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Payne v. Tennessee: The Demise of Booth v. Maryland

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INTRODUCTION

The last twenty years have seen a dramatic growth throughout the United States in the area of victims' rights.[1] California has been a pioneer in this area, and was the first state to enact a statute providing for state compensation for innocent victims of violent crimes.[2] In 1982, California amended its constitution to reflect an increased concern with victims' rights.[3] By the beginning of 1991,

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1. *See, e.g.*, CAL. CONST. art. I, § 28 (defining victim's rights to encompass the right to restitution and the basic expectation that persons who commit felonious acts will be appropriately punished). For a general description of the victims' rights movement see Carrington & Nicholson, *The Victim's Rights Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1 (1984). Currently, there are an estimated 2,000 government and privately sponsored victim assistance organizations at the state and local level. *Id.* at 2. "Crime Victims Week" has also been proclaimed by the President of the United States, as well as state governors and legislatures. *Id.* Throughout this Note the term "victim" may refer to the victim's family as well as the actual victim.

2. 1965 Cal. Stat. ch. 1546, sec. 1, at 3703 (enacting CAL. GOV'T CODE §§ 13960-13966), *repealed by* 1973 Cal. Stat. ch. 1144, sec. 1, at 2348. California's current victim compensation program is codified in Government Code sections 13959-13969.1 and Penal Code sections 1191.2, 1203.1(j), 1214, and 2085.5. *See* CAL. GOV'T CODE §§ 13959-13969.1 (West 1980 & Supp. 1991) (providing a comprehensive statutory scheme for compensating victims of crime); CAL. PENAL CODE § 1191.2 (West Supp. 1991) (requiring the probation officer to provide the victim information concerning the victim's right to civil recovery); *id.* § 1203.1(g) (West Supp. 1991) (requiring any defendant convicted of sexual assault on a minor who is now eligible for parole to make restitution for medical and psychological treatment); *id.* § 1203.1(j) (West Supp. 1991) (requiring any defendant convicted of assault with a deadly weapon on a victim 65 years of age or older to make restitution for medical and psychological costs); *id.* § 1214 (West Supp. 1991) (describing enforcement procedures for restitution awards to victims).

3. *See* CAL. CONST. art. I, § 28 (declaring the importance of protecting victim's right to justice and restitution and declaring the necessity of enacting reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons to protect the victim's rights). The people of California amended the state constitution by passing Proposition Eight, "The Victim's Bill of Rights" on June 8, 1982.

Congress and all fifty states had enacted comprehensive victims' rights legislation.[4]

Advocates of the victims' rights movement seek to make the criminal justice system more responsive to the needs of victims of crime.[5] Many victims' rights activists argue that the principal shortcomings of the American criminal justice system are the lack of concern for crime victims as individuals, and the failure to treat crime victims with dignity.[6] Another focus of the victims' rights movement is to encourage active involvement of victims in criminal justice proceedings, especially in the sentencing phase of the criminal process.[7] In response to the need for victim

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4. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242 (enacting the Victim Witness Protection Act of 1982). The Victim Witness Protection Act of 1982 recognized various rights of victims, including notification of victims of proceedings in the prosecution of the accused. *Id. See, e.g.*, CAL. PENAL CODE §§ 679, 679.01, 679.02 (West 1988) (declaring the intent of the legislature that victims and witnesses of crime be treated "with dignity, respect, courtesy, and sensitivity").

5. *See* Kiesel, *Crime and Punishment: Victim Rights Movement Presses Courts, Legislatures*, 70 A.B.A. J. 25, 25 (1984) (discussing the responsiveness of the criminal justice system to victims of crime). *See generally* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, 17-56 (1982) (hereinafter FINAL REPORT) (copy on file at *Pacific Law Journal*) (proposing federal and state action to address the interests of victims); Polito, *The Rights of Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, NEW ENG. J. ON CRIM. & CIV. CONFINEMENT, 241, 241 (1990) (discussing the criminal justice system's response to victims' rights).

6. *See* Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA. L. REV. 199, 199. *See also* FINAL REPORT, *supra* note 5, at 76-78 (1982) (concluding that victim participation in the prosecution and sentencing will foster a victim's feeling of dignity and justice); CAL. PENAL CODE § 679 (West 1988) (declaring the intent of the legislature that victims and witnesses of crime are treated "with dignity, respect, courtesy, and sensitivity"); *Furman v. Georgia*, 408 U.S. 238, 413-14 (1972) (Blackmun, J., dissenting) (discussing the failure to personalize crime victims). Justice Blackmun stated that even though the various concurring opinions in *Furman* acknowledged the heinous and atrocious character of the offenses, there was a curious void in the concurring opinions of any discussion of the misery of the victims, their families and the communities where the offenses took place. *Id.* at 413-14 (1972) (Blackmun J., dissenting).

7. *See* FINAL REPORT, *supra* note 5, at 18 (proposing federal and state action to pass legislation to require victim impact statements at sentencing); Comment, *The Crime Victim and the Criminal Justice System*, 11 PEPPERDINE L. REV. 23, 28 (1984) (discussing the rationales for enhanced victim involvement and reform). *See also* CAL. PENAL CODE § 1191.1 (West Supp. 1991) (enacted by Proposition 8) (allowing victim participation in the sentencing phase of a criminal trial by permitting a victim to express his or her views concerning the crime, the person responsible, and the need for restitution). *See also* People v. Siripongs, 45 Cal. 3d 548, 585-86 n.12, 754 P.2d 1306 n.12, 247 Cal. Rptr. 729, 751 n.12 (1988) (discussing Proposition 8 and the enactment of California Penal Code § 1119.1). Many states have adopted a bifurcated trial in which there is a guilt phase and a sentencing phase. *See* Bedau, *Capital Punishment*, 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 133, 136 (S. Kadish ed. 1983) (generally discussing statutory and judicial sentencing).

involvement in the criminal process, legislation has been enacted by the United States Congress and forty-eight states which provides for the admission of victim impact evidence during the sentencing phase of a criminal trial.[8]

In criminal trials, victim impact evidence is used by the prosecution to promote stiffer penalties for the convicted defendant.[9] Direct evidence may be admitted in the form of testimony by victims showing the impact of the crime on those testifying.[10] Additionally, whether or not direct impact evidence

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8. *See* 18 U.S.C. §§ 1512-1515, 3146(a), 3580, 3597 (1988); FED. R. CRIM. P. 32(c)(2)(D); ALASKA STAT. § 12.55.022 (1990); ARIZ. REV. STAT. ANN. §§ 12-253(4) (Supp. 1989); ARK. STAT. ANN. § 5-65-109 (1987); CAL. PENAL CODE § 1191.1 (West Supp. 1991); COLO. REV. STAT. § 16-11-102 (Supp. 1990); CONN. GEN. STAT. ANN. §§ 54-91a (West 1985), 54-91c (West 1985 & Supp. 1990); DEL. CODE ANN. tit. 11, § 4331 (Supp. 1988); D.C. CODE ANN. § 23-103(a) (1990); FLA. STAT. ANN. § 921.143 (West 1984 & Supp. 1990); GA. CODE ANN. § 17-10-1.1 (Supp. 1989); IDAHO CODE § 19-5306(b) (Supp. 1990); ILL. ANN. STAT. ch. 38, para. 1005-3-2(a) (Smith-Hurd 1982 & Supp. 1990); IND. CODE ANN. §§ 35-38-1-8 to 1-9 (Burns 1985 & Supp. 1990); IOWA CODE ANN. § 901.3(5) (West 1979 & Supp. 1990); KAN. STAT. ANN. § 21-4604(2) (1981); KY. REV. STAT. ANN. § 421.520 (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 875(B) (West 1984); ME. REV. STAT. ANN. tit. 17-A, § 1257 (Supp. 1990); MD. ANN. CODE art. 41, § 4-609(c)(3) (1986); MASS. GEN. LAWS ANN. ch. 279, § 4B, ch. 258B, § 3(h) (West Supp. 1990); MICH. COMP. LAWS. ANN. § 771.14 (West 1990); MINN. STAT. ANN. §§ 611A.037-.038 (West Supp. 1990); MISS. CODE ANN. §§ 99-19-151 to 19-159 (Supp. 1987); MO. ANN. STAT. § 217.762 (Vernon 1990); MONT. CODE ANN. §§ 46-18-112, 46-18-242 (1989); NEB. REV. STAT. § 29-2261 (1989); NEV. REV. STAT. § 176-145(3) (Supp. 1989); N.H. REV. STAT. ANN. § 651:4-a (1986); N.J. STAT. ANN. § 2C:44-6(b) (West 1982 & Supp. 1990); N.M. STAT. ANN. § 31-24-5 (1990); N.Y. CRIM. PROC. LAW § 390.30(3) (McKinney 1983 & Supp. 1990); N.C. GEN. STAT. § 15A-825(9) (1988); OHIO REV. CODE ANN. §§ 2929.12, 2947.051 (Baldwin 1986); OKLA. STAT. ANN. tit. 22, § 982 (West 1986); OR. REV. STAT. §§ 137.530(2), 144.790(2) (1989); PA. STAT. ANN. tit. 71, § 180-9.3 (Purdon 1990); R.I. GEN. LAWS §§ 12-28-3, 12-28-4, 12-28-4.1 (Supp. 1989); S.C. CODE ANN. § 16-3-1550 (Law. Co-op. 1989); S.D. CODIFIED LAWS ANN. § 23A-27-1.1 (1988); TENN. CODE ANN. §§ 40-35-207 (8), -209(b) (1982 & Supp. 1990); TEX. CRIM. PROC. CODE ANN. § 56.03 (Vernon 1990); UTAH CODE ANN. § 64-13-20(1)(e) (1986); VT. STAT. ANN. tit. 13, § 7006 (Supp. 1987), tit. 28, § 204(e) (1986); VA. CODE ANN. § 19.2-299.1 (1990); WASH. REV. CODE ANN. §§ 7.69.020(4), .030 (Supp. 1990); W. VA. CODE §§ 61-11A-2, 61-11A-3, 61-11A-6 (1989); WIS. STAT. ANN. §§ 950.04(2m), .05(1)(dm) (West Supp. 1990); WYO. STAT. § 7-13-303(a)(iv)-(v) (all providing for the admission of victim impact evidence); Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 200 n.12 (1988) (listing and describing victim impact statutes). *See generally infra* notes 71-74 and accompanying text (discussing different legislation admitting victim impact evidence).

9. *See, e.g.*, South Carolina v. Gathers, 490 U.S. 805, 808-09 (1989) (prosecution arguing victim impact evidence in the sentencing phase of a capital trial).

10. *See supra* note 8 and accompanying text (listing various statutes allowing the admission of victim impact evidence at the sentencing phase of a criminal trial).

is admitted, prosecutors may use the issue of victim impact in closing argument at the sentencing phase of trial.[11]

The admission of victim impact evidence in capital cases is controversial due to the conflict of rights between the guilty defendant and the defendant's innocent victims.[12] The eighth amendment to the United States Constitution protects the defendant charged with a capital crime by demanding the highest scrutiny of the sentencing process.[13] The absence of any protection for victims reflects an inequity in the criminal justice system since the victim's interest in justice is at a pinnacle during the sentencing stage of a capital case.[14] Arguably, when victims are not permitted to participate in the defendant's trial, the victims continue to be victimized.

Amidst this conflict between the interests of the defendant and the victims, the Supreme Court of the United States, perhaps triggered by the popular demand for more protection for victims of crime, recently changed its course on the question of whether to allow the admission of victim impact evidence in the sentencing phase of a capital trial.[15] Contrary to its earlier decisions,[16] the Supreme Court in *Payne v. Tennessee*[17] held that the eighth amendment does not bar a state from allowing a jury to consider victim impact evidence during the sentencing phase of a capital

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11. For convenience throughout this Note, all references to the admission of victim impact evidence will include prosecutorial argument of this evidence.

12. *See infra* notes 87-299 and accompanying text (discussing the Supreme Court's opinion in *Payne v. Tennessee* and *Booth v. Maryland*).

13. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

14. *See* Hudson, *The Crime Victim and the Criminal Justice System*, 23 PEPPERDINE L. REV. 23, 41 (1984) (discussing the lack of any constitutional basis for victim's rights).

15. *Compare* Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) (holding the admission of victim impact evidence in the sentencing phase of a capital trial constitutional) *with* Booth v. Maryland, 482 U.S. 496, 504-05 (1987) (holding the admission of victim impact evidence in the sentencing phase of a capital trial unconstitutional). *See* notes 88-300 and accompanying text (discussing the Court's opinions in *Payne* and *Booth*).

16. *See* Booth v. Maryland, 482 U.S. 496, 507 (1987) (holding that the admission of victim impact evidence in the sentencing phase of a capital trial is unconstitutional); South Carolina v. Gathers, 490 U.S. 805, 822-23 (1989) (holding prosecutorial argument of victim impact evidence in the sentencing phase of a capital trial unconstitutional).

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

case.[18] This Note will discuss the reversal by the Supreme Court regarding the admissibility of victim impact evidence during the sentencing phase of capital cases as presented in *Payne*.

Part I of this Note explores the legal background of the eighth amendment in capital cases and how the eighth amendment relates to victim impact evidence in the sentencing phase of a capital trial.[19] Part II discusses the majority, concurring and dissenting opinions of the Supreme Court in *Payne v. Tennessee*.[20] Finally, Part III assesses the potential legal ramifications of the *Payne* decision with respect to both federal and California laws.[21]

I. LEGAL BACKGROUND

Determining the admissability of victim impact evidence in death penalty cases can be difficult because the substantive[22] and procedural[23] applications of the eighth amendment must be considered in conjunction with the admissibility question. Thus, to fully appreciate this question, it is first necessary to discuss the relevant death penalty case law involving the eighth amendment impact on capital sentencing. Once the applicable death penalty cases have been developed, the focus will turn to the eighth amendment's limitations, if any, on the admissibility of victim impact evidence at the sentencing phase of a capital trial.

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18. *Id.* at 2609.

19. *See infra* notes 22-125 and accompanying text.

20. *See infra* notes 126-299 and accompanying text.

21. *See infra* notes 300-427 and accompanying text.

22. For purposes of this Note, the term substantive application of the eighth amendment refers to the actual infliction of the death penalty.

23. For purposes of this note the term procedural eighth amendment refers to the judicial process by which the death penalty is imposed.

A. Application of The Eighth Amendment to the Death Penalty

The eighth amendment to the United States Constitution prohibits cruel and unusual punishment.[24] The United States Supreme Court has struggled with the constitutionality of the death penalty due to a variety of issues caused by the substantive and procedural protection of the eighth amendment.[25] However, the Supreme Court has held that the death penalty is not *per se* cruel and unusual punishment under the eighth amendment.[26] Often the constitutionality of a state's death penalty scheme is determined by the amount of discretion a jury is allowed in deciding whether any particular defendant should receive the death penalty.[27] Thus, the Supreme Court has held that a death penalty statute which gives the jury unbridled discretion is unconstitutional.[28] Under a similar concept, statutes giving the jury no discretion at all have been held unconstitutional by the Court.[29] The three landmark cases of *Furman v. Georgia,*[30] *Woodson v. North Carolina,*[31] and *Gregg*

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24. U.S. CONST. amend. VIII. *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 852-53 (1969) (discussing the original meaning of the phrase "cruel and unusual punishment" and its first appearance in the English Bill of Rights of 1689).

25. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 168-70 (1976) (discussing the constitutionality of the death sentence and the difficulty encountered by the Supreme Court in deciding the issue).

26. The United States Supreme Court has held that particular methods of executing a capital sentence are allowable under the eighth amendment. *See, e.g.*, Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1974) (upholding execution by electric chair after first attempt failed due to malfunction); In re Kemmler, 136 U.S. 436, 447-48 (1890) (upholding death by electrocution); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1879) (upholding death by public shooting).

27. *See* Furman v. Georgia 408 U.S. 238, 256-57 (1972) (per curiam) (Douglas, J., concurring) (discussing impermissible amount of jury discretion during the sentencing phase of a capital trial); Woodson v. North Carolina, 428 U.S. 280, 301-05 (1976) (discussing the lack of any jury discretion during the sentencing of a capital trial). *See also infra* notes 33-40, 60-70 and accompanying text (discussing the Court's opinion in *Furman v. Georgia* and *Woodson v. North Carolina*).

28. *Furman*, 408 U.S. at 309 (Stewart, J., concurring). *See infra* notes 33-40, 60-70 and accompanying text (discussing the Court's opinion in *Furman v. Georgia* and *Woodson v. North Carolina*).

29. *Woodson*, 428 U.S. 280, 305 (1976). *See infra* notes 60-70 and accompanying text (discussing the Supreme Court's opinion in *Woodson v. North Carolina*).

30. 408 U.S. 238 (1972) (per curiam). *See infra* notes 36-40 and accompanying text (discussing the Court's opinion in *Furman*).

31. 428 U.S. 280 (1976). *See infra* notes 60-70 and accompanying text (discussing the Supreme Court's opinion in *Woodson*).

v. Georgia[32] involved application of the eighth amendment to the death penalty. These cases have been the foundation of the Supreme Court's decisions involving the constitutionality of the death penalty.

In *Furman*, the defendant was sentenced to death for murder under a Georgia statute which authorized the jury to choose one of three punishments for murder: the death penalty, life imprisonment, or imprisonment and labor in the penitentiary for between one to twenty years.[33] The statute did not provide any guidelines for the jury in determining when each type of punishment would be appropriate.[34] Deciding in favor of one sentence over the other two punishments was purely a matter of juror discretion.[35]

In *Furman*, the United States Supreme Court addressed the issue of whether a given sentence can be "cruel and unusual" based only upon the *procedure* by which that punishment is imposed.[36] The Court answered in the affirmative, reasoning that Georgia's death penalty statute created a substantial risk that the punishment would be determined by the jury in an arbitrary or capricious manner.[37] According to the Court in *Furman*, the unpredictability of the application of the death sentence was cruel and unusual, and thus violative of the eighth amendment.[38] The

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32. 428 U.S. 153 (1976). *See infra* notes 41-51 and accompanying text (discussing the Supreme Court's opinion in *Gregg*).

33. *Furman*, 408 U.S. at 240 (Douglas, J., concurring).

34. *Id.* at 253 (Douglas, J., concurring).

35. *Id.*

36. *See id.* at 253. *Cf.* McGautha v. California, 402 U.S. 183, 207 (1971) (rejecting the argument that procedures imposing capital punishment violated the Due Process Clause).

37. *Furman*, at 256-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* 313-14 (White, J., concurring). The *Furman* Court issued five opinions in support of holding the statute unconstitutional, and four dissenting opinions. *Id.* 408 U.S. at 256-57 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring) *id.* at 310 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 370 (Marshall, J., concurring); *id.* at 375 (Burger, C.J., dissenting); *id.* at 414 (Blackmun, J., dissenting); *id.* at 464-65 (Powell, J., dissenting); *id.* at 468 (Rehnquist, C.J., dissenting).

38. *Id.* at 256-57 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring). Justice Stewart stated:

> These death sentences are cruel and unusual in the same way that being struck down by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected handful upon whom the sentence of death has in fact been imposed. The eighth and fourteenth amendments cannot tolerate the infliction of a sentence of death under legal

Furman Court held that the jury must be given specified standards, defined by the legislature, in order to impose the death penalty.[39] The issue of the constitutionality of the death penalty itself was addressed in *Furman*, but remained unresolved.[40] That issue was finally answered in *Gregg v. Georgia*.[41]

In *Gregg v. Georgia*, the petitioner, Gregg, was sentenced to death after being found guilty of armed robbery and murder.[42] Gregg claimed that the death penalty was cruel and unusual in all cases where it was imposed, regardless of the crime, the procedures involved, or the character of the criminal.[43] The Supreme Court rejected Gregg's argument and held that the death penalty was not *per se* cruel and unusual under the eighth amendment.[44] In reaching this conclusion the *Gregg* Court recognized that what constitutes cruel and unusual punishment is not a static concept.[45] In interpreting the eighth amendment, the Court drew meaning from society's standards of decency.[46] However, the Court recognized that it must presume the validity of a punishment selected by a democratically selected legislature.[47] The *Gregg* Court noted that while an examination of society's mores was necessary, it was not the end of the inquiry.[48] In addition to comporting with the existing standards of decency, the Court stated

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systems that permit this unique penalty to be so wantonly and so freakishly imposed. *Id.* at 309-10 (Stewart, J., concurring).

39. *Id.* at 253-54 (Douglas, J., concurring).

40. Gregg v. Georgia, 428 U.S. 153, 168-69. In *Furman*, four justices, Burger, Blackmun, Powell and Rehnquist, would have held that the death penalty was constitutional. *Furman*, 408 U.S. at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting). Two justices, Brennan and Marshall, would have held that the death penalty is unconstitutional *per se*. *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). Three justices, Douglas, Stewart and White, while agreeing that the statute before them was unconstitutional, left open the issue as to the constitutionality of the death penalty. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

41. 428 U.S. 153 (1976).

42. *Id.* at 158.

43. *Id.* at 168.

44. *Id.* at 187.

45. *Id.* at 172-73.

46. *Id.* at 173.

47. *Id.* at 174.

48. *Id.* at 173.

that the sanction must not be "excessive."[49] The *Gregg* Court asserted that the examination of excessive sanctions had two components.[50] First, there must not be an excessive infliction of pain.[51] Second, the punishment must not be grossly out of proportion to the severity of the crime.[52]

In applying the first component, the Court looked to the theory of punishment that justifies the sentence of death.[53] The Court concluded in *Gregg* that there was not enough evidence to show that the legislature clearly erred in allowing the death penalty.[54] The Court went on to analyze the second component, proportionality, and held that the sentence of death for murder is not disproportional.[55] Therefore, the Court in *Gregg* held that the death penalty was not *per se* unconstitutional under the eighth amendment.[56]

The Court then turned to an analysis of whether the death penalty was appropriate on the facts of *Gregg* under *Furman v. Georgia*.[57] In so doing, the Court refined the holding of *Furman* by stating that the jury's discretion must be "directed and limited."[58] The Court referred to the standards set forth in the Model Penal Code as illustrative of how a sentencing system could be structured and meet *Furman's* constitutional concerns.[59]

In *Woodson v. North Carolina*[60] the Supreme Court addressed the remaining question of whether a death penalty statute that permitted the jury no discretion at all in sentencing was

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* 186-87.
55. *Id.* at 187.
56. *Id.*
57. *Id.* at 188.
58. *Id.* at 189. The Court in *Gregg* further asserted that standards for guiding a jury's discretion are capable of being formulated by the state legislatures. *Id.* at 192 (citing Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, ¶ 595).
59. *Id.* at 193. *See* MODEL PENAL CODE § 201.6 commentary at 71 (Tent. Draft No. 9, 1959) (asserting that standards to guide the jury can be developed).
60. 428 U.S. 280 (1976).

constitutional.[61] The North Carolina sentencing statute in *Woodson* contained an absolute mandate of the death penalty for all defendants convicted of first degree murder.[62] The statute was challenged as violative of the eighth amendment on the theory that the death penalty, under any circumstances, is unconstitutional under the eighth and fourteenth amendments.[63]

The *Woodson* Court held that the mandatory death penalty statute violated the eighth amendment for three reasons.[64] First, the Court asserted that the statute did not comport with contemporary standards regarding the imposition of the punishment of death.[65] The Court asserted this was due to the fact that the North Carolina statute was a reaction to the rule handed down in *Furman*, that the jury not be given too much discretion, and therefore, the statute did not reflect society's values.[66] Second, the Court recognized that the jury was given no discretion by the North Carolina statute because that statute made the death penalty mandatory upon a finding of guilt.[67] The net effect of this lack of discretion, the Court found, was that a jury which found a defendant guilty of first degree murder, but felt the defendant was not morally culpable enough to deserve the death sentence, would simply find the defendant not guilty of first degree murder in order

61. Id. at 294-97.

62. *Id.* at 286.

63. *See id.* at 286-87 (describing the North Carolina murder statute as a mandatory death penalty law).

64. *Id.* at 305.

65. *Id.* at 301.

66. *Id.* The Court noted that for 130 years prior to 1972 there was consistent rejection of a mandatory death sentence. *Id.* at 298. However, the Court noted that since 1972 some states had enacted a mandatory death sentence for first degree murder and that this trend may have been an example of society's reversal on it's view of the mandatory death sentence. *Id.* at 298. The Court then recognized that, in view of the persistent history of legislative rejection of mandatory death penalty statutes beginning in 1838 and continuing for 130 years until *Furman*, it seemed evident that the post-*Furman* enactments were due to the states trying to conform to the Constitution, rather than a change in societal values. *Id.* at 298. The Court stated that mandatory sentencing statutes enacted in response to *Furman* have simply papered over the problem of unlimited jury discretion. *Id.* at 302.

67. *Id.* at 302.

to avoid imposing the mandatory death sentence.[68] The final reason given by the Supreme Court for finding the statute unconstitutional was that in mandating the death sentence, the statute did not allow a jury to consider the defendant as a unique human being.[69] Thus, the North Carolina statute in *Woodson* failed scrutiny under the eighth amendment for the same reason as the Georgia statute in *Furman*: the application of the statutes led to an arbitrary and capricious jury decision in imposing the death sentence.[70] This concern over juror imposition of the death sentence based on caprice and emotion has led to a heated debate over the constitutionality of victim impact evidence in the sentencing stage of a capital trial.

B. *The Eighth Amendment's Application to Victim Impact Statements*

It has been argued that victim impact evidence implicates the eighth amendment because this information is irrelevant to determining a defendant's moral blameworthiness and hence creates a substantial risk of the death penalty being imposed in an arbitrary or capricious manner.[71] The term "victim impact evidence" covers a wide variety of factual, opinion and documentary

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68. *Id.* at 302-03. The Court relied on a North Carolina study commission which reaffirmed this belief by reporting that juries "quite frequently" would not convict a defendant who was otherwise guilty of first degree murder because of the enormity of the sentence automatically imposed. *See id.* at 299-300 (quoting Report of the Special Commission For the Improvement of the Administration of Justice, North Carolina, Popular Government 13 (Jan. 1949)). Arguably, under the North Carolina statute, the rights of the victim would be diminished instead of bolstered. The statute's mandatory death penalty provision appeared to be tough on defendants and seemed to give at least some solace to victims. However, because the statute deprives the jury of any discretion in sentencing the defendant for first degree murder, some juries found the defendant guilty of only second degree murder, and hence deprived the victim of a conviction of first degree murder. *Id.*

69. *Id.* at 304. The Court stated that the statute does not treat defendants convicted of capital crimes as "uniquely individual human beings," but as members of a class on which the death penalty is imposed. *Id.* In order for the *Woodson* Court to rationalize the fact that in non-death penalty cases a defendant is often not considered a "unique individual," the Court reasoned that the death penalty is qualitatively different from an imposition of life imprisonment. *Id.* at 305. The Court rested its logic on the premise that the finality of death requires entirely different considerations. *Id.* at 305.

70. *Id.* at 303.

71. *See generally* Booth v. Maryland, 482 U.S. 496, 504-07 (1987).

evidence,[72] and includes evidence from both the direct victim or the victim's family members.[73] Victim impact evidence is offered in four basic types. The first type, which relates the circumstances of the crime, includes the victim's statements regarding the crime and the physical harm resulting to the victim.[74] The second type of victim impact evidence involves the personal characteristics of the victim, including the victim's status in society, personality and relationships with others.[75] A third type of evidence includes the emotional impact of the crime on the victim's family.[76] Finally, the fourth type of victim impact evidence encompasses a victim's family members' testimony regarding characterizations and opinions of the crime, the defendant, and the appropriate sentence.[77]

Victim impact evidence is usually introduced in a victim impact statement.[78] As previously discussed, most jurisdictions have enacted statutes allowing prosecutors to introduce victim impact statements at the sentencing stage of the criminal proceeding.[79] Statutes that allow victim impact statements to be admitted in criminal trials vary throughout the country. Some statutes require that a victim impact statement be included in the pre-sentence

72. *See generally* Comment, *supra* note 6, at 202-11 (1988) (discussing the variety of information which may be provided by victim impact evidence).

73. *Id.*

74. *Id.*

75. *Id.* (describing victim impact statutes that include allow the admission of evidence relating to the personal characteristics of the victim and his or her personal relationships). *See* Payne v. Tennessee, 111 S. Ct. 2596, 2611 n.2 (discussing the types of victim impact evidence that were presented in *Payne*). *See, e.g.,* MD. ANN. CODE art. 41, § 4-609(c)(3)(i) (1986) (allowing a victim impact statement to "identify the victim").

76. Comment, *supra* note 6, at 201-10 (1988) (describing the level of victim harm that is included in victim impact statements). *See Payne*, 111 S. Ct. at 2611 n.2 (discussing the types of victim impact evidence that were presented in *Payne*). *See, e.g.,* MD. ANN. CODE art. 41, § 4-609(c)(3)(v) (1986) (allowing a victim impact statement to identify any requests for psychological services initiated by the victim or the victim's family as a result of the offense).

77. Comment, *supra* note 6, at 207-10 (1988). *See Payne*, 111 S. Ct. at 2611 n.2 (discussing the types of victim impact evidence that were presented in *Payne*).

78. *See generally* Comment, note 6, (discussing victim impact statements).

79. *See supra* note 8 (listing the statutes allowing admission of victim impact statements during the sentencing phase of a capital trial).

report for all felonies,[80] while others only allow admission of victim impact evidence if a victim impact statement is required by the court.[81] In other jurisdictions, the victim is allowed to testify orally regarding the contents of the victim impact statement in front of the defendant before a sentence is entered,[82] or the victim may speak freely at the sentencing proceedings.[83] A few statutes allow the victim to submit only a personally drafted statement,[84] while other statutes require the probation officer to draft a statement which includes an objective assessment of the degree of harm caused by the crime.[85] Victim impact statements in the sentencing phase of a capital trial have been challenged due to their potential for inflaming the jury, thus creating a risk of an arbitrary or capricious decision in violation of the eighth amendment.[86] The first United States Supreme Court case to address the constitutionality of the admission of victim impact statements during the sentencing phase of a capital trial was *Booth v. Maryland.*[87]

In *Booth v. Maryland*, the defendant robbed and murdered an elderly couple, Irvin and Rose Bronstein.[88] A victim impact statement was prepared pursuant to a Maryland statute that required a victim impact statement to be admitted in the pre-sentence report

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80. *See, e.g.*, ALASKA STAT. § 12.55.022 (1988) (requiring the probation officer to include the need for restitution and financial, emotional and medical effects of the offense in the pre-sentence report of each felony offender).

81. *See, e.g.*, IOWA CODE ANN. § 901.3 (West 1988) (requiring the courts to order a pre-sentence investigation before victim impact statement can be admitted).

82. *See, e.g.*, GA. CODE ANN. § 17-10-1.2 (1985) (allowing a victim to make an impact statement in the presence of the defendant before a sentence is determined).

83. *See, e.g.*, CAL. PENAL CODE § 1191.1 (West Supp. 1991) (allowing victim participation in the sentencing phase of a criminal trial).

84. *See, e.g.*, NEB. REV. STAT. § 29-2261 (1985) (requiring the admission of any written statements submitted to the county attorney or the probation officer by a victim).

85. *See, e.g.*, OHIO REV. CODE ANN. § 2947.051 (Baldwin 1987) (requiring the probation officer or a victim assistance program operated by the state to prepare a victim impact statement).

86. *See supra* notes 33-41 and accompanying text (discussing the Court's opinion in *Furman* and the unconstitutionality of a statute that creates a risk of a decision to impose the death sentence based on arbitrariness or caprice by giving the jury too much discretion).

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

88. *Id.* at 497.

of all felony cases.[89] The victim impact statute involved in *Booth* required the parole officer to prepare the statement, which was based on interviews with the Bronstein's family, including their son, daughter, son-in-law, and granddaughter.[90] Many of the family's comments focused on the victims' outstanding personal qualities and the deep sense of loss resulting from the Bronsteins' murder.[91] Other victim impact evidence described the emotional problems the family had sustained because of the murders.[92]

For example, the son stated that he suffered from insomnia and depression and that he was afraid for the first time in his life.[93] The son also testified that he believed that his parents were "butchered like animals."[94] Similarly, the daughter complained of sleeplessness and indicated that since the murder she had become withdrawn and distrustful.[95] The daughter stated that she could not watch scary movies or look at kitchen knives without being reminded of the murders.[96] The daughter also testified that she could not forgive the defendant and, in her opinion, the defendant could "never be rehabilitated."[97] Next, the granddaughter described how the wedding of a close family member had been ruined by the defendant's act and stated that instead of proceeding on a honeymoon the bride had attended the funeral.[98] The victim impact statement introduced at the sentencing phase also included the fact that the granddaughter had

89. *Id.* at 498-99. The Maryland statute required specifically that the report contain the identity of the victim of the offense, an itemization of any economic loss, to identify any physical injury suffered by the victim, identify any request for psychological services initiated by the victim, and contain any other information that the court requires. *Id.* at 498-99.

90. *Id.* at 499.

91. *Id.*

92. *Id.*

93. *Id.* at 499-500.

94. *Id.* at 500.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

received counseling, but had stopped because she felt that no one could help her.[99]

A jury found Booth guilty of two counts of first degree murder, two counts of robbery, and conspiracy to commit robbery and sentenced him to death.[100] On automatic appeal, the Maryland Court of Appeals affirmed the conviction and the sentence.[101] Booth alleged that the admission of the victim impact statement violated the eighth amendment.[102] The United States Supreme Court granted certiorari to decide whether the eighth amendment prohibits the admission of victim impact evidence during the sentencing phase of a capital trial.[103]

The Court in *Booth* stated that a jury must take into consideration the defendant's record, characteristics, and the circumstances of the crime, in order to arrive at an individual determination of whether the defendant should receive the death sentence.[104] The Court reiterated the *Woodson* rule that the jury is required to focus on the defendant as a uniquely individual human being.[105] In addition, the Court stated that only evidence related to blameworthiness was relevant to the capital sentencing decision.[106]

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99. *Id.* The Division of Parole and Probation official who conducted the interviews concluded the victim impact statement by stating:

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

Id.

100. *Id.* at 498.

101. *See* Booth v. State, 306 Md. 172, 507 A.2d 1098 (1986), *rev'd*, 482 U.S. 496 (1987).

102. *Booth*, 482 U.S. at 500-01.

103. *Id.* at 501-02.

104. *Id.* at 502.

105. *Id.* at 504. The *Woodson* Court held that when a defendant is being sentenced with the possibility of receiving the death penalty, the jury must be presented with relevant facets of his character such that they can view the defendant as a "uniquely individual human being." Woodson v. North Carolina, 428 U.S. at 304.

106. *Booth*, 482 U.S. at 504. The *Booth* Court found that a statute that requires the consideration of factors other than those having a bearing on blameworthiness must be scrutinized to ensure that the evidence has some bearing on the defendant's personal responsibility and moral guilt. *Id.*

The Court in *Booth* determined that the victim impact statements at issue contained two types of information.[107] The Court found that the first category of victim impact evidence, the victim characteristics and emotional impact to the family, was completely unrelated to the blameworthiness of a particular defendant and thus irrelevant.[108] The Court justified this position on the basis that the personal characteristics of the victim and the emotional impact on the family are, in most cases, unintended or unknown by the killer and thus do not factor into a defendant's moral blameworthiness.[109]

The *Booth* Court also recognized that it would be difficult, if not impossible, for the defendant to rebut the victim impact evidence.[110] The Court questioned how a defendant would prove that the victim's family was exaggerating their depression, emotional pain or insomnia.[111] The Court in *Booth* recognized that the defendant might be able to rebut victim impact evidence by introducing evidence about the victim's character.[112] The Court hypothesized that such a rebuttal would include evidence that the victim was unpopular, was of bad moral character, or that the victim was ostracized by his or her family.[113] However, the *Booth* Court argued that in attempting to rebut such evidence, the trial would be transformed into a mini-trial on the victim's personal characteristics.[114] The Court believed that this result was unacceptable because it would distract the jury from its duty of

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107. *Id.*

108. *Id.*

109. *Id.* at 504-05. However, the Court stated that if the victim impact evidence related to the circumstances of the crime it would be relevant to the moral culpability of the defendant. *Id.* at 507 n.10. Further, the Court noted that if a defendant did take into consideration the personal characteristics of the victim, and the impact the crime would have on the family, this would reflect on the defendant's moral blameworthiness and, thus, be relevant. *Id.* at 505. However, the Court noted that even though this evidence may be relevant, victim impact evidence is not admissible because of the impermissible risk that a capital sentencing decision will be made in an arbitrary manner due to the nature of the information contained in the victim impact statement. *Id.* at 505.

110. *Id.* at 507. *See* Gardner v. Florida, 430 U.S. 349, 362 (1977) (holding that due process requires a defendant be given a chance to rebut a pre-sentence report).

111. *Booth*, 482 U.S. at 506.

112. *Id.*

113. *Id.* at 506-07.

114. *Id.* at 507.

determining whether the death penalty was warranted.[115] Therefore, the Court in *Booth* held that victim impact evidence involving the personal characteristics of the victim and emotional impact on the family was not admissible in the sentencing phase of a capital trial.[116] According to the *Booth* Court, the introduction of these types of evidence violated the eighth amendment because it created an unjustified risk of a wholly arbitrary and capricious application of the death sentence.[117]

The *Booth* Court also found that the second category of information, the family members' opinion of the crime and characterization of the defendant, was likewise irrelevant to determination of the blameworthiness of a defendant.[118] The Court stated that the only purpose for the second category of information was to inflame the jury.[119] Thus, the Supreme Court held in *Booth* that the admission of both types of victim impact evidence during the sentencing phase of a capital trial violated the eighth amendment.[120]

Two years after *Booth v. Maryland*, the Supreme Court extended its holding in *Booth* to exclude the use of victim impact evidence in prosecutorial argument in *South Carolina v. Gathers*.[121] In *Gathers*, the defendant was convicted of first degree murder and sentenced to death for the slaying of a mentally

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115. *Id.* Another consideration that weighed heavily in the Court's analysis was the fact that the jury's decision to give the death penalty might turn on irrelevant and inappropriate considerations such as the articulateness of the victim's family or the amount of esteem that a victim enjoyed in the community. *Id.* at 505.

116. *Id.* at 507.

117. *Id.* at 509. However, the Court did state that admission of victim impact evidence would not be irrelevant in all contexts. *Id.* at 507 n.10. The Court stated that this type of information may be admissible when it directly relates to the circumstances of the crime. *Id.* The Court asserted that victim impact evidence may be relevant in a non-capital trial. *Id.* Also, the victim's personal characteristics may be relevant to rebut an argument offered by the defendant during the guilt phase of the trial. *See, e.g.*, FED. R. EVID. 404(a)(2) (providing that the prosecution may show peaceable nature of victim to rebut charge that victim was the aggressor).

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

119. *Id.* The Court referred to the son's statement that his parent's were "butchered like animals" and that he "doesn't think anyone should be able to get away with it" to show that the only effect of admitting these statements was to incite the jury. *Id.*

120. *Id.* at 509.

121. 490 U.S. 805 (1989).

handicapped person.[122] During the sentencing phase of the trial, the prosecutor read a prayer card that was found next to the victim's body.[123] Gathers argued that this information was irrelevant in light of *Booth* and therefore should be inadmissible.[124] The Supreme Court agreed, and held that the testimony was irrelevant to the determination of the sentence and therefore was unconstitutional.[125] Four years after *Booth*, and two years after *Gathers*, the Supreme Court was again faced with the question of whether victim impact evidence and prosecutorial argument utilizing victim impact evidence was admissible in the sentencing phase of a capital trial. Those issues were addressed in *Payne v. Tennessee*.[126]

II. THE CASE

A. The Factual and Procedural History

The victims in *Payne v. Tennessee* were twenty-eight-year-old Charisse Christopher, her two-year-old daughter Lacie, and her three-year-old son Nicholas.[127] The family lived together in an apartment in Millington, Tennessee, across the hall from the defendant's girlfriend.[128] On the morning of the murders, the defendant, Payne, spent his time injecting cocaine and drinking beer.[129] Payne then drove around town with a friend before he returned to the Christophers' apartment complex.[130] Payne entered the Christophers' apartment and made sexual advances toward Charisse.[131] Charisse resisted and Payne became violent.[132] A

122. *Id.* at 807-08.
123. *Id.* at 808.
124. *Id.*
125. *Id.* at 822-23.
126. 111 S. Ct. 2597 (1991).
127. *Id.* at 2601.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

neighbor heard Charisse scream "get out."[133] The neighbor called the police after hearing a second scream.[134]

When police officers arrived at the scene, they encountered Payne leaving the complex appearing extremely nervous and anxious.[135] When a police officer questioned Payne, Payne struck the officer and fled.[136] Inside the apartment the police discovered the bodies of Charisse and her children lying on the kitchen floor.[137] Blood covered the walls and floor throughout the apartment.[138] Charisse was found dead, on her back with her legs fully extended.[139] She had sustained forty-two direct knife wounds and forty-two defensive wounds on her arms and hands.[140] The wounds were caused by forty-one[141] separate thrusts with a butcher knife.[142] The autopsy determined that although none of the eighty-four wounds inflicted by Payne were individually fatal, death probably occurred as a result of bleeding from all the wounds.[143]

Charisse's daughter's body was on the kitchen floor near her mother, with the murder weapon lying at her feet.[144] She had suffered stab wounds to the chest, abdomen, back and head.[145] Payne's baseball cap was snapped around her arm near her elbow and there were three cans of malt liquor bearing Payne's fingerprints on a table near Charisse's daughter's body.[146] Nicholas, Charisse's son, survived the attack, despite several

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133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 2601-02.
137. *Id.* at 2602.
138. *Id.*
139. *Id.*
140. *Id.*
141. A doctor testified that the number of thrusts was only 41 because one went through Charisse's body and thrusts that go through the body are counted as two wounds. State v. Payne, 791 S.W.2d 10 (1990), *aff'd sub nom.* Payne v. Tennessee, 111 S. Ct. 2597 (1991).
142. *Payne*, 111 S. Ct. at 2602.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

wounds inflicted by a butcher knife that completely penetrated his body from front to back.[147] In spite of the assault, Nicholas was awake when he was found by the police.[148]

Payne was later found hiding in the attic of a former girlfriend's house.[149] As Payne descended the stairs, he stated to the police officers that he had not killed a woman.[150] Payne's clothes and body were stained with blood that was later determined to match the blood of the victims.[151] Payne was arrested, and convicted of two counts of first degree murder and one count of assault with intent to commit murder in the first degree.[152]

Payne presented the testimony of his parents, a friend, and Dr. Huston, a clinical psychologist who specialized in criminal evaluations.[153] Payne's parents testified that Payne had no criminal record and had never been arrested.[154] Payne's parents also stated that Payne had no history of drug abuse, had worked with his father as a painter, was good with children, and was a good son.[155]

Payne's friend, Bobbie Thomas, testified that she had met Payne at church and that Payne had helped when Thomas was being abused by her husband.[156] Thomas stated that Payne was a very caring person, and that Payne had devoted much time and attention to her three children.[157] In addition, Thomas stated that Payne had treated her children in the same loving manner he would have treated his own children.[158] Thomas also asserted that Payne did not drink, nor did he use drugs, and that she believed that it

147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* In a capital trial a defendant is allowed to bring forward any relevant mitigating evidence. *Id.* at 2608-09.
154. *Id.* at 2602-03.
155. *Id.* at 2603.
156. *Id.* at 2602.
157. *Id.*
158. *Id.*

was generally inconsistent with Payne's character to have committed these crimes.[159]

Dr. Huston testified that Payne was mentally handicapped due to his low score on an IQ test.[160] Dr. Huston also testified that Payne was neither psychotic nor schizophrenic.[161] Dr. Houston gave his opinion that Payne was the most polite prisoner he had ever met.[162]

In order to show the harm caused by the defendant Payne, the State presented victim impact evidence from Charisse's mother.[163] When Charisse's mother was asked how her grandson, Nicholas, had been affected by the murders of his mother and sister she responded:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says I'm worried about my Lacie.[164]

In addition to the evidence of the effect of the crime upon Nicholas, the prosecutor, in his closing arguments, commented on the continuing effects of Nicholas' experience.[165] The prosecutor stated that Nicholas was awake with his eyes open and understood the paramedics when they found him, because Nicholas was able to respond to directions.[166] The prosecutor also pointed out that as Nicholas was being carried to the ambulance, he was physically able to apply pressure with his hands to his own abdomen so that his intestines would not protrude from his body.[167] Further, the prosecutor argued that this evidence supported the conclusion that Nicholas knew what had happened to his mother and sister.[168]

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159. *Id.*
160. *Id.*
161. *Id.* at 2608-09.
162. *Id.* at 2602.
163. *Id.* at 2603.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*

Stating that there was nothing that could be done to ease the pain of the families involved, the prosecutor argued:

> There is nothing that can be done for Charisse and Lacie Jo. But there is something you can do for Nicholas. Somewhere down the road Nicholas is going to grow up, hopefully. He is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer.
>
> You saw the video tape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives.
>
> Nicholas's mother will never be there to kiss him good night. No one will know about Lacie Jo. Her life was taken away at two years old.[169]

The prosecutor further commented about the mitigating evidence that Payne had presented to the jury:

> The Petitioner wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother, and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that child will carry forever.[170]

Over *Payne's* objection, these statements were admitted during the sentencing phase.[171] Payne contended that the admission of victim impact evidence violated his eighth amendment rights as

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169. *Id.*
170. *Id.*
171. *Id.*

provided by the *Booth* and *Gathers* decisions.[172] Nevertheless, the jury sentenced Payne to death.[173]

Defendant Payne appealed the imposition of the death sentence to the Supreme Court of Tennessee.[174] Specifically, Payne argued that the admission of the testimony of the Charisse's mother, and allowing the prosecutor's closing arguments, constituted prejudicial violations of his rights under the eighth amendment as interpreted in *Booth v. Maryland.*[175] The Tennessee court rejected Payne's argument, characterizing the admission of the grandmother's testimony as a harmless error because it was technically irrelevant and did not create an unacceptable risk of an arbitrary imposition of the death penalty.[176] The Tennessee court, therefore, held that the testimony was constitutional under both *Furman v. Georgia* and *Booth v. Maryland.*[177] In responding to Payne's argument that *Gathers*, decided after Payne's conviction, barred the prosecutor's statements to the jury, the court stated that the prosecutor's statements were not irrelevant as Payne had argued.[178] In direct contradiction to the holding in *Gathers*, the Tennessee court stated "[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 Defendant [sic]

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172. *Id.* at 2604.

173. *Id.* at 2601.

174. State v. Payne, 791 S.W.2d 10 (1990), *aff'd sub nom.* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

175. *Payne*, 111 S. Ct. at 2604.

176. State v. Payne, 791 S.W.2d at 19. The Supreme Court of Tennessee did not try and mask its disfavor of the rule handed down in *Booth* and extended in *Gathers*. The Court declared that the Supreme Court of the United States has "read...a so-called religious tract, couched in sporting parlance, seeking God's help in playing the game of life as a good sport should" into its condemnation of victim impact evidence. *Id.* at 18.

177. *Id.* at 20. The Supreme Court of Tennessee characterized the testimony of Nicholas' grandmother as a factual statement. *Id.* at 18. The court reasoned this statement was qualitatively different from the victim impact statement in *Booth*. *Id.* at 20. The court stated that the victim impact evidence in *Booth* was much more extensive and inflammatory than Nicholas' grandmother's testimony during Payne's trial. *Id.* The Tennessee court reasoned that, while technically irrelevant, the grandmother's statement did not create an unacceptable risk of a arbitrary imposition of the death penalty. *Id.* Finally, the court indicated that the prosecutor's act of picking up the murder weapon and stabbing a diagram of Nicholas Christopher's body, although improper, was harmless beyond a reasonable doubt. *Id.*

178. *Id.* at 19.

(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."[179] Due to of the important issues involved in *Payne v. Tennessee*,[180] the Supreme Court of the United States granted certiorari to reconsider its holdings in *Booth v. Maryland*[181] and *South Carolina v. Gathers*.[182]

B. The Majority Opinion

1. Admissibility of Victim Impact Evidence

In an opinion written by Chief Justice Rehnquist,[183] the Supreme Court overturned *Booth v. Maryland* and *South Carolina v. Gathers* by holding that the eighth amendment erects no *per se* bar to the admission of victim impact evidence.[184] In reaching its result, the *Payne* majority noted that the *Booth* opinion was based upon two premises.[185] The majority pointed out that the initial premise of *Booth* was that evidence of the victim's characteristics and of the harm done to the victim's family is not probative of the defendant's blameworthiness.[186] Next, the Court in *Booth* had asserted that only evidence related to blameworthiness is relevant to the capital sentencing decision.[187]

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179. *Id.*

180. 111 S. Ct. 2597 (1991).

181. 482 U.S. 496 (1987).

182. 490 U.S. 805 (1989). *See Payne*, 111 S. Ct. at 2601.

183. Justice Rehnquist's majority opinion was joined by Justices White, O'Connor, Scalia, Kennedy and Souter. *Payne*, 111 S. Ct. at 2601. Justice O'Connor filed a concurring opinion in which Justices White and Kennedy joined. *Id.* at 2611-13 (O'Connor, J., concurring). Justice Scalia filed a concurring opinion in which Justices O'Connor and Kennedy joined in part II. *Id.* at 2613-14 (Scalia, J., concurring). Justice Souter filed a concurring opinion in which Justice Kennedy joined. *Id.* at 2614-19 (Souter, J., concurring). Justice Marshall filled a dissenting opinion joined by Justice Blackmun. *Id.* at 2619-25 (Marshall, J., dissenting). Justice Stevens filed a dissenting opinion joined by Justice Blackmun. *Id.* at 2625-31 (Stevens, J., dissenting).

184. *Id.* at 2609. *See infra* notes 394-428 and accompanying text (discussing the doctrine of stare decisis).

185. *Payne*, 111 S. Ct. at 2605.

186. *Id. See infra* notes 39-56 and accompanying text (discussing the relevance of victim impact evidence to a determination of moral culpability).

187. *Payne*, 111 S. Ct. at 2605.

The majority in *Payne* rejected the premise that victim impact evidence is not probative of a defendant's blameworthiness, and stated that the harm done as a result of a crime has always been an important consideration in criminal law, in both the determination of the elements of an offense and sentencing.[188] The majority argued that one fundamental principle of criminal sentencing is that the punishment should be made to fit, the crime and that a true measure of a crime is the harm done to society.[189] Thus, the *Payne* majority recognized that two defendants may be considered guilty of different crimes solely based upon the actual harm caused.[190]

The majority asserted that the amount of harm caused by a defendant is significant in two respects.[191] First, harm is a prerequisite to criminal sanction.[192] Without harm, there is generally no reason to punish.[193] Second, the majority would measure the seriousness of the crime to determine the severity of sentence that will be meted out.[194] The majority further asserted that, as long as relevant evidence does not prejudice a defendant, it is desirable that the jury have as much information as possible without restrictions.[195] Based on these considerations, the majority concluded that the harm caused by a defendant's crime is

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188. *Id.*

189. *Id.* (quoting the 18th century Italian criminologist CESARE BECCARIA, in J. FARRER, CRIMES AND PUNISHMENTS, 199 (London, 1880)). Two thousand years ago Cicero stated, "Noxiae poena par esto" (Let the punishment match the offense). CICERO, DE LEGIBUS, III, 20 (C. W. Keys Trans. 1928). *See* H. PACKER, LIMITS OF THE CRIMINAL SANCTION 43-44 (1968) (discussing the death penalty as a reflection of society's moral outrage).

190. *Payne*, 111 S. Ct. at 2606. For example, the majority cites Justice Scalia's example of a bank robber who points a gun at a guard, with the intent to kill, and pulls the trigger. *Id.* at 2605 (citing *Booth*, 482 U.S. at 519 (Scalia, J., dissenting)). If the bank robber kills the guard he can be put to death. *Id.* at 2605. If the gun somehow misfires he cannot. *Id.* In both cases his moral guilt is identical, but his responsibility in the former is greater. *Id.* The majority additionally pointed out that wherever judges have had discretion to impose a sentence, the consideration of the harm has to be an important factor in the exercise of that discretion. *Id.* at 2602.

191. *Id.* at 2606 (quoting S. WHEELER, K. MANN, & A. SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 56 (1988)).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 2606 (quoting *Gregg*, 428 U.S. 153, 203-04).

relevant.[196] The majority in *Payne* further asserted that victim impact evidence is simply one method of informing the jury about the specific harm caused by the defendant's crime.[197]

The *Payne* majority stated that a misreading of precedent by the *Booth* Court had resulted in an unfair tipping of the scales of justice in a capital trial in favor of the defendant.[198] The majority reiterated that a state is required by the eighth amendment of the United States Constitution to admit all relevant mitigating evidence, in the sentencing phase of a capital trial, that the defendant offers in support of a sentence less than death.[199] Thus, the *Payne* majority, agreeing with *Booth* on this point, required that a defendant in a capital trial be treated as a unique human being.[200] However, the majority in *Payne* asserted that the Court had never held, nor even suggested, in any case before *Booth*, that the defendant was to receive this individual consideration as a human being apart from consideration of the crime committed.[201] The *Payne* majority asserted that the language quoted in *Booth* to the effect that the capital murder defendant be treated as a uniquely individual human being was intended to describe a class of evidence that *must* be admitted.[202] The statement was not intended to describe a class of evidence that was not admissible.[203] The *Payne* majority concluded that the effect of the misreading of precedent in *Booth* is that a defendant can bring forward virtually any mitigating evidence, while the state is barred from either offering a glimpse of the life which a defendant chose to extinguish, or demonstrating the loss to the victim's family and to society which has resulted from the homicide committed by the

196. *Id.* at 2608.

197. *Id.* at 2608.

198. *Id.* at 2607.

199. *Id.* at 2606. *See infra* notes 383-394 and accompanying text (discussing the ramifications of the admission of any mitigating evidence).

200. *Payne*, 111 S. Ct. at 2606.

201. *Id.* at 2607.

202. *Id.* at 2606-07.

203. *Id.* at 2607. The Majority pointed out that any doubt as to this premise is dispelled when considering language from *Gregg* which said that a wide range of evidence may be considered. *Id.*

defendant.[204] As a result, the majority concluded that the inadmissability of victim impact evidence created an inequity, because the absence of victim impact evidence deprived the state of the full moral force of its case which is necessary in a capital case.[205]

The *Payne* majority continued by noting that the various concerns of the Court in *Booth* did not justify the blanket prohibition of victim impact evidence.[206] The Court in *Booth* had concluded that victim impact evidence must be excluded because of the difficulty a defendant would encounter in trying to rebut victim impact evidence, and the possibility of shifting the focus of the jury from the defendant to a trial of the victim's character.[207] The majority in *Payne* argued that in many cases the evidence relating to the victim is already before the jury in the guilt phase.[208] As to any additional evidence, the majority determined that the mere fact that it would not be prudent for the defense to rebut the evidence, does not make the situation different from other cases in which the defendant is faced with the same dilemma.[209]

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204. *Payne*, 111 S. Ct. at 2607. Implicit in this argument is the consideration that the people have a right to a balanced proceeding. As Justice Cardozo stated for the Court in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934): "But justice, though due 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." The Court has repeatedly upheld the peoples' right to due process. *See, e.g.*, United States v. Nixon 418 U.S. 683, 709 (1974) (holding that the very integrity of the judicial system depends upon full access to evidence by either side); Stein v. New York, 346 U.S. 156, 196-97 (1953), *overruled on other grounds in* Jackson v. Denno, 378 U.S. 368 (1968) (reiterating that the People of the State are entitled to due process); Fay v. New York, 332 U.S. 261, 288-89 (1947) (holding that a defendant is entitled to a neutral jury as opposed to a friendly jury, and that society has a right to a fair trial); Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

205. *Payne*, 111 S. Ct. at 2606-07.

206. *Id. See infra* notes 388-420 and accompanying text (discussing the Court's opinion in *Booth*).

207. *Payne*, 111 S. Ct. at 2607 (quoting Booth v. Maryland, 482 U.S. 496, 506-07 (1987)).

208. *Id.* at 2607.

209. *Id.* The majority asserted that the defendant's position is similar to that of the prosecutor's. *Id.* The prosecutor is also faced with the difficulty of a rebuttal when the defendant calls a witness that gives mitigating evidence. *Id.* For example, when a defendant calls his mother to be a witness the prosecution is faced with trying to rebut her testimony about her son. *Id.* The state in *Booth* was faced with this dilemma and decided not to rebut the mitigating evidence admitted. *Booth*, 482 U.S. at 518 (White, J., dissenting). *See* McGautha v. California, 402 U.S. 183, 213 (1971) (stating that the constitution does not shield the defendant from making difficult choices); *Booth*, 482 U.S. at 519 (White, J., dissenting) (stating that the possibility that the jury would be distracted by rebuttal

The *Payne* majority rejected another concern, evident in the *Booth* decision, that the admission of victim impact evidence would permit a jury to hand down a death sentence based upon the social status of the victim.[210] The majority dismissed this concern by asserting that victim impact evidence is not offered to encourage comparative judgments.[211] The majority found that victim impact evidence is designed to show each victim's uniqueness as an individual human being, regardless of what the jury might think the loss to the community resulting from the victim's death might be.[212]

Finally, the *Payne* majority found that victim impact evidence is encompassed within the state's power to create new procedures to meet felt needs.[213] The majority stated that the primary responsibility for defining crimes, and enacting the corresponding punishments, belongs to the states.[214] The majority asserted that the eighth amendment does impose special limitations on this power.[215] However, within the eighth amendment the states are free, in capital cases as well as others, to devise new procedures as the need arises.[216] The majority in *Payne* held that victim impact evidence is simply another way to inform the sentencing authority about the specific harm that the defendant's crime has caused.[217] Thus, the majority stated that the *Booth* decision was incorrect when it determined that victim impact evidence led to the arbitrary imposition of the death penalty.[218] The *Payne* majority asserted

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evidence is purely hypothetical, since in *Booth* the State introduced no such evidence). The rules of evidence generally anticipate that relevant, unprivileged evidence should be admitted to the fact finder; the fact finder is to determine its weight, after cross examination and contrary evidence has been admitted. *Payne*, 111 S. Ct. at 2607 (citing Barefoot v. Estelle, 463 U.S. 880, 898 (1983)).

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

211. *Id.*

212. *Id.* The Court pointed to the facts of *Gathers* as a good example. South Carolina v. Gathers, 490 U.S. 805, 806-07 (1989). The victim in *Gathers* was an out of work, mentally handicapped individual and yet the death penalty was imposed. *Id.* at 806-07.

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

214. *Id.* at 2607.

215. *Id.* at 2608.

216. *Id.*

217. *Id.* The majority noted that forms of victim impact evidence have long been considered by the sentencing authority. *Id.*

218. *Id.*

that there is a mechanism for relief in the due process clause of the fourteenth amendment if victim impact evidence is so prejudicial that it renders the trial fundamentally unfair.[219] Therefore, the majority reasoned that the concern of the Court in *Booth*, that unduly prejudicial evidence would be admitted, was unfounded.[220]

In applying these arguments to the facts of the *Payne* case, the majority reasoned that *Payne* was a prime example of the unfairness created by the *Booth* decision.[221] The defendant Payne had been allowed to introduce mitigating evidence that Payne was affectionate, caring, kind, good to children and a good man who was not an abuser of drugs or alcohol.[222] Additional evidence was given that Payne was an extremely polite prisoner and that he suffered from a low IQ.[223]

In contrast, the majority pointed out that the only evidence of the impact of Payne's crime admitted was the statement of Nicholas' grandmother that Nicholas missed his baby sister and his mother.[224] The majority found that there was nothing unfair about admitting evidence that depicted some of the harm caused by Payne's crimes.[225] The majority agreed with the Supreme Court of Tennessee that it would be unfair on the facts of this case to disallow the victim impact statements.[226]

The *Payne* majority continued by stating that under *Gathers*, the defendant's attorney is allowed the broadest latitude to argue mitigating evidence reflecting the defendant's personality.[227] The majority asserted that since Payne's attorney argued this evidence, it would be unfair to not allow the prosecution to admit aggravating victim impact evidence.[228] The majority then held

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219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 2602-03.
223. *Id.* at 2608-09.
224. *Id.* at 2609.
225. *Id.*
226. *Id.* at 2608-09.
227. *Id.* at 2609.
228. *Id.*

that the arguments for the admission of victim impact evidence outlined above applied with equal force to prosecutorial argument of that evidence, and therefore the prosecutorial argument of victim impact evidence is also constitutional under the eighth amendment.[229]

2. *Rejection of* Stare Decisis

In a later portion of the opinion, the majority rejected Payne's arguments that despite the various shortcomings of *Booth* and *Gathers*, the Court should adhere to the doctrine of *stare decisis*.[230] The majority recognized that *stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.[231] The majority also noted that often it is more important to have the rule of law settled than to have it settled correctly.[232] Nevertheless, the majority stated that it was not bound to uphold decisions that are unworkable or are badly reasoned.[233] The majority noted that *stare decisis* is not a mechanical device that should be applied as a formula to the latest decision.[234] While the majority asserted that consideration of *stare decisis* is most important in cases involving property and contract rights, the majority argued that the opposite is true in cases involving procedural and evidentiary rules.[235]

The majority stated that an important factor for overruling *Booth* and *Gathers* was the fact that those cases were decided by five to four split decisions, over spirited dissents challenging the

229. *Id.*

230. *Id.* at 2609.

231. *Id.* (citing Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986)).

232. *Id.* (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932)).

233. *Id.* "[T]his Court has never felt constrained to follow precedent." *Id.* (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

234. *Id.* at 2609-10.

235. *Id.* at 2610. The Court pointed out that the application of *stare decisis* "[is] at [its] acme in cases involving property and contract rights, where reliance interests are involved." *Id.*

basic underpinnings of those decisions.[236] In addition, the majority argued that *Booth* and *Gathers* have not been applied consistently by the lower courts.[237] In reconsidering *Booth* and *Gathers*, the *Payne* majority found that those cases were wrongly decided and thus overruled.[238]

C. Concurring opinions of Justices O'Connor, Scalia and Souter

Justices O'Connor, Scalia and Souter concurred with the majority in the ultimate holding that the eighth amendment does not pose a *per se* bar to victim impact evidence.[239] Justice O'Connor wrote a concurring opinion to reiterate the limited holding of *Payne*.[240] Justice Scalia emphasized that the eighth amendment *requires* the admission of victim impact evidence.[241] Justice Souter stated that although some of the arguments in *Booth* were persuasive when taken individually, these arguments did not justify the holding that the entire category of victim impact evidence was unconstitutional.[242]

1. Concurring Opinion of Justice O'Connor

Justice O'Connor agreed with the majority that a proper consideration was to look at the deceased victim as a unique human being.[243] Justice O'Connor argued that the *Booth* decision

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236. *Id.* at 2611.

237. *Id. See* South Carolina v. Gathers, 490 U.S. at 813 (O'Connor, J., dissenting) (discussing the confusion in lower courts created by the holding in *Booth*); Mills v. Maryland, 486 U.S. 367, 395-96 (Rehnquist, CJ., dissenting) (discussing the confusion of lower courts in applying *Booth*). *See also* State v. Huertas, 51 Ohio St. 3d 22, 33, 553 N.E.2d 1058, 1070 (1990) (Moyer, C.J., concurring) (declaring that the fact that the majority and two dissenters in *Huertas* interpret the *Booth* and *Gathers* decisions differently illustrates the confusion of the lower courts).

238. *Payne*, 111 S. Ct. at 2611.

239. *Id.* 2611 (O'Connor, J., concurring); *id.* 2613 (Scalia, J., concurring); *id.* 2614 (Souter, J., concurring).

240. *See infra* notes 243-252 and accompanying text (discussing the opinion of Justice O'Connor).

241. *See infra* notes 253-263 and accompanying text (discussing the opinion of Justice Scalia).

242. *See infra* notes 264-279 and accompanying text (discussing the opinion of Justice Souter).

243. *Payne*, 111 S. Ct. at 2611 (O'Connor, J., concurring).

was flawed because victim impact evidence is relevant and it should be treated in the same manner as all other relevant evidence.[244] Justice O'Connor asserted that the eighth amendment does not command a different treatment of victim impact evidence.[245]

Justice O'Connor further concluded that prosecutorial argument of the impact of a crime on a victim is not barred by the eighth amendment.[246] Justice O'Connor pointed out that murder is the ultimate act of depersonalization by taking away the life of a living human being and "transforms a living person with hopes and dreams into a cold corpse thereby taking away all that is special and unique about a person."[247] Justice O'Connor concluded that the fact that a prosecutor is giving some of the individuality and life back to the victim is not barred by the Constitution.[248]

Justice O'Connor stated that the decision in *Payne* did not mean that victim impact evidence *must* be admitted.[249] Indeed, according to Justice O'Connor, the Court held only that it is a constitutionally valid procedure for a state to allow victim impact evidence.[250] Justice O'Connor also noted that the Court in *Payne* did not decide the issue of whether the evidence of the family members' characterizations and opinions about the crime violates the eighth amendment.[251] Justice O'Connor emphasized that the *Payne* decision only dealt with the specific type of victim impact evidence that demonstrated the victim's personal characteristics and the emotional impact of the crime on the family of the victim.[252]

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244. *Id.*
245. *Id.*
246. *Id.* at 2612 (O'Connor, J., concurring).
247. *Id.* (quoting Brief For All Political Committee as *Amicus Curiae* at 3, *Payne*, 111 S. Ct. 2597).
248. *Id.* at 2612 (O'Connor, J., concurring).
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*

2. *Concurring Opinion of Justice Scalia*

Justice Scalia wrote a separate opinion to express his conviction that the eighth amendment not only allows the admission of victim impact evidence, it *requires* such evidence to be admitted.[253] Justice Scalia agreed with the majority that the *Booth* decision created an injustice by allowing the defendant to bring forward any mitigating evidence, while excluding any aggravating victim impact evidence.[254] The *Booth* result, according to Justice Scalia, was not demanded by the eighth amendment.[255] On the contrary, Justice Scalia concluded that the eighth amendment *requires* parity between mitigating and aggravating evidence in the sentencing phase.[256]

The remainder, and largest portion, of Justice Scalia's opinion focused on the *stare decisis* issue arising from the reversal of *Booth*.[257] Justice Scalia stated that it is the *Booth* decision, and not *Payne*, that defies reason.[258] Justice Scalia noted further that *stare decisis* is based on a general principle that the settled practices and expectations of society should not be disregarded by the Supreme Court.[259] Justice Scalia asserted that it was the *Booth* decision that was in violation of the general principal of *stare decisis* and not the *Payne* decision.[260] Justice Scalia asserted that the doctrine of *stare decisis* applies beyond the Supreme Court's prior cases, extending to settled practices and expectations of the public.[261] Justice Scalia asserted that *Booth* violated *stare decisis* because the holding that the actual harm caused in a crime is irrelevant to punishment is against the expectations of

253. *Id.* at 2613 (Scalia, J., concurring).
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 2613-14 (Scalia, J., concurring). *See infra* notes 394-428 and accompanying text (discussing the Court's new test for *stare decisis*).
258. *Payne*, 111 S. Ct. at 2613 (Scalia, J., concurring).
259. *Id.* at 2613-14 (Scalia, J., concurring).
260. *Id.* (Scalia, J., concurring).
261. *Id.* at 2614 (Scalia, J., concurring).

society.[262] Therefore, Justice Scalia concluded that *Booth* and *Gathers* should be overruled.[263]

3. Concurring Opinion of Justice Souter

Justice Souter filed a concurring opinion to emphasize that although victim impact evidence may be inflammatory, it is no different than any other type of evidence.[264] Justice Souter disagreed with the *Booth* holding that victim impact evidence is irrelevant to the determination of whether a defendant deserves the death sentence.[265] In arriving at this conclusion, Justice Souter separated the reasoning of *Booth* into two elements; the prejudicial effect of the victim impact evidence, and the requirement that the jury consider the defendant as a unique human being.[266] As to the former element, Justice Souter argued that the *Booth* Court's reasoning was meritorious but not sufficient to bar the entire category of evidence.[267] As to the latter element, Justice Souter asserted that the *Booth* Court was mistaken.[268]

Justice Souter agreed with the *Booth* Court that victim impact evidence can be so inflammatory that the jury will not base its decision on logic but rather on caprice or emotion.[269] However, Justice Souter argued that the potentially inflammatory nature of victim impact evidence can be found in any form of evidence.[270] Justice Souter noted that the Supreme Court and all other courts are bound to search the record before them with painstaking care for constitutional error.[271] Therefore, Justice Souter concluded *Booth*

262. *Id.* at 2613-14 (Scalia, J. concurring).
263. *Id.* at 2613 (Scalia, J., concurring).
264. *Id.* at 2614 (Souter, J., concurring).
265. *Id.* (Souter, J., concurring).
266. *Id.* (Souter, J., concurring).
267. *Id.* (Souter, J., concurring).
268. *Id.* (Souter, J., concurring).
269. *Id.* (Souter, J., concurring).
270. *Id.* at 2614-15 (Souter, J., concurring).
271. *Id.* at 2615 (Souter, J., concurring).

went too far by making a blanket prohibition of victim impact evidence.[272]

Justice Souter next asserted that the fact that a jury must consider evidence of the defendant as a unique human being does not bar other types of evidence.[273] Justice Souter argued that all murderers, who have the capacity for criminal responsibility, know that when they kill another unique human being there will be people left behind who will have been injured.[274] Justice Souter stated that even if the defendant does not know the exact harm that will be caused by the defendant's act, evidence of the actual impact suffered to the victim should still be admissible.[275]

Justice Souter further supported the overruling of *Booth* by arguing that the evidentiary standard of constitutional relevance set forth in *Booth* was unconstitutional and unworkable.[276] Justice Souter argued that if the *Booth* evidentiary standard were to be taken seriously, there would be a need for a second jury to determine the sentencing in a capital trial because the evidence validly admitted during the trial would be constitutionally inadmissible in the sentencing phase.[277] Justice Souter argued that the rule in *Booth* itself created an arbitrary imposition of the death penalty by limiting the jury from considering relevant facts.[278]

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

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

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

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

276. *Id.* Justice Souter argued that three facts illustrate why the standard is practically flawed. *Id.* First, restricting relevant facts to those the defendant knew applies to all evidence and not simply to victim impact evidence. *Id.* Second, details which the defendant did not know about will be disclosed during the guilt phase of the trial. *Id.* Finally, the jury that determines guilt will usually determine the imposition of capital punishment. *Id.*

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

278. *Id.* (Souter, J., concurring). Justice Souter posited a hypothetical where the defendant learns of the presence of the victim's daughter through her shout prior to the murder. *Id.* Justice Souter compared the above hypothetical to a situation in which the daughter watches the murder but does not yell out. *Id.* (Souter, J., concurring). In the former case, the defendant knew that there was a family member or friend that was witnessing the crime, and thus, under *Booth*, the evidence of the impact of the crime on the daughter would be admissible. *Id.* (Souter, J., concurring). In the latter situation, the defendant would not have known of the daughter's existence and thus her testimony would not be admissible. *Id.* (Souter, J., concurring). Justice Souter argued that resting a decision on such a fortuity is arbitrary. *Id.* (Souter, J., concurring).

Hence, Justice Souter concluded that *Booth* and *Gathers* should be overruled.[279]

D. Dissenting Opinions of Justices Marshall and Stevens

1. Dissenting Opinion of Justice Marshall

In a dissenting opinion joined by Justice Blackmun, Justice Marshall declared that "[p]ower, not reason, is the new currency of this Court's decision making."[280] Although the majority of Justice Marshall's opinion is devoted to the *stare decisis* issue, the Justice did reiterate the arguments set forth in *Booth* and *Gathers*.[281] Justice Marshall noted that at the time of *Booth* the core principle of the Supreme Court's capital sentencing jurisprudence was that the defendant's death sentence must be looked at as an individualized determination of the defendant's personal responsibility and moral guilt.[282] Justice Marshall argued that this determination must be based on factors that limit the jury's discretion, so as to minimize the chance of a death penalty being handed down in an arbitrary or capricious manner.[283] Justice Marshall stated that *Payne*, *Booth* and *Gathers* were factually and legally indistinguishable and that the majority did not assert any new discussion that justified the overruling of these cases.[284]

2. Dissenting Opinion of Justice Blackmun

In a separate dissent joined by Justice Blackmun, Justice Stevens disagreed with the majority's premise that victim impact evidence is relevant to the defendant's guilt or moral

279. *Id.* (Souter, J., concurring).
280. *Id.* at 2619 (Marshall, J., dissenting).
281. *Id.* at 2620 (Marshall, J., dissenting).
282. *Id.* at 2619 (Marshall, J., dissenting).
283. *Id.* (Marshall, J., dissenting).
284. *Id.* at 2620 (Marshall, J., dissenting).

culpability.[285] Justice Stevens argued that even if *Booth* and *Gathers* had not been decided, there is no precedent that would allow such irrelevant evidence to be admitted in the sentencing phase of a capital trial.[286] Justice Stevens reasoned that the admission of victim impact evidence would lead to the arbitrary and capricious imposition of the death penalty in violation of the eighth amendment.[287]

Moreover, Justice Stevens argued that the majority's decision was based on its strong political appeal and not based on constitutional logic.[288] Justice Stevens asserted that allowing the defendant to admit relevant mitigating evidence does not justify the admission of *irrelevant* victim impact evidence.[289] Justice Stevens stated that the victim is not the one on trial, thus any evidence of the victim's character is simply not an aggravating or mitigating circumstance.[290]

Justice Stevens also disagreed with the premise that a criminal prosecution requires an even-handed balance between the state and the defendant.[291] Justice Stevens pointed out that the Constitution grants certain rights to the defendant, while imposing specific limitations on the state to control the state's disproportionate power.[292] Justice Stevens emphasized that the Constitution demands that the state prove guilt beyond a reasonable doubt.[293] Justice Stevens asserted that the majority's inability to understand this constitutional demand led the majority to misunderstand Justice Powell's argument in *Booth* that the admission of victim impact evidence risks shifting the focus of the sentencing hearing away

285. *Id.* at 2625 (Stevens, J., dissenting).
286. *Id.* (Stevens, J., dissenting).
287. *Id.* at 2631 (Stevens, J., dissenting).
288. *Id.* at 2627 (Stevens, J., dissenting).
289. *Id.* at 2629 (Stevens, J., dissenting).
290. *Id.* at 2625 (Stevens, J., dissenting).
291. *Id.* at 2627 (Stevens, J., dissenting).
292. *Id.* (Stevens, J., dissenting).
293. *Id.* (Stevens, J., dissenting). Justice Stevens also pointed to the fact that the rules of evidence are weighted in the defendant's favor. *Id.* (Stevens, J., dissenting). For example, the state cannot admit evidence of the defendant's character to prove a propensity to commit the crime, while the defendant is free to introduce evidence of the defendant's law abiding nature. *Id.* at 2627-28 (Stevens, J., dissenting) (citing FED. R. EVID. 404(a)).

from the defendant's responsibility for the crime, and turning the inquiry into a mini-trial on the victim's character.[294] Justice Stevens declared that *Booth* did not consider this tactical risk a problem, as the majority in *Payne* suggested.[295] Rather, Justice Souter noted that the *Booth* decision rested on the risk that the jury will be so distracted by prejudicial and irrelevant considerations that it will base its decision on whim or caprice.[296]

Justice Stevens concluded that, rather than giving the jury a quick glimpse of the life of the victim that the defendant chose to extinguish, as Chief Justice Rehnquist[297] and Justice O'Connor[298] asserted, *Payne* goes far beyond this by allowing a jury to hold a defendant responsible for an array of harm that the defendant could not have foreseen and for which the defendant is not blameworthy.[299] Due to this unforseen harm Justice Stevens contended, that in some cases, the *Payne* rule will lead to the death penalty being imposed in an arbitrary and capricious manner.[300]

III. LEGAL RAMIFICATIONS

Payne v. Tennessee[301] overruled *Booth v. Maryland*[302] and *South Carolina v. Gathers*[303] by holding that the admission of victim impact evidence in the sentencing phase of a capital case does not violate the eighth amendment.[304] The Supreme Court's

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294. *Id.* at 2629-30 (Stevens, J., dissenting).

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

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

297. *Id.* (Stevens, J., dissenting) (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

298. *See id.* at 2611 (O'Connor, J., concurring) (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

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

300. *Id.* at 2630-31 (Stevens, J., dissenting).

301. 111 S. Ct. 2597 (1991).

302. 482 U.S. 496 (1987). *See supra* notes 85-117 and accompanying text (discussing the Court's opinion in *Booth*).

303. 490 U.S. 805 (1989). *See supra* notes 118-122 and accompanying text (discussing the Court's opinion in *Gathers*).

304. *Payne*, 111 S. Ct. at 2609. *See supra* notes 124-300 and accompanying text (discussing the Court's opinion in *Payne*). It is important to note that the decision in *Payne* is limited by the fact that the Court was not faced with a third category of victim impact evidence, declared

decision in *Payne* has several ramifications at both the federal and state level. In California, the impact of the *Payne* decision has already been felt in the recent case of *People v. Edwards*[305] which settled the issue of the admissibility of victim impact evidence in the sentencing phase of a capital trial.[306] Further, the *Payne* decision impacts the underlying theory of punishment the Supreme Court uses in determining what evidence is relevant in the sentencing phase of a capital trial.[307] Finally, the *Payne* decision may be charting a new course for the concept of stare decisis.[308]

A. *Ramifications of* Payne *on Capital Sentencing in California*

The impact of *Payne v. Tennessee* on California law is circumscribed by the Supreme Court's holding that the eighth amendment neither prohibits nor requires the admission of victim impact evidence by state courts.[309] The Court in *Payne* held only that the admission of victim impact evidence is constitutional under the eighth amendment.[310] Hence, a state is free to determine whether or not victim impact evidence or prosecutorial argument of that evidence, will be allowed in the sentencing phase of a capital trial.[311]

Prior to the United States Supreme Court's decision in *Payne*, California's death penalty jurisprudence did not allow the admission of victim impact evidence for two reasons.[312] First, California courts were constrained by the *Booth* rule that the

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unconstitutional in *Booth*, concerning a victim's family member's statements characterizing the crime, the defendant, and the appropriate sentence. *Id.* at 2614 n.1 (Souter, J., concurring).

305. 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991).

306. *See infra* notes 309-338 and accompanying text (discussing the impact of *Payne* on death sentencing in California).

307. *See infra* notes 21-123 and accompanying text (discussing the Court's capital sentencing philosophy).

308. *See infra* notes 394-427 and accompanying text (discussing the ramifications of the *Payne* decision on the concept of *stare decisis*).

309. *Payne*, 111 S. Ct. at 2609.

310. *See supra* notes 124-299 and accompanying text (discussing the Court's opinion in *Payne*).

311. *Payne*, 111 S. Ct. at 2609.

312. People v. Gordon, 50 Cal. 3d 1223, 1266-67, 792 P.2d 251, 277-78, 270 Cal. Rptr. 451, 476-78 (1990).

admission of victim impact evidence was unconstitutional under the eighth amendment.[313] Second, the Supreme Court of California had held in *People v. Boyd*[314] that under California Penal Code section 190.3,[315] only evidence that is within the statutory definition of mitigating[316] or aggravating[317] factors may be admitted in the sentencing phase of a capital trial.[318]

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313. *See id.* (holding that the admission of victim impact evidence is unconstitutional under *Booth* and *Gathers*). *See supra* notes 85-117 and accompanying text (discussing the Court's opinion in *Booth*).

314. 38 Cal. 3d 762, 700 P.2d 782, 215 Cal. Rptr. 1 (1985).

315. Under Penal Code section 190.3 the following factors shall be taken into account by the jury when determining the sentence in a capital case:

(a) The circumstances of the crime of which the defendant was convicted and any special circumstances under Penal Code section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CAL. PENAL CODE § 190.3(a)-(k) (West 1988).

316. Mitigating circumstances tend to reduce the degree of the defendant's "moral culpability." *See* BLACK'S LAW DICTIONARY 1002 (6th ed. 1990) (definition of mitigating circumstances).

317. Aggravating circumstances are those factors which tend to increase or amplify the crime's gravity or injurious consequences. *See* BLACKS LAW DICTIONARY 65 (6th ed. 1990) (definition of aggravating factor). Neither mitigating or aggravating factors are an element of the crime itself. *Id.* at 60, 903. *See* CAL. PENAL CODE § 190.3 (West 1988) (defining mitigating and aggravating factors that are admissible in a capital trial).

318. *Boyd*, 38 Cal. 3d at 773, 700 P.2d at 790, 215 Cal. Rptr. at 9. *See* CAL. PENAL CODE § 190.3 (West 1988) (describing procedure for determination as to penalty of death or life imprisonment, including the weighing of mitigating and aggravating circumstances). This analysis is not applicable in non-capital cases. *Id.* In non-capital cases, California Penal Code section 190.3 does not apply, and Penal Code section 1191.2 allows victims or their representatives to make a personal appearance at the sentencing phase of a trial and give a statement regarding the victim's

However, after the Supreme Court's decision in *Payne*, the first constraint was removed when *Booth* was overruled.[319] Consequently, in *People v. Edwards*,[320] the California Supreme Court was faced with the issue of whether to admit victim impact evidence in a capital case.[321] In *Edwards*, the defendant shot two twelve-year-old girls just outside a campsite.[322] One of the girls died, and the other was injured.[323] The defendant, Edwards, was sentenced to death for the crimes.[324] At the sentencing phase of Edward's trial, three photographs of the victims were admitted over the defense's objection.[325] One photograph showed both girls together at the campground the night before the shooting.[326] The other two photographs depicted the surviving victim some time after the shooting.[327]

The defendant contended that the admission of the photographs and prosecutorial argument on the impact of the crime on the victims' families was irrelevant and inflammatory.[328] Edwards asserted that regardless of the Supreme Court's decision in *Payne*, the evidence was inadmissable in California because the photographs and victim impact evidence did not come within any of the statutorily-required aggravating or mitigating factors listed

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views concerning the crime, the person responsible, and the need for restitution. CAL. PENAL CODE § 1191.1 (West Supp. 1992) (allowing the admission of victim evidence in the sentencing phase of a criminal trial); *id.* § 190.3 (West 1988) (limiting admissible evidence in a capital trial to specified aggravating and mitigating factors). Further, though the issue was not resolved in *Booth*, in a footnote the Court in *Booth* intimates that in non-capital cases the considerations are different because of the fact that death is a "punishment different from all other sanctions." *Booth*, 482 U.S. at 509 n.12. However, the *Booth* Court expressly reserved the issue of the admissibility of victim impact evidence in non-capital cases. *Id.*

319. *See supra* notes 124-300 and accompanying text (discussing the Court's opinion in *Payne*).

320. 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991). *Edwards* was decided on November 25, 1991. *Id.*

321. *Id.* at 832-33, 819 P.2d at 465, 1 Cal. Rptr. 2d at 725.

322. *Id.* at 804, 819 P.2d at 446, 1 Cal. Rptr. 2d at 706.

323. *Id.* at 805, 819 P.2d at 447, 1 Cal. Rptr. 2d at 707.

324. *Id.* at 804, 819 P.2d at 445, 1 Cal. Rptr. 2d at 705.

325. *Id.* at 832, 819 P.2d at 464, 1 Cal. Rptr. 2d at 724.

326. *Id.*

327. *Id.*

328. *Id.* at 832, 819 P.2d at 465, 1 Cal. Rptr. 2d at 725.

under California Penal Code section 190.3.[329] The prosecution asserted that victim impact evidence was admissible under subdivision (a) of section 190.3 which allows evidence that is a "circumstance of the crime."[330]

The Court in *Edwards* declined to accept the defendant's theory, and asserted that the word circumstances in section 190.3(a) not only includes the immediate and temporal harm caused by the defendant, but also encompasses that which "materially, morally, or logically" surrounds the crime.[331] The *Edwards* Court concluded that the specific harm caused by a defendant does surround the crime materially, morally, or logically and hence is a "circumstance" of the crime under subdivision (a) of California Penal Code section 190.3.[332] Moreover, the Court asserted that the assumption of *Gordon*, that evidence of victim impact is not an aggravating factor under 190.3, is suspect in light of later cases[333]

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329. *Id.* Edwards relied primarily on the case of *People v. Gordon*, 50 Cal. 3d 1223, 792 P.2d 251, 270 Cal. Rptr. 451 (1990), in which the California Supreme Court held that the effect of the crime on the victim's family or sympathy for the victim is, in most cases, not relevant to any material circumstance under Penal Code 190.3(a). *Gordon*, 50 Cal. 3d at 1266-67, 792 P.2d at 294, 270 Cal. Rptr. at 493. The court in *Gordon* stated that in light of *Boyd*, it was obvious that the effect of the crime on the victim's family is inadmissible because the evidence did not fall under a mitigating or aggravating factor under section 190.3. *Id.* at 1266-67, 792 P.2d at 294, 270 Cal. Rptr. at 493. Under the reasoning in *Gordon*, it appeared that victim impact evidence in a California capital case would not be allowed even though *Booth* was overruled, because the barrier of Penal Code section 190.3 still remained. *See supra* note 15 (text of Penal Code section 190.3).

330. *Edwards*, 54 Cal. 3d at 832, 819 P.2d at 465, 1 Cal. Rptr. 2d at 725.

331. *Id.* at 832, 819 P.2d at 465, 1 Cal. Rptr. 2d at 725.

332. *Id.* at 833, 819 P.2d at 465, 1 Cal. Rptr. 2d at 725.

333. The court in *Edwards* buttressed its holding by the fact that several California cases after *Gordon* had held that argument and evidence based on the suffering the defendant had inflicted on the victim was properly admitted as a circumstance of the crime under subdivision (a) of section 190.3. *Id.* In *People v. Benson*, 52 Cal. 3d 754, 802 P.2d 330, 276 Cal. Rptr. 827 (1990), the court upheld argument regarding the impact that *other* criminal conduct of the defendant had upon the victims and expressly reserved the question as to whether *Booth* or *Gathers* would prohibit such evidence. *Benson*, 52 Cal. 3d at 795-97, 802 P.2d at 353-54, 276 Cal. Rptr. at 852-54. *See* People v. Douglas, 50 Cal. 3d 468, 536, 788 P.2d 640, 680, 268 Cal. Rptr. 126, 166 (1990) (holding that the comment "What huge offense that is, and then on top of that, what does it do to the family? This is a tragedy, not just for the person you killed, but the family and society. . . ." as admissible); People v. Hasket, 30 Cal. 3d 841, 863-64, 180 640 P.2d 776, 790, 180 Cal. Rptr. 640, 654 (1982) (a pre-*Booth* case holding that the prosecutor's comments suggesting that the jury "put themselves in the shoes of Mrs. Rose [the attempted murder victim and the mother of the two murder victims] and imagine suffering the acts inflicted on her" were admissible under 190.3 as a circumstance of the crime).

because the *Gordon* Court's holding was primarily based upon *Booth* and *Gathers*.[334]

After *Edwards*, there is no doubt that victim impact evidence is admissible in the sentencing phase of a capital trial in California, and that victim impact evidence is a "circumstance" under California Penal Code section 190.3(a).[335] The California Supreme Court in *Edwards* affirmed the reasoning used by the United States Supreme Court in *Payne*, that victim impact evidence is relevant to the determination of whether a particular defendant should receive the death penalty.[336] As discussed below, the Supreme Court's decision in *Payne*, permitting the use of victim impact evidence in the sentencing phase of a capital trial, has a profound effect on the criminal law.[337] Both *Payne* and *Edwards* signify a change in the fundamental theory of punishment that the courts are employing in capital cases.[338]

B. Theories of Punishment

It is undisputed that victim impact is a harm caused by the defendant's crime. The disputed question is whether that harm is relevant to the jury's decision of whether to impose the death penalty. The relevance of a particular type of evidence is determined, in part, by the reason for which society seeks to punish.[339] Therefore, the justification for punishing the defendant is, at least partly, determinative of whether victim impact evidence is relevant in the sentencing phase of a capital trial.

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334. *Edwards*, 54 Cal. 3d at 834-35, 819 P.2d at 466-67, 1 Cal. Rptr. 2d at 726-27.

335. *See id.* at 835, 819 P.2d at 467, 1 Cal. Rptr. 2d at 727 (holding that victim impact evidence is admissible in the penalty phase of a capital trial).

336. *See infra* notes 124-299 and accompanying text (discussing the Court's opinion in *Payne*).

337. *See infra* notes 301-338 and accompanying text (discussing the ramifications of the *Payne*).

338. *See infra* notes 339-356 and accompanying text (discussing the two basic models of punishment used in capital sentencing).

339. *See generally* Comment, *The Significance of Victim Harm:* Booth v. Maryland *and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1303-06 (1988) [hereinafter Comment, *The Significance of Victim Harm*] (discussing the Supreme Court's sentencing philosophy and theories of punishment).

The justification for punishment, in terms of both the reason for and the extent of the punishment, falls into two general models: retribution[340] or utilitarianism.[341] It is beyond the scope of this Note to fully discuss the theories and conflicts underlying either model. However, a basic explanation of how the theories of retribution and utilitarianism are generally used will aid in developing a deeper understanding of the Supreme Court's decision in *Payne*.

The basic premise of the retribution theory is that the actor should be punished in proportion to what the actor deserves.[342] The punishment must be scaled to moral responsibility, which in turn can only be defined by the actor's ability to foresee the harm the actor's conduct will cause.[343] Since the theory of retribution focuses in part on the *choice* the actor has made, if an actor cannot foresee the harm the act will cause, the act is free from culpability

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340. The term retribution has been used inconsistently by commentators. Many focus on the concept of just desserts or moral culpability. *See* ANDREW VON HIRSH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS chs. 8, 9 (1976) (discussing the theory of retribution as the concept that one should be punished by what one deserves, which is commensurate with blameworthiness, which in turn is based on the degree of culpability of the actor and the type of crime committed). *See also* Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFAIRS 217 (1973) (discussing the theory of retribution); *infra* notes 342-349 (discussing the theory of retribution). Other commentators have used the term retribution to be synonymous with retaliation or vengeance. *See* HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATION 15-22 (1970) (asserting nine different meanings that can be ascribed to the phrase "the criminal deserves punishment").

341. *See* Comment, *The Significance of Victim Harm*, *supra note* 339, at 1306-12 (defining utilitarianism as the concept that society should act only if society gains from the act).

342. *See* Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 608-11 (1978) [hereinafter Bedau] (discussing the moral basis of the retributive model); Comment, *The Significance of Victim Harm*, *supra note* 339, at 1307 (discussing a theory of the moral basis for retribution). According to Immanuel Kant, punishment must be based upon a moral principle which is focused on the individual, and may never be imposed to benefit society at the expense of one of its citizens. *Id.* In Immanuel Kant's words: "Judicial Punishment can never be administered merely as a means for promoting another Good either with regard to the criminal himself or to Civil Society. . . . [F]or one man ought never to be dealt with merely as a means subservient to the purpose of another. . . " KANT, THE PHILOSOPHY OF LAW 195 (M. Kelley trans. 1887). A primitive form of retribution is vengeance without respect to culpability. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. 1497, 1151-14 (1974) [hereinafter Schulhofer] (discussing retaliation and vengeance). For the purposes of this Note, vengeance will be considered a utilitarian theory and will not be considered a form of retribution due to its lack of emphasis on moral blameworthiness.

343. *See* Schulhofer, *supra* note 342, at 1516 (discussing an actor's culpability, based upon the actor's ability to foresee the risk of the actor's actions, as a factor in the calculus of defining moral blameworthiness).

and should not be punished.[344] Likewise, if the actor can only foresee one kind of harm, the actor cannot be morally culpable for an unforeseeable harm that derives from the actor's decision to engage in the morally culpable choice.[345] Thus, retribution looks to the actor's state of mind prior to when the act in question was committed.[346] Under the retributive model, the actual harm caused by the defendant is irrelevant in the determination of the deserved punishment.[347] Retribution, therefore, takes two forms, a moral obligation to punish culpable conduct and a limitation on punishment; the moral obligation *not* to punish non-culpable conduct.[348] Under the retributive model, only foreseeable victim impact evidence is relevant to the sentencing phase of the capital trial, while the *actual* victim impact, foreseeable or unforeseeable, is irrelevant.[349]

In contrast to the retributive theory, the basic premise of utilitarianism is that an actor should be punished only if the punishment furthers an interest of society.[350] Examples of mechanisms used to achieve utilitarian goals are deterrence, rehabilitation, vengeance[351] and incapacitation.[352] The focus of

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344. For example, imagine a person who is walking on a sidewalk and steps on a pressure bomb perfectly hidden under the street. When the explosion of the bomb kills three people, the person is not punished because the person is not culpable. Likewise, if the person was jaywalking, which would be culpable conduct, when the person stepped on the bomb, the person's culpability would not rise to the level of murder under the retribution model because the moral wrongness of the decision to jaywalk was not based on the chance of killing someone by the blast from a bomb.

345. *See* Payne v. Tennessee, 111 S. Ct. 2597, 2628 (1991) (Stevens, J., dissenting) (asserting that aspects of victim impact evidence unforeseeable to the defendant at the time of the defendant's crime are irrelevant to a determination of the defendant's moral guilt).

346. Comment, *The Significance of Victim Harm*, *supra* note 339, at 1310; Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 5 (1955).

347. *See* Schulhofer, *supra* note 342, at 1508-17 (discussing why harm actually caused is an inadequate basis for retributive punishment).

348. *See* Comment, *The Significance of Victim Harm*, *supra* note 339, at 1307 (discussing Immanuel Kant's formulation of retribution as a limitation on punishing one man for the benefit of others).

349. *Id.* at 1310.

350. Bentham, *The Utilitarian Theory of Punishment*, in INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 162 (1823).

351. Some commentators argue that revenge is a primitive form of retribution without consideration of moral blameworthiness. For purposes of this Note, revenge will not be considered under the modern retributive model, because revenge does not focus on moral blameworthiness.

352. Comment, *The Significance of Victim Harm*, *supra* note 339, at 1310.

utilitarianism is on the benefit gained by the punishment rather than on punishing morally blameworthy conduct.[353] Admission of victim impact evidence is relevant to the determination of punishment under a utilitarian model in two respects. First, admission of victim impact evidence may increase the defendant's sentence which permits society as a whole, as well as the victim, to express moral outrage.[354] Second, the admission of victim impact evidence acts as a deterrent by punishing the defendant for harm that the defendant did not intend.[355] The Supreme Court's decision in *Payne*, that victim impact evidence is admissible in the sentencing phase of a capital trial, illustrates that the Court's sentencing philosophy has changed from a pure retributive model to include some aspects of utilitarianism.[356]

1. Recognizing Unintended Emotional Harm - A New Concept of the Criminal Law

The Supreme Court has held that the death penalty is different from all other forms of punishment.[357] As a result, the Court has held that the death sentence must be proportional to what the defendant deserves.[358] Hence, the Supreme Court's capital

353. *See* Bentham, *The Utilitarian Theory of Punishment*, in INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 162 (1823) (stating that the purpose of law is to promote happiness); Comment, *The Significance of Victim Harm*, *supra* note 339, at 1308 (discussing the utilitarian model of punishment).

354. Comment, *The Significance of Victim Harm*, *supra* note 339, at 1304.

355. *Id.*

356. Retribution and utilitarianism are not mutually exclusive. It is possible to consider both the moral responsibility for an act, while at the same time considering the gain to society in punishing the act.

357. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

358. *See* South Carolina v. Gathers, 490 U.S. 805, 810 (1989) (stating that in death penalty cases proportionality requires a nexus between the punishment imposed and the defendant's moral guilt). *See also* Harmelin v. Michigan, 111 S. Ct. 2680, 2702 (1991) (holding that a life sentence for possession of cocaine was not cruel and unusual); Coker v. Georgia 433 U.S. 584, 592 (1977) (holding unconstitutional a death sentence for the rape of an adult woman on the grounds that the punishment was disproportional to the crime). The Court in *Harmelin* reasserted that the death penalty is different than all other punishments and the requirement of proportionality is limited to death penalty cases. *Harmelin*, 111 S. Ct. at 2611. *See* Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 606-08 (discussing the requirement that punishment be in proportion to what the defendant deserves).

sentencing decisions have focused primarily on the defendant's moral culpability, and therefore, on the retributive theory of punishment.[359]

The United States Supreme Court's holding in *Booth v. Maryland* was based on the reasoning that only evidence pertaining to the defendant's culpability is relevant to the determination of the death penalty.[360] This holding in *Booth* is consistent with most, but not all,[361] of the Supreme Court's capital punishment jurisprudence.[362] The *Booth* Court's reliance on retribution was illustrated by the Court's assertion that victim impact evidence, which is evidence of harm caused by the defendant's crime, generally does not reflect upon a defendant's moral culpability.[363] However, the Court in *Booth* recognized that if the defendant was aware of the impact on the victim through a circumstance of the crime, victim impact evidence would be relevant to the defendant's moral culpability.[364] Though consistent with the retributive theory, an argument against the *Booth* Court's reasoning is that it completely ignored a harm that is not only foreseeable, but is highly likely to occur; the pain and suffering of the family of the victim and the loss to society of one of its citizens.[365] The Court in *Payne v. Tennessee* took a different view of the harm caused by the defendant.[366]

The *Payne* Court based its conclusion, that victim impact evidence is relevant during the sentencing phase, on the premise that harm, both foreseeable and unforeseeable, has always been an important concern of the criminal law in determining the elements

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359. Booth v. Maryland, 482 U.S. 496, 504-05 (1987). *See* South Carolina v. Gathers, 490 U.S. 805, 810 (1989) (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)) (asserting that the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender); Comment, *The Significance of Victim Harm*, *supra* note 339, at 1304 (discussing the *Booth* Court's use of retribution).

360. *Booth*, 482 U.S. at 504-05.

361. *See* Jurek v. Texas, 482 U.S. 262 (1976) (discussing the relevance of non-culpable evidence contrary to *Booth's* mandate of evidence that relates to the defendant's culpability).

362. Comment, *The Significance of Victim Harm*, *supra* note 339, at 1305.

363. *Booth*, 482 U.S. at 505, 504.

364. *Id.* at 505.

365. Payne v. Tennessee, 111 S. Ct. 2597, 2615 (1991) (Souter, J., concurring).

366. *See id.* at 2605 (holding that harm is relevant to the determination of the death sentence).

of a crime and the appropriate punishment.[367] To illustrate this argument, the *Payne* Court used Justice Scalia's example of a bank robber who shoots a guard.[368] If the guard dies, the robber is charged with one crime, and if the guard lives the robber is charged with another crime and sentenced differently.[369] This rationale represents two fundamental changes in the Supreme Court's sentencing philosophy.

First, the bank robber hypothetical does not provide a suitable bench mark for the admission of victim impact evidence. Victim impact evidence illustrates an emotional harm, while the distinction in Justice Scalia's bank robbery hypotheticals turns upon physical harm. In Justice Scalia's example of the bank robber, the defendant is being punished differently based on an allegedly unintended physical harm, the guard's death or mere injury. However, the criminal law, until *Payne*, had not recognized unintended emotional harm in the same way that it traditionally recognized unintended physical harm.[370] Therefore the Supreme Court is recognizing a new form of unintended harm in the calculus of capital sentencing punishment, unintended emotional harm.

The second fundamental change in criminal jurisprudence resulting from the Court's holding in *Payne* is again illustrated by Justice Scalia's bank robber hypothetical. The hypothetical illustrates that in death penalty cases, the Supreme Court has changed from a retributive model of punishment to a utilitarian model. The bank robber in both instances has an identical amount

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367. *Id.* at 2609.

368. *Id.* at 2605.

369. *Id.*

370. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. R. 1497, 1511 (1974). Virtually all crimes that have an element of emotional harm require specific intent to cause the emotional harm. *See, e.g.*, CAL. PENAL CODE § 240 (West 1999) (definition of assault as the unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another) (West 1988). A hypothetical will illustrate how differently the criminal law treated unintended emotional harm from unintended, and possibly unforeseeable, physical harm. If a bank robber shoots a bank customer in the arm, the bank robber is charged with battery. If the victim is a surgeon who suffers a great deal of harm through depression and sleepless nights due to the fact that the surgeon can never perform surgery again, the defendant is charged with the same crime, a battery. The criminal law does not recognize emotional harm as an element of a crime. Irrespective of the amount of unintended emotional harm the victim suffers, the crime(s) that the defendant can be charged with are identical.

of moral blameworthiness and yet is being punished differently.[371] This change is inconsistent with the Supreme Court's earlier holdings that the jury in a capital case must focus on a defendant's moral guilt.[372] The Court, therefore, appears to be deviating from the earlier holding that the death penalty is fundamentally different from all other punishments, and due to this difference requires focusing upon the defendant's moral guilt.[373] This may be an indication that the Supreme Court's underlying theory of punishment in capital cases is changing from retribution to some form of utilitarianism.

2. *The Valuation of Human Life - A Tort Concept*

Another ramification of the *Payne* decision is that a potential result of looking at the harm through victim impact evidence is the valuation of human lives differently. In fact, a dissent in *Payne* expressed concern that one implication of the majority's holding is

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371. *See Payne*, 111 S. Ct. at 2605 (asserting that in Justice Scalia's hypothetical the defendants would have the same level of moral blameworthiness).

372. *See* South Carolina v. Gathers, 490 U.S. 805, 810 (1989) (stating that the defendant's punishment must be tailored to the defendant's personal responsibility and moral guilt); Booth v. Maryland, 482 U.S. 496, 502-03 (1987) (holding that only evidence relating to "...personal responsibility and moral guilt..." is relevant to the capital sentencing decision) (quoting Edmond v. Florida, 458 U.S. 782, 801 (1982)).

373. *See Gathers*, 490 U.S. at 810 (stating that the defendant's punishment must be tailored to the defendant's personal responsibility and moral guilt); *Booth*, 482 U.S. 496, 502-03 (1987) (holding that only evidence relating to "...personal responsibility and moral guilt" is relevant to the capital sentencing decision) (quoting Edmond v. Florida, 458 U.S. 782, 801 (1982)). The change in focus in *Payne* appears to be consistent with the Supreme Court's recent decision in Walton v. Arizona, 110 S. Ct. 3074 (1990) (plurality opinion). In *Walton* the Supreme Court affirmed a death sentence given under an Arizona statute which placed the burden on the defendant to show that mitigating evidence outweighed the aggravating evidence. *Id.* at 3054-56. The effect of this statute was to create a presumption that the defendant receive the death sentence. *Id.* This presumption seems to be inconsistent with the Court's earlier holding in *Woodson* that the sentencer must focus on the defendant as a unique individual. *See* Harris, *Capital Sentencing After* Walton v. Arizona*: a Retreat from the "Death is Different" Doctrine*, 40 AM. U.L. REV. 1389, 1395 (1991) (discussing *Walton v. Arizona* and the Court's apparent change in sentencing philosophy from the construct that death is different). *But see* Harmelin v. Michigan, 111 S. Ct. 2680, 7202 (plurality opinion) (1991) (asserting that death is different from all other forms of punishment).

that different lives would be valued unequally by jurors.[374] For example, a defendant convicted of killing a human being while randomly firing a gun into a crowd might be sentenced differently according to the identity or character of the victim. If the victim is homeless and without a family, there will be little victim impact evidence admitted in the sentencing phase. On the other hand, if the victim is a well respected professional with a family, there will undoubtedly be a large amount of victim impact evidence. Such evidence may make the difference between the defendant receiving life imprisonment or the death penalty.[375] The net result is that the same defendant, with the identical *mens rea* and moral culpability, may be punished differently by the mere chance of where the bullet landed. This hypothetical begs the question: what is the value of a human life, and can the loss of one life truly be measured differently than the loss of another?[376]

Civil law frequently distinguishes between the relative "value" of victims due to the fact that the damages awarded in tort law are based on theories which require that defendants take plaintiffs as they are.[377] For example, in the shooting hypothetical above, the defendant would likely be compelled to pay a large damage award in one circumstance, while in the other, the defendant would pay a relatively small judgment. This disparity is due in part to the tort

374. *See Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting) (asserting that the use of victim impact evidence can only be to identify some victims that are more worthy of protection than others). Justice Stevens also asserted that if the victim is a minority, the impact of the crime could be treated differently by the jury depending upon the race of the victim. *Id.*

375. The mere fact that victim impact evidence is considered by the court as relevant, necessarily suggests that in some instances, the admission of victim impact evidence alone will make a difference. *See* FED. RULE EVID. 401 (definition of relevant evidence as any evidence that has a tendency to establish the presence or absence, truth or falsity, of a fact).

376. One argument is that society is not punishing the two crimes differently based upon the status of the victims. Instead, society is simply punishing the two crimes differently to reflect the total amount of loss to society and to reflect the emotional harm caused to loved ones of the victim. In other words, the focus is on the *actual* harm done to society. If one murder causes greater aggregate pain and suffering than another, then, one murder has harmed society more and should receive greater punishment.

377. *See, e.g.*, Thompson v. Lupone, 135 Conn. 236, 62 A.2d 861, 863 (1948) (holding the defendant liable for all recovery costs though the obesity of the 261-pound plaintiff delayed recovery from normal period of two weeks to eight months).

law policy of compensating the victim and the victim's family for the economic, physical and emotional losses suffered.[378]

However, the traditional focus of criminal law has not been one of compensation, but one of punishment.[379] Therefore, one result of *Payne* is the apparent introduction of a tort theory of compensation into the Supreme Court's death sentence jurisprudence, a strictly criminal area. The "compensation" is derived by the victims through the concept of vengeance or retaliation.[380] In modern times this theory of punishment has been widely rejected.[381] This aspect of the *Payne* decision may be a victory for victims' rights advocates since it recognizes a harm that many have felt has gone unnoticed by the criminal law.[382]

C. *Is* Payne *a Step in the Wrong Direction?*

Another justification proffered by the Court in *Payne* for its decision was that victim impact evidence should be admitted to balance the scales of justice.[383] The *Payne* Court rationalized that since the defendant could bring in virtually any mitigating evidence "without limitation as to relevancy," the prosection should be able to balance this evidence with victim impact.[384] This leads to the

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378. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 82-85 (5th ed. 1984) (discussing the civil compensation system).

379. *See generally* KADISH & SCHULHOFER, CRIMINAL LAW AND ITS PROCESS 113-14 (5th ed. 1989) (discussing the purposes for punishment). *See also* CAL. PENAL CODE § 1170(a) (West Supp. 1992) (declaring that the legislature finds that the purpose of imprisonment for crime is punishment).

380. *See* Schulhofer, *supra* note 342, at 1511 (discussing retaliation as a form of satisfying the desires of victims and the public's want for vengeance). Some commentators argue that retaliation is necessary to prevent private citizens from taking the law into their own hands. *Id.*

381. *Id.* at 1500-01. Most commentators, judges, and legislatures have denounced vengeance as an unacceptable policy. *Id. See* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 130-31 (1968) (discussing the disapproval of retaliation and vengeance); O.W. HOLMES, THE COMMON LAW 37 (M. Howe ed. 1963) (discussing the disapproval of retaliation and vengeance).

382. *See supra* notes 5-8 and accompanying text (discussing the victims' rights movement and the goals of victims' rights activists).

383. *See* Payne v. Tennessee, 111 S. Ct. at 2608-09. *See also supra* notes 124-300 and accompanying text (discussing the underlying rationale for the *Payne* decision).

384. *Payne*, 111 S. Ct. at 2609 (quoting the Supreme Court of Tennessee in State v. Payne, 791 S.W.2d 10, 19 (1990). *See id.* at 2616 (Souter, J., concurring) (stating that sentencing without victim impact evidence would be an unbalanced process); *Payne*, 111 S. Ct. at 2613 (Scalia, J., concurring) (stating that the majority correctly observes the injustice of admitting mitigation evidence while

threshold question: Why is irrelevant evidence allowed to be admitted on behalf of the defendant?

The Supreme Court has held that in death penalty cases the defendant must be looked upon as a unique human being because of the severity and finality of the punishment of death.[385] Under this standard there appears to be no limitation as to what evidence qualifies as shedding light on the uniqueness of the defendant.[386] It has been suggested that this standard simply goes too far.[387] One of the main purposes of the sentencing phase is to determine the appropriate penalty.[388] The only relevant information regarding sentencing is evidence that will somehow aggravate or mitigate the guilty defendant's responsibility for the charged crime.[389]

The facts of *Payne* illustrate how potentially irrelevant information may be admitted on a defendant's behalf. In *Payne* the defendant offered evidence that he was a good son, that he did not use drugs, that he was a polite prisoner and that he was good to

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excluding aggravating evidence). *See also supra* notes 198-205 and accompanying text (discussing the *Payne* majority's balance of justice rationale for the admission of victim impact evidence).

385. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). The Supreme Court has held that a state may not preclude the sentencer from considering any *relevant* mitigating evidence and that the sentencer must look at the defendant as a unique human being. Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982).

386. *See Woodson*, 428 U.S. 280, 303 (1976) (holding that the jury must consider the defendant as a unique human being). Virtually any fact that has to do with the defendant's life can have some relevance to the defendant's uniqueness because a person's uniqueness is the summation of the person's environment and genetic structure. However, it seems that a more appropriate inquiry would consider what evidence is relevant to the decision of whether a particular defendant should receive the death sentence.

387. *See Payne*, 111 S. Ct. at 2613 (Scalia, J., concurring) (stating that the requirement of the admission of relevant mitigating evidence is wrong, and when combined with the remainder of the Supreme Court's capital sentencing jurisprudence, is unworkable).

388. *See, e.g.*, CAL. PENAL CODE § 190.1(c) (West 1988) (requiring that once a defendant is found guilty of first degree murder, further proceedings are to be held to determine the appropriate sentence).

389. *See* Booth v. Maryland, 482 U.S. 496, 504-07 (1987) (asserting that only evidence relevant to the defendant's moral blameworthiness is relevant during the sentencing phase of a capital trial). The *Payne* decision did not overrule the premise in the *Booth* decision that only evidence relevant to moral blameworthiness is relevant. *Payne* merely asserted that victim impact evidence is relevant to the moral blameworthiness of the defendant. *Payne*, 111 S. Ct. at 2609. *See also* CAL. PENAL CODE 190.3 (West Supp. 1991) (limiting evidence in the sentencing phase of a capital trial to mitigating or aggravating).

children.[390] Questions may be raised as to how this information reflects on Payne's responsibility and culpability for the murders of Charisse and Lacie Christopher. In fact, the Court in *Payne* stated that these facts were not related to the circumstances of the crime.[391] The fact that Payne was a polite prisoner does not appear to mitigate his moral responsibility for the murders he committed. Arguably, the only purpose being served by this information is to incite sympathy in the jury and lead them to an arbitrary or capricious determination. The admission of this sort of irrelevant evidence is at odds with the notion that society and the defendant are equally entitled to justice and due process.[392]

After *Payne* it is evident that the standard for admitting mitigating evidence on the behalf of the defendant should be re-evaluated to promote justice to both the accused and the accuser. The scope of mitigating evidence admitted on the defendant's behalf must be limited to some *factual* relevance to the culpability of the defendant for the crime that he has committed.[393] Thus, the justification for introducing arguably irrelevant victim impact information, based upon the fact that the defendant is allowed to admit irrelevant mitigating evidence, may be a step in the wrong direction. The *Payne* decision may be creating an environment where the sentencing of capital defendants can be motivated by

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390. *Payne*, 111 S. Ct. at 2602-03.

391. *See id.* at 2609 (stating that none of the information offered by the defendant was related to his crime).

392. *See, e.g.*, United States v. Nixon 418 U.S. 683, 709 (1974) (holding that the very integrity of the judicial system depended upon full access to evidence by either side): Stein v. New York, 346 U.S. 156, 196-97 (1953) (overruled on other grounds in Jackson v. Denno, 378 U.S. 368, 381 (1968) (reiterating that the People of the State are entitled to due process); Fay v. New York, 332 U.S. 261, 288-89 (1947) (in holding that a defendant is entitled to a neutral jury as opposed to a friendly jury, the Court expressly stated society has a right to a fair trial). As Justice Cardozo stated for the Court: "But justice, though due 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." Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

393. For example, it is a well known fact that a high proportion of sexual offenders have been abused themselves. Therefore, evidence showing that a defendant had been sexually abused would be relevant to show that the defendant was somehow less responsible for a rape and murder the defendant committed. This evidence would arguably show that the defendant had less free will or understanding of the acts than a like defendant who was not sexually abused.

emotion or caprice. In the final analysis, such an environment cannot be relied on to promote justice for the defendant or society.

D. Stare Decisis: *A New Test?*

The doctrine of *stare decisis* is a fundamental principal of the common law.[394] *Stare decisis* requires that where a court has settled a point of law on a particular set of facts, the court will apply that principal to facts of a substantially similar nature.[395] *Stare decisis* is an important concept "because it promotes evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process."[396] The Supreme Court has stated that the concept of *stare decisis* has diminished force in constitutional cases where no legislative change is available to correct the law.[397] However, the Supreme Court has held that even in constitutional cases, the doctrine still has some force, and that a departure from precedent must be supported by some "special justification."[398]

The concept of judicial review of the constitution by the High Court places the Supreme Court beyond any practical means of the people to assert their dissatisfaction with the Court's decisions through the legislative process.[399] Therefore, for the concept of judicial review of the constitution by the Supreme Court to be

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394. *See generally* Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 215-219 (1963) [hereinafter Israel] (discussing the Supreme Court's use of *stare decisis*).

395. BLACK'S LAW DICT. 4th ed., 1577 (1968).

396. *Payne*, 111 S. Ct. at 2609.

397. *Id.* at 2610; Israel, *supra* note 394, at 216-17. *See* Burnet v. Coronado Oil & Gas, 285 U.S. 393, 410 n.5 (1932) (noting that there have been only two occasions that the constitution has been amended to nullify a decision of the Court). *But see* Boudin, *The Problem of Stare Decisis in Our Constitutional Theory*, 8 N.Y.U.L.Q. 589, 601-02 (1931) (stating that *stare decisis* should not be given any consideration in constitutional decisions).

398. Arizona v. Rumsey, 467 U.S. 203, 212 (1984); *Payne* 111 S. Ct. at 2613 (Scalia, J., concurring); *Id* at 2621 (Marshall, J., dissenting).

399. *See* Israel, *supra* note 394, at 216 (discussing the inability of the legislature to change constitutional decisions by the Supreme Court). *See also* Burnet v. Coronado Oil & Gas., 285 U.S. 393, 410 n.5 (1932) (noting that on only two occasions has the constitution been amended to nullify a decision of the Court).

accepted in a democracy that is built upon the foundation that the people have a voice in determining what is the law and policy of the nation, it is especially important that judicial review be consistent and based upon more than the makeup of the Court at any point in time.[400] Otherwise, the Court could not maintain its role as the interpreter of the constitution, a document that symbolizes continuity.[401]

Stare decisis, however, is not an "inexorable command" that must always be followed.[402] Traditionally, four justifications have been used by the Supreme Court to justify overruling prior constitutional decisions.[403] First, changing circumstances over the passage of time have required that the prior case be overruled.[404] Second, the lesson of experience has shown either the erroneous nature of the factual assumption upon which the decision was based, or the administrative difficulties and uneven application the case has brought to the area of law.[405] The third, and the most frequently used justification is that later precedent has shown that the earlier opinion was wrong.[406] Under this rationale, the Court shows that a subsequent line of cases is inconsistent with the

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400. *See* Israel, *supra* note 394, at 214-15 (discussing the importance of promoting an acceptable image of the Court through the doctrine of *stare decisis*).

401. *Id.* at 217. *See* Douglas, *Stare Decisis*, 49 COLUM. L. REV. 734, 736 (1949) (discussing the symbolism of the Constitution). Justice Jackson once asserted that if the continuity of the Supreme Court's decisions is disrupted, it will give the appearance that precedent in the Supreme Court has "a mortality rate almost as high as authors [of the decision]" *Id.* (quoting Jackson, *The Task of Maintaining Our Liberties: The Role of The Judiciary*, 39 A.B.A. J. 961, 962 (1953)); Israel, *supra* note 394, at 214-15 (discussing the Supreme Court's use of *stare decisis*).

402. *Payne*, 111 S. Ct. at 2609.

403. Israel, *supra* note 294, at 219-29 (discussing the Supreme Court's techniques of overruling prior decisions).

404. *Id.* at 219. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (stating that subsequent changes or development of the law are sufficient justifications for overruling a previous decision); Brown v. Board of Education, 347 U.S. 483, 492-95 (1954) (citing the change in the status of public schools since the overruled case, *Plessy v. Ferguson*, 163 U.S. 537 (1896), was decided); The Genesee Chief, 12 How. 443 (1851) (using this technique in one of the Supreme Court's earliest overruling cases).

405. Israel, *supra* note 394, at 221-23. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (Brandeis, J., dissenting) (stating that the lesson of experience is a sufficient justification to overrule a prior decision).

406. Israel, *supra* note 394, at 223. *See Paterson*, 491 U.S. at 173 (stating that a particular precedent has become detrimental to consistency in the law).

original decision to be overruled.[407] Finally, the fourth category consists of several factors that help buttress the three rationales stated above, but on their own do not justify overruling a case.[408] These factors include: (1) The previous decision was decided by a divided Court; (2) the original context did not allow the Court to give the issue the deliberate consideration that it deserved; (3) the unavailability of a lesser ground that would permit the Court to reach the correct result.[409]

The majority in *Payne* reiterated some, but not all, of the traditional purposes and factors underlying the concept of *stare decisis.*[410] However, there appear to be several significant changes in the majority's formulation and analysis of the application of *stare decisis.* Similar to traditional analysis, the majority's discussion of *stare decisis* asserted that the doctrine is most important in cases involving property and contract rights.[411] However, unlike traditional analysis, the Rehnquist majority asserted that the opposite is true in cases involving procedural and evidentiary rules.[412] Further, in applying the doctrine of *stare decisis* to *Payne* the Court gave great weight to the fact that the case was a narrowly decided, five-to-four decision that was settled over spirited dissents.[413] Finally, the Court gives weight to the fact *Booth* was questioned by members of the Court in subsequent cases.[414]

As Justice Marshall asserted, taken at face value, this formulation of *stare decisis* gives broad latitude to the Court to overrule precedent cases in the areas of procedure, evidence, and constitutional law, including cases involving civil liberties and the

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407. Israel, *supra* note 394, at 223. *See* Mapp v. Ohio, 367 U.S. 643, 651-52 (1961) (pointing to the basic inconsistency between the Court's refusal to exclude unconstitutionally seized evidence and the required exclusion of all coerced confessions, irrespective of their reliability).

408. Israel, *supra* note 394, at 227-28. The purpose of these factors is to lessen the precedential value of the prior decision. *Id.*

409. Israel, *supra* note 394, at 226-27.

410. *Payne*, 111 S. Ct. at 2610-11.

411. *Id.* at 2610.

412. *Id.*

413. *Id.* at 2611.

414. *Id.*

bill of rights.[415] A complete discussion of all the cases that this new test could affect is beyond the scope of this Note. However, a brief analysis of two cases is illustrative of the potential impact of Justice Rehnquist's formulation of the doctrine of *stare decisis.*

In the areas of both "procedure" and "evidence" a significant case that fits the *Payne* criterion for overruling a case is *Miranda v. Arizona.*[416] In *Miranda* the Court held, in a five-to-four[417] decision, that for a custodial statement made during interrogation to be valid against a defendant at trial, the defendant must be warned of the defendant's right to remain silent, warned that anything said could be used against the defendant in a court of law, and that the defendant has a right to the presence of an attorney, either retained or appointed.[418] The *Miranda* decision has been questioned by members of the Court and has been limited by

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415. *Id.* at 2623 (Marshall, J., dissenting). Based on this new test, the following five-to-four split cases are open to be overruled: Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2736 (1990) (recognizing a first amendment right not to be denied public employment on the basis of party affiliation); Peel v. Attorney Registration and Disciplinary Comm'n, 110 S. Ct. 2281 (1990) (recognizing a first amendment right to advertise legal specialization); Zinermon v. Burch, 494 U.S. 113 (1990) (due process right to procedural safeguards aimed at assuring voluntariness of decision to commit oneself to mental hospital); James v. Illinois, 493 U.S. 307 (1990) (finding a fourth amendment right to exclusion of illegally obtained evidence introduced for impeachment of defense witness); Rankin v. McPherson, 483 U.S. 378, 392 (1987) (finding a first amendment right of a public employee to express views on matter of public importance); Rock v. Arkansas, 483 U.S. 44, 62 (1987) (finding the existence of a fifth amendment and sixth amendment right of a criminal defendant to provide hypnotically refreshed testimony on his own behalf); Gray v. Mississippi, 481 U.S. 648, 668 (1987) (rejecting applicability of harmless error analysis to the eighth amendment right not to be sentenced to death by "death qualified" jury); Maine v. Moulton, 474 U.S. 159, 180 (1985) (recognizing that the sixth amendment right to counsel is violated by introduction of statements made to a government informant-codefendant in the course of preparing defense strategy); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 531-31 (1985) (rejecting the theory that the tenth amendment immunizes states from federal regulation); Pulliam v. Allen, 466 U.S. 522, 541-42 (1984) (finding a right to obtain injunctive relief from constitutional violations committed by judicial officials). *See Payne* 111 S. Ct. 2623 n.2 (Marshall, J., dissenting) (citing the above cases).

416. 384 U.S. 436 (1966). Arguably, *Miranda* could be overruled under traditional *stare decisis* doctrine. However, the *Payne stare decisis* analysis, as illustrated by the following analysis, gives the Court even more latitude in which to overrule *Miranda.* If the Court chooses to overrule *Miranda* it is highly unlikely that the Court would rely on *Payne* exclusively, but this would be an opportunity to further indoctrinate the new *stare decisis* test from *Payne.*

417. The majority opinion was written by Chief Justice Warren. *Miranda,* 384 U.S. at 439-99. Concurring Justices were Black, Douglas, Brennan and Fortas. *Id.* Justice Clark dissented, but concurred in the result; Justice Harlan dissented and was joined by Justices White and Stewart. *Id.* at 499-526, 526-45. Justice White also wrote a separate dissent. *Id.* at 526.

418. *Id.* at 444.

subsequent cases.[419] In fact, many commentators argue that *Miranda's* constitutional underpinnings have been stripped from beneath the decision.[420] Considering these facts, the *Miranda* decision may well have been a consideration of the Rehnquist Court in defining the Court's new formulation of *stare decisis.*[421] Whether or not the Court decides to overrule *Miranda* remains to be seen, but after *Payne*, it seems that *stare decisis* would no longer be a barrier.

Garcia v. San Antonio Metropolitan Transit Authority[422] is a another example of a case which may be impacted by the *Payne* formulation of *stare decisis.* In *Garcia*, a five-to-four majority overruled the previous five-to-four majority decision in *National League of Cities v. Usery*[423] which itself had overruled the six-to-two decision of *Maryland v. Writz.*[424] *Garcia* abandoned the test of *National League of Cities* which held that a state or municipal government activity was not subject to regulation by Congress under the commerce clause when the activity was a "traditional

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419. *See* Michigan v. Tucker, 417 U.S. 433, 445-46 (1974) (finding that a failure to give *Miranda* warnings did not violate the fifth amendment but only the "prophylactic standards" developed to protect that right, while *Miranda*, 384 U.S. at 467, held that the warnings were constitutionally required); Harris v. New York, 401 U.S. 222, 224-26 (1970) (allowing a statement made without proper warnings to be used to impeach the defendant's testimony despite clear language in *Miranda*, 384 U.S. at 477, to the contrary). *See also* Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 32-39 [hereinafter Bradley] (discussing the erosion of the *Miranda* decision).

420. *See* Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. LAW J. 733, 738 [hereinafter Herman] (stating that, at one point, six Justices of the Court believed that *Miranda* was not necessary); Bradley, *supra* note 419, at 37-38 (stating that the *Tucker* decision held that *Miranda* was not a constitutional holding). *See also* Oregon v. Elstad 470 U.S. 298, 309 (1985) (holding that it was an unwarranted extension of *Miranda* to hold that a "simple failure" to apply *Miranda* warnings does not justify exclusion of subsequent fruit); *Tucker*, 417 U.S. at 449-52 (holding that the fruit of the poisonous tree doctrine does not apply to evidence that was a result of a *Miranda* violation). *Cf.* New York v. Quarles, 467 U.S. 649, 674 (1984) (Marshall, J., dissenting) (suggesting that the Court's power to exclude evidence must be constitutionally based or *Miranda* and its progeny are an unconstitutional exercise of judicial power).

421. Some commentators have argued that the decision in *Tucker*, written by Justice Rehnquist, laid the groundwork for overruling *Miranda*. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 123. *See* Bradley, *supra* note 419, at 37-38 (discussing the erosion of the *Miranda* decision).

422. 469 U.S. 528 (1985).

423. 426 U.S. 833 (1976).

424. 392 U.S. 183 (1968).

governmental function."[425] *Garcia* appears to be a classic illustration of a case that fits within the framework of the *Payne* majority's new test. *National League of Cities* was a closely divided five-to-four constitutional decision[426] that was recently decided and has been questioned by members of the court. In fact, both Justices Rehnquist and O'Connor have called for the overruling of *Garcia* at the first opportunity.[427] The *Payne stare decisis* test provides strong ammunition with which to overrule *Garcia.*

Miranda and *Garcia* are just two illustrations of the potential repercussions of the *Payne* majority's formulation of *stare decisis.* It is impossible to predict what cases will be overturned under this new formulation, but it is certain that if the Supreme Court does apply the *Payne* test literally, the Court's precedents in the areas of constitutional law, procedure and evidence that were decided by a five-to-four majority, are on tenuous ground. However, if the life span of *Booth* and *Gathers* are any indication of what is in store, the future looks very different.[428]

CONCLUSION

The *Payne* holding represents a victory for the victims' rights movement. The admission of victim impact evidence in the sentencing phase of a capital trial represents a new focus in capital sentencing jurisprudence. In admitting victim impact evidence, the *Payne* decision has changed the emphasis of the sentencing phase from the moral blameworthiness of the defendant to society's desire for vengeance and retaliation. It can be argued that *Payne*

425. *Garcia,* 469 U.S. at 530-31, 548. *See National League of Cities,* 426 U.S. at 852 (asserting the traditional government function test).

426. *National League of Cities,* 426 U.S. at 856, 880. Justice Rehnquist wrote the opinion of the Court in which Justices Burger, Stewart, Blackmun, and Powell Joined. Justice Blackmun filed a separate concurring opinion. *Id.* at 856. Justice Brennan filed a dissenting opinion in which Justices White and Marshall joined. *Id.* Justice Stevens filed a separate dissent. *Id. National League of Cities,* 426 U.S. at 553. Dissenting Justices were Powell, Burger, Rehnquist, and O'Connor. *Id.*

427. *Garcia,* 469 U.S. at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

428. *See Payne* at 2619 (Marshall, J., dissenting) (asserting that an "extensive upheaval" of the Supreme Court's precedent may be in store).

recognizes the idea that the defendant has harmed the victims of crime, as well as society, and so should be held accountable for this harm. However, it must be noted that *Payne* has also recognized a new factor in the death sentence calculus, unintended emotional harm. Additionally, in overturning the five-to-four decisions of *Booth v. Maryland* and *South Carolina v. Gathers*, the Supreme Court appears to be charting a new course in the doctrine of *stare decisis*. The *Payne* Court's formulation of *stare decisis* may indicate a significant change in the constitutional, procedural and evidentiary jurisprudence over the years to come.

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