter, however, murder always has foreseeable consequences since every defendant knows that the life he takes is unique and that the victim will leave behind some individuals who will mourn his passing and suffer harm as a result.[213] Therefore, the fact that the defendant may not know specific details about his victim or those who will survive him cannot obscure the fact that the victim, like the defendant, is a unique individual.[214] Given a defendant's opportunity to present unlimited mitigating evidence during sentencing, evidence of victim impact should be allowed to balance the process.[215] Justice Souter also argued that there were serious problems involved in applying the *Booth* standard: despite the *Booth* prohibition, victim impact evidence still could be introduced during the guilt phase of a trial, in which case the jury would have the benefit of its knowledge during sentencing.[216] Thus, in order to

208. *Id.*

209. *See id.* at 2613-14.

210. *Id.* at 2614 (Souter, J., concurring).

211. *See id.* at 2614-19.

212. *Id.* at 2615; *see* Booth v. Maryland, 482 U.S. 496, 502-03 (1987), *overruled by Payne*, 111 S. Ct. 2597.

213. *Payne*, 111 S. Ct. at 2615 (Souter, J., concurring). Justice Souter reasoned:

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

Id.

214. *Id.* at 2616.

215. *Id.*

216. *Id.* Justice Souter gave the following example to illustrate the problems associated with *Booth*. Suppose a minister dressed in layperson's clothes was robbed and killed on a street by a stranger. Unbeknownst to the defendant, the minister's wife and child witnessed the

maintain the goals of *Booth*, separate juries would be required for the guilt and penalty phases of trial, which, according to Justice Souter, would clearly be unworkable.[217]

C. Dissenting Voices: The Consequences of Abandoning the Doctrine of Stare Decisis and the Role of Public Opinion

Justice Marshall, in his final dissent after the announcement of his retirement,[218] sharply criticized the majority's decision to overrule *Booth* and *Gathers*. Joined by Justice Blackmun, Justice Marshall posited what was, in his view, one of the true reasons the Court agreed to revisit the issue of victim impact evidence: the change in the makeup of the Court.[219] Justice Marshall noted that neither the legal justification underlying the *Booth* doctrine and the *Gathers* extension, nor the evidential foundation supporting them, had experienced any alteration in the four years since *Booth* was decided.[220] Justice Marshall also took strong exception to the majority's apparent dismissal of the doctrine of stare decisis in overruling two Supreme Court precedents, which were only two and four years old respectively.[221] The implication that cases dealing with constitutional liberties might now be open to reconsideration and possibly reversal, was, in Justice Marshall's words, "staggering."[222]

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killing from a car. Under *Booth*, such information would not be admissible during sentencing since it was unknown to the defendant and therefore irrelevant to his decision to kill. This information, however, would be admitted during the guilt phase of the trial, and it is likely the wife and child would deliver emotional testimony. In addition, the fact that the victim was a minister would also be difficult to keep from the factfinder. The irony of *Booth* is that these facts will remain in the minds of jurors, even if they cannot be admitted again during the sentencing phase of the trial. *Id.* at 2616-17.

217. *Id.* at 2617.

218. Ruth Marcus, *Marshall Retires from Divided Supreme Court; 6-3 Vote Reverses Precedents as Justices End Term*, WASH. POST, June 28, 1991, at A1.

219. *See Payne*, 111 S. Ct. at 2622 (Marshall, J., dissenting). Justice Marshall noted "[i]t takes little real detective work to discern what *has* changed since this Court decided *Booth* and *Gathers*: this Court's own personnel." *Id.*

220. *Id.* at 2619. The only notable difference, in Justice Marshall's view, was a change in the Court's personnel. According to Justice Marshall, "[p]ower, not reason, is the new currency of this Court's decisionmaking." *Id.*

221. *See id.*

222. *Id.* Justice Marshall listed seventeen cases, all decided by a five-Justice majority, as being on the "endangered precedents" list. The list included a 1990 case upholding the authority of the federal government to set aside broadcast licenses for applicants; a 1987 affirmative action ruling stating that promotions may be used as a remedy for racial discrimination in government hiring; a 1986 case reaffirming the right to abortion; a 1986 decision prohibiting the execution of the insane; and a 1985 decision barring federal government financial aid to parochial schools. *See id.* at 2623 & n.2.

In contrast to the majority's characterization of stare decisis, Justice Marshall argued that historically the Court demanded an "extraordinary showing" in order to reverse its precedents.[223] Further, stare decisis is important because fidelity to precedent buttresses the Court's authority and fosters its ability to command compliance with its holdings.[224] Justice Marshall argued that by side-stepping the doctrine, lower courts and state actors are invited to renew those policies deemed unconstitutional by the Supreme Court in the hope of obtaining a Supreme Court reversal.[225] Indeed, Justice Marshall pointed out that the Tennessee Supreme Court did just that by declining to follow the Court's precedents because of its open contempt for the *Booth* and *Gathers* decisions.[226] Justice Marshall concluded by stating that the majority's ruling would open the gates of precedent to attack, placing at substantial risk the Court's role as a "protector of the powerless."[227]

Justice Stevens, in a dissent joined by Justice Blackmun, argued that even if *Booth* and *Gathers* had never been decided, the majority's decision would represent a dramatic departure from prior Court rulings.[228] Those rulings required that any decision to impose a death sentence must be predicated exclusively upon that evidence which informs the sentencing authority of the nature of the crime and the character of the defendant.[229] Victim impact evidence which, according to Justice Stevens, serves no purpose other than to inflame the emotions of the jurors, fails to meet the aforementioned criteria and therefore should not be admissible.[230] Justice Stevens also asserted that while the majority's argument to balance the scales during sentencing had strong political appeal, such evidence is irrelevant.[231] Justice Stevens concluded by acknowledging that given the current heightened level of crime in the United States, and the political power wielded by victims' rights

223. *Id.* at 2621.

224. *See id.* at 2623-24.

225. *Id.* at 2624.

226. *Id*; *see supra* notes 31-32 and accompanying text.

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

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

229. *See id.* at 2625-26.

230. *Id.* at 2626.

231. *Id.* at 2627. In other words, the victim is not the one who is on trial, the defendant is; therefore, the victim's character is irrelevant to the sentencing determination. *See id.* Justice Stevens argued that evidence relating to the victim would serve no purpose other than to identify some victims as more worthy of protection than others. *Id.* at 2631. Justice Stevens, however, found it entirely consistent with *Booth* and *Gathers* to mandate the death penalty for certain classes of victims, such as the President, a Supreme Court Justice or a policeman on active duty. *Id.* at 2628 n.2. Justice Stevens explained the apparent contradiction by noting that the killing of these classes of victims is proscribed by statute, and therefore all defendants convicted of such crimes would have been able to foresee the consequences and be assured of equal treatment under the law. *Id.*

groups across the country, the decision in *Payne* will be received enthusiastically by a majority of Americans.[232] Justice Stevens warned, however, that the great misfortune of the *Payne* decision is that public opinion influenced not only the Court's initial determination to hear the case, but also its resolution of the constitutional question involved.[233] Further, the possibility of affirming the case using the Tennessee Supreme Court's "harmless error" approach was not even considered.[234]

V. THE IMPACT OF *PAYNE V. TENNESSEE* AND POSSIBLE RAMIFICATIONS

A. The Admission of Victim Impact Evidence in Judicial Determinations Following Payne: *Some Qualifications*

The majority decision, in overruling *Booth* and *Gathers*, holds that the Eighth Amendment to the Constitution erects no per se bar to the admission of evidence or prosecutorial argument relating to the character of the victim or the impact of the crime upon a victim's family during a capital sentencing proceeding.[235] The practical result of this holding is that if a state chooses to permit the admission of victim impact evidence, there is no constitutional barrier to its inclusion during sentencing. However, this decision does not hold that victim impact evidence should be admitted, or even that it must be admitted.[236] The propriety of introducing victim impact evidence during capital sentencing proceedings remains subject to the procedural law of the jurisdiction, which may choose not to allow such information.[237] Such a result places a strong burden upon state legislatures, as well as Congress, to statutorily proscribe the extent to which victim impact information may be utilized during capital sentencing hearings.

The Court in *Payne* was careful to impose some limitations upon its holding. In addition to ruling that the Eighth Amendment erects no per se bar to

232. *Id.* at 2631.

233. *Id.*

234. *Id.* Justice Stevens noted that much of the victim impact evidence presented in *Payne* had been properly introduced during the guilt phase of the trial. Since the crime committed was so disturbing, it is likely the impact of the evidence would have remained on the minds of jurors during sentencing, regardless of whether it was reintroduced. For this reason, the Tennessee Supreme Court's conclusion that the error was harmless may have been justified. *Id.* at 2630. *Compare supra* notes 31-33 and accompanying text (arguing that this justification is what makes *Booth* unworkable).

235. *See id.* at 2609.

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

237. "[T]he primary responsibility for defining crimes against state law [and] fixing punishments for the commission of these crimes . . . rests with the States." *Id.* at 2607 (majority opinion); *see, e.g.*, State v. Biegenwald, 594 A.2d 172, 222 (N.J. 1991) (Garibaldi, J., dissenting).

the admission of victim impact evidence, the Court also determined that if victim impact evidence is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment may provide a relief mechanism to prohibit its inclusion.[238] In addition, the Court did not rule on *Booth*'s prohibition of the use of victim evidence relating to family members' opinions about the crime, the defendant, and the sentence he should receive.[239] Since no such evidence was presented in *Payne*, the Court refrained from overruling that segment of the *Booth* opinion.[240] Thus, the ability to introduce victim impact information during capital sentencing determinations is not without limits.

B. The Legislative Response

Although it is still relatively early to gauge state legislative response to the *Payne* decision,[241] Congress, as previously noted, has begun to craft legislation which addresses the use of victim impact evidence during capital sentencing proceedings.[242] Following the passage of the two divergent anti-crime bills in the Senate and the House, each containing provisions dealing with victim impact information, a congressional conference was held in late 1991 to reconcile the bills.[243] The resulting conference report adopted the victim impact language from the House bill.[244] While both versions are substantially similar in terms of the type of victim impact information that may be admitted, the House version provides only for voluntary inclusion of vic-

238. *See supra* notes 174-75, 194-95 and accompanying text; *see, e.g.*, McMillian v. State, No. 1 Div. 864, 1991 Ala. Crim. App. LEXIS 1443, at *57 (Sept. 20, 1991).

239. *See supra* note 204 and accompanying text.

240. *See, e.g.*, State v. Lavers, 814 P.2d 333, 337 (Ariz.), *cert. denied*, 112 S. Ct. 343 (1991).

241. At least six states have introduced legislation regarding the use of victim impact information in capital sentencing proceedings since the decision in Payne v. Tennessee was handed down by the Court: California, Florida, Louisiana, Ohio, Pennsylvania and Washington. Search of LEXIS, Legis library, Sttrck file (Aug. 22, 1992).

242. *See* discussion *supra* part III.B.

243. The Conference Report on the Violent Crime Control and Law Enforcement Act of 1991, H.R. CONF. REP. NO. 405, 102d Cong., 1st Sess. (1991), was submitted to the full Congress on November 26, 1991. 137 CONG. REC. H11,686 (daily ed. Nov. 26, 1991). It called for the application of the death penalty to greater than fifty federal crimes, the restriction of death row inmate appeals to federal courts, the use of evidence seized under faulty warrants so long as the police acted in "good faith," a delay of five working days in order to buy a handgun, and the authorization of three billion dollars for law enforcement. Helen Dewar & Guy Gugliotta, *Congressional Scorecard*, WASH. POST, Nov. 29, 1991, at A29.

244. H.R. CONF. REP. NO. 405, 102d Cong., 1st Sess. 199 (1991) (joint explanatory statement of conference committee); *see id.* at 6 and *supra* note 162 (providing specific language).

tim impact statements during sentencing;[245] the Senate version is mandatory.[246]

Since the *Payne* decision allows a jurisdiction to choose whether or not to admit such evidence,[247] the adopted House language would closely follow *Payne*, but it would not strengthen it to the degree that the Senate version would have. Perhaps this reason, in conjunction with the belief that the conference bill would weaken the criminal justice system rather than strengthen it, led President Bush to threaten to veto the crime bill.[248] While the House narrowly approved the conference agreement, Democrats in the Senate were unable to muster enough votes to avoid a filibuster by Republicans, and the bill was shelved.[249] As of August 1992, the bill continued to languish in the Senate, although lawmakers from both parties had met with the Justice Department with the goal of reaching a compromise to break the impasse.[250] Such a compromise could further alter the "victim impact" language.

C. The Future of the Doctrine of Stare Decisis

While the Court's view on the admissibility of victim impact statements during capital sentencing proceedings is clear, its impact upon the doctrine of stare decisis is not immediately evident. According to Justice Marshall, the majority in *Payne* trivializes the doctrine by limiting its applicability to those cases involving property and contract rights.[251] The majority ruling, however, was based upon the principle that adherence to precedent is necessary in cases involving property and contract rights because of the strong reliance interests involved.[252] According to the majority, the opposite is true in constitutional cases where corrective action through legislation is near to impossible.[253] In overruling *Booth* and *Gathers*, the majority explained that

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245. *See supra* note 162.

246. *See supra* note 158.

247. *See supra* text accompanying notes 236-38.

248. John E. Yang, *Bush Vows He Will Veto Crime Bill*, WASH. POST, Nov. 26, 1991, at A1.

249. Helen Dewar, *Senate Crime Bill Shelved After Republican Filibuster*, WASH. POST, Mar. 20, 1992, at A8.

250. Guy Gugliotta, *Crime Bill a Hostage of Politics*, WASH. POST, August 5, 1992, at A14.

251. Payne v. Tennessee, 111 S. Ct. 2597, 2623 (1991) (Marshall, J., dissenting).

252. *Id.* at 2610 (majority opinion); *see* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting); United States v. Title Ins. & Trust Co., 265 U.S. 472 (1924); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458 (1852).

253. *Payne*, 111 S. Ct. at 2610; *see supra* note 196 (discussing reasons why legislative correction is difficult in constitutional cases). The constitutional issue faced by the Court in *Payne*

the opinions were narrow majority decisions involving individual rights, decided over staunchly critical dissents.[254] In retrospect, it thus appears the Court may be signaling a willingness to revisit those cases involving constitutional or individual rights where the decisions resulted from a narrow majority split of the Court. In Justice Marshall's view, "[t]he implications of this radical new exception to the doctrine of *stare decisis* are staggering."[255]

In actuality, the Court's treatment of the doctrine of stare decisis is not such a novel approach. The principle of strict adherence to precedent has been consistently maligned thoughout this century and is currently disfavored in the context of constitutional adjudication.[256] Indeed, some commentators have gone so far as to suggest abandoning the application of the doctrine altogether in the realm of constitutional law.[257] The Supreme Court itself has long recognized that stare decisis plays a limited role in cases involving constitutional questions,[258] and its role in those situations where capital punishment is at issue is even more suspect.[259] While stare decisis traditionally promotes stability, uniformity, and predictability in the law, in

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was whether the Eighth Amendment imposed a blanket prohibition on the use of victim impact evidence during a capital sentencing proceeding. *Id.*

254. *Id.* at 2610-11.

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

256. Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 741 & n.108 (1988).

257. *Id.* at 743.

258. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-11 (1932) (Brandeis, J., dissenting). A celebrated lecture given by Justice William O. Douglas noted that stare decisis should mean very little in constitutional cases. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949). Justice Douglas explained: "[a] judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." *Id.* at 736. The Supreme Court has given the doctrine of stare decisis consistently less deference in the constitutional sphere. For example, the Court overruled thirty cases from 1937 to 1949. *Id.* at 743. Twenty-one of those reversals were on constitutional grounds. Earl M. Maltz, *Some Thoughts of the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467 (1980). From 1960 to 1980 the Court overruled constitutional cases forty-seven times. *Id.* During the past twenty terms, the Court overruled, in whole or in part, thirty-three constitutional decisions. *Payne*, 111 S. Ct. at 2610 & n.1.

259. *See, e.g.*, United States *ex rel.* Fong Foo v. Shaughnessy, 234 F.2d 715, 718-19 (2d Cir. 1955) (arguing that while stare decisis may perpetuate an unjust rule upon which individuals have relied in conducting their business activities, the doctrine should not govern when a person's life is involved); People v. Aranda, 407 P.2d 265, 272 (Cal. 1965) (arguing that courts should not adhere to precedents in criminal cases where a person's life is at stake); People v. Lewis, 430 N.E.2d 1346, 1371 (Ill. 1981) (Simon, J., dissenting) (asserting that capital punishment is an area unsuited for strict adherence to stare decisis because of the nature of the death penalty and the stakes involved), *cert. denied*, 456 U.S. 1011 (1982); Margaret S. Hewing, Note, *Stare Decisis and the Illinois Death Penalty*, 1986 U. ILL. L. REV. 177, 196 (proposing that the doctrine of stare decisis should have a diminished role in capital cases).

capital and constitutional cases the greater need for flexibility and prevention of error outweigh these considerations.[260] Finally, the Supreme Court has suggested that stare decisis encompasses the importance of considering constitutional and capital punishment cases on their merits, examining all of the policy questions involved, rather than acting with blind deference to precedent.[261]

Former Justice William J. Brennan, Jr., commented on the doctrine of stare decisis in a manner which is particularly enlightening in view of the decision in *Payne*. Justice Brennan noted that the Supreme Court plays a unique role in its interpretation of the Constitution, and that role demands flexibility.[262] In parsing the text of the Constitution, Justice Brennan believed that the Court must consider society's views to the extent that "when a justice perceives an interpretation of the text to have departed so far from its essential meaning, that justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path."[263] Exposing the Court's departure from the true meaning of the Eighth Amendment is what the majority in *Payne* actually accomplished.[264] By allowing states to admit victim impact evidence during capital sentencing proceedings, the Court reflected the concerns and perceptions of society, as well as the Court's own constitutional interpretations.[265] This result is entirely consistent with the Court's prior determination of the role of stare decisis in constitutional cases.[266]

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260. *See* Hewing, *supra* note 259, at 196-97. Because of the fundamental rights at issue in constitutional cases, and the threat of the deprivation of a life in capital cases, the need to correct error in those cases rather than to perpetuate it under stare decisis is of particular concern. *Id.*

261. *See* Helvering v. Hallock, 309 U.S. 106, 119 (1940) (stating that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision").

262. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986).

263. *Id.*

264. The majority in *Payne* rejected the Court's prior decisions in *Booth* and *Gathers* that the Eighth Amendment erected a per se bar against the admission of victim impact evidence during capital sentencing proceedings. *See* discussion *supra* part IV.A.

265. *Id.*

266. *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (arguing that stare decisis "is not 'an imprisonment of reason' ") (quoting United States v. Int'l Boxing Club, Inc., 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting)); Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (explaining that adherence to precedent which contradicts the public's sense of justice may diminish respect for the law and the judicial process); Smith v. Allwright, 321 U.S. 649, 665 (1944) (noting that the Court has never been constrained to follow poorly reasoned or unworkable precedent); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (noting the limited role stare decisis plays in constitutional cases); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (noting that stare decisis should play a limited role in constitutional cases because of the difficulty associated with legislative correction).

VI. CONCLUSION

In *Payne v. Tennessee*, the United States Supreme Court reconsidered its decisions in *Booth v. Maryland* and *South Carolina v. Gathers*, decided in 1987 and 1989, respectively. Those opinions had announced a blanket, per se rule prohibiting the use of victim impact evidence, or prosecutorial comment reflecting such evidence, during capital sentencing proceedings. As a result of a change in the personnel of the Court, the Court's desire to reflect the concerns of citizens which had become manifested in national and state legislation and the victims' rights movement, and the majority's belief that *Booth* and *Gathers* had been wrongly decided, the *Payne* Court overruled *Booth* and *Gathers*. The Court held that the Eighth Amendment does not forbid the admission of evidence regarding a victim's personal characteristics, or the impact of the crime upon the victim's family, during the penalty phase of capital trials. States are now free to introduce such evidence.

Consideration of victim impact information at sentencing adds balance to the current system and is in accord with the tenet that stare decisis plays a limited role in deciding fundamental constitutional issues. The decision in *Payne v. Tennessee* reflects the view that fairness can be accomplished in capital trials only when information regarding the victim, as well as the defendant, is considered. In the words of former Justice Benjamin N. Cardozo: "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[267]

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267. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), *quoted in* Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991).