


12-15-1992

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### Recommended Citation

R. P. Peerenboom *Victim Harm, Retributivism and Capital Punishment: A Philosophy Critique of Payne v. Tennessee*, 20 Pepp. L. Rev. 1 (1993)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol20/iss1/2>

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# Victim Harm, Retributivism and Capital Punishment: A Philosophical Critique of *Payne v. Tennessee*

R. P. Peerenboom\*

The politically powerful victim's rights movement has brought the effects of crime on victims and their families into the public eye.<sup>1</sup> One result is that legislators and courts have given increasing weight to victim harm in determining the gravity of the offense and the punishment due the offender.<sup>2</sup>

Harm, results, and consequences have always played some role in our penal system. For instance, murder is more serious, and punished more severely, than robbery. Similarly, if one shoots at someone intending to kill but misses, the result being that no one dies, there is no murder,

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\* Ph.D., Philosophy, University of Hawaii, 1990. I thank Vivian Berger, R. Kent Greenawalt, Gerard Lynch and Ronald Replegle for their many helpful comments, and Dean Berger for providing a draft of her forthcoming article on *Payne*.

1. See Frank Carrington & George Nicholson, *The Victim's Rights Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1984); Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501 (1986).

2. 18 U.S.C. §§ 1512-1515, 3663, 3664 (1988 & Supp. II 1990) (authorizing the inclusion of victim impact statements in presentence reports). Federal Rule of Criminal Procedure section 32(c)(2) provides: "The presentence report shall contain: (D) [v]erified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed." FED. R. CRIM. P. 32(c)(2)(D). At the time of *Booth v. Maryland*, 482 U.S. 496 (1987), when the Court first considered the issue of the admissibility of victim impact evidence, at least 36 states had enacted legislation permitting some form of victim impact statement. *Id.* at 509 n.12; McLeod, *supra* note 1, at 507 & n.22. By August 1987, 47 states allowed such statements. Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 62 (1987). Justice Scalia explicitly acknowledged the "outpouring of popular concern for what has come to be known as 'victims' rights." *Booth*, 482 U.S. at 520 (Scalia, J., dissenting). For an empirical study of the effect of victim participation and a bibliography of several leading articles on victim impact evidence, see Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 451 (1990).

and one faces at most a lesser punishment for attempt.<sup>3</sup>

The emphasis, however, on harm, results, and consequences is antithetical to the doctrine of Kantian retributivism. Under the Kantian doctrine, punishment is to be meted according to the offender's culpability, defined in terms of *mens rea*, mental states, and intentions, regardless of the unintended consequences.<sup>4</sup> Few would wish to punish as a murderer the cautious driver whose car hits an ice patch, spins out of control and kills a pedestrian. The harm to the victim is as great as if she were murdered, but the intent, and hence moral culpability, of the driver differs significantly from that of a cold-blooded murderer.

The inherent tension in these two lines of penal philosophy came to a head in a 1987 case, *Booth v. Maryland*,<sup>5</sup> where the Supreme Court considered for the first time the appropriateness of victim impact evidence in sentencing. The specific issue in *Booth* was whether the Constitution permits consideration of victim impact during the sentencing phase of a capital trial.<sup>6</sup> The State, in accordance with Maryland law, had submitted to the jury a victim impact statement,<sup>7</sup> describing i) the personal characteristics of the victims, ii) the impact of the murder on the victims' family, and iii) the family members' characterization of and opinions about the crime, the defendant and the appropriate sentence.<sup>8</sup> The Court held that use of victim impact statements in

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3. Section 5.05 of the Model Penal Code provides: "An attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree." MODEL PENAL CODE § 5.05 (1985).

4. IMMANUEL KANT, PROLEGOMENA, GENERAL DIVISIONS OF THE METAPHYSICS OF MORALS, IV 38 (Hastie trans.) (stating that a crime is an "intentional transgression—that is, an act accompanied with the consciousness that it is a transgression"). Recently, Jeffrie Murphy has challenged the orthodox view of Kant as the prototypical retributivist. Murphy argues that Kant's remarks about punishment, when taken together, may not provide any coherent theory of punishment at all. See Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987). For a discussion of retributivism and a comparison of Kant's (or the orthodox interpretation of Kant's) retributivism and that of the Booth Court, see *infra* notes 114-15, 129-39 and accompanying text.

5. 482 U.S. 496 (1987), *overruled by* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

6. *Id.* at 497.

7. See MD. ANN. CODE art. 41, § 4-609(c) (1957). Victim impact statements vary from state to state. Some require victim impact evidence for felonies. See, e.g., KAN. STAT. ANN. § 21-4604(2) (1981). Some do not permit victim impact statements in capital cases. See, e.g., COLO. REV. STAT. § 16-11-102 (Supp. 1992), MASS. GEN. LAWS ANN. ch. 279, § 4B (West Supp. 1992). The Court's ruling in *Payne* may lead states that currently do not allow victim impact statements in capital cases to amend their statutes. For a summary of victim impact statements, see Charleton T. Howard III, Note, *Booth v. Maryland—Death Knell for the Victim Impact Statement?*, 47 MD. L. REV. 701, 733-38 app. (1988).

8. The Court reproduced the entire victim impact statement in an appendix to its opinion. *Booth*, 482 U.S. at 509-15.

capital sentence hearings violated the Eighth Amendment on the retributive ground that such information is irrelevant to the culpability of the defendant.<sup>9</sup>

Four short years later, the Supreme Court abruptly reversed direction, overruling *Booth* in *Payne v. Tennessee*.<sup>10</sup> Arguing that punishment is a function of both subjective guilt and objective harm, the Court held that the Eighth Amendment erects no per se bar against victim impact evidence in a capital sentence hearing.<sup>11</sup>

*Payne* raises two issues: Having abandoned mens rea retributivism—the view that one only deserves to be punished for the acts and consequences of acts for which one has mens rea—what penal theory does the Court now embrace? Further, and more importantly, is this theory justifiable?

This article challenges the normative justifiability of the *Payne* ruling. Full appreciation of the critique, however, requires a clear understanding of the Court's decision in *Payne*. Part I describes the legal context and the Court's reasoning from *Booth* to *Payne*. Part II casts the Court's ruling in *Payne* against a larger philosophical backdrop, placing the Court's penal theory along the retributive spectrum, though at a point far removed from the Kantian version. Part III focuses narrowly on the precise thesis to be justified, namely the use in capital sentencing of evidence of the victim's personal characteristics and the impact of the crime on the victim's family.<sup>12</sup> More specifically, the ruling in

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9. *Id.* at 501-02. The Court held in the alternative that the admission of victim impact evidence "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 503. On the retributive basis of the Court's decision, see Richard S. Murphy, Comment, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1312-19 (1988).

10. 111 S. Ct. 2597 (1991).

11. *Id.* at 2612. The Court addressed only two kinds of victim impact information: The personal characteristics of the victim and the impact on the family. It did not pass judgment on the third kind: Family members' opinions about the crime, the defendant, and the appropriate sentence. *Id.* at 2611 n.2.

12. Victim harm is somewhat of a misnomer. The label fits well enough for evidence of the impact of the crime on the family. But evidence of the personal characteristics of the victim relates primarily to the harm to society, not to the individual victim. Obviously, any murder victim suffers harm. Indeed, a victim who does not possess socially valuable characteristics may be harmed more than a victim who does, at least in the former's own opinion. Wealth and social status do not ensure that one values one's own life highly, nor does poverty and a low social status go hand in hand with low self-worth.

*Payne* permits the use of such evidence even where the personal characteristics of the victim and the impact on the family are neither foreseen nor foreseeable.

I contend the better view is that one must have mens rea with respect to the particular harm for which one is to be punished. The standard of mens rea is debatable; I argue for intent. At the very least, however, the offender must be reckless with respect to the victim's characteristics and the family impact. The difference is important. In *Payne*, the defendant was aware of, and hence arguably reckless with respect to, the victim's personal characteristics and family relations. Thus, if the proper mens rea is recklessness, *Payne* may be rightly decided on the substantive issue, though not necessarily on other grounds.<sup>13</sup> If, however, the proper mens rea is intent, *Payne* is wrongly decided on the substantive issue. In any event, whatever the proper level of mens rea, *Payne* is wrongly reasoned. At minimum, the ruling should be limited to prevent execution based on unforeseen and unforeseeable harm.

Part IV examines retributivist justifications for *Payne*. In justifying punishment, it is helpful to ask both whether the State has the right to punish<sup>14</sup> and whether it is right to do so.<sup>15</sup> A retributivist response to the former is that the State has the right to punish because citizens consent to such punishment.<sup>16</sup> The argument of Part IV is that from an *ex ante* position in which one does not know whether one will be victim or murderer, no rational person would consent to *Payne*. The rational choice is to limit punishment to consequences for which one possessed mental culpability. Again, the required level of culpability is debatable. The strong thesis is that no rational person would consent to capital punishment based on *unintended* consequences (including consequences for which one possessed the mens rea of recklessness); the weak thesis is that one would not consent to capital punishment based on *unforeseen or unforeseeable* consequences to the victim.

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13. As noted, the *Booth* Court held, in the alternative, that admission of victim impact evidence created a constitutionally unacceptable risk of arbitrariness. See *supra* note 9. The probative value of such evidence is simply outweighed by its prejudicial character. The dissent in *Payne* insists that the majority failed to adequately address this issue. See *infra* note 97 and accompanying text. Further, *Payne* may be challenged on equal protection grounds. See Jonathan Willmott, Note, *Victim Characteristics and Equal Protection for the Lives of All: An Alternative Analysis of Booth v. Maryland and South Carolina v. Gathers and a Proposed Standard for the Admission of Victim Characteristics in Sentencing*, 56 BROOK. L. REV. 1045 (1990).

14. See Jeffrie Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 *passim* (1973) (discussing utilitarian and Kantian theories on punishment).

15. For a discussion of both questions with respect to capital punishment generally, see HUGO ADAM BEDAU, *DEATH IS DIFFERENT* 47-63 (1987).

16. See Murphy, *supra* note 14, at 223-24.

Part V explores utilitarian justifications for the *Payne* ruling. The taking of life for utilitarian gains, of which capital punishment based on consequences to the victim is but one species, is an anathema to many. The argument here is that even assuming *arguendo* the morality of trading off lives for utilitarian gains, the trade-off in *Payne* is not justified. A careful examination of traditional utilitarian justifications of punishment—rehabilitation, incapacitation, deterrence, denunciation, and vengeance—reveals that (i) no gain is realized by imposing capital punishment for unintended and unforeseen victim harm, (ii) the gain could be realized at lesser cost through an approach other than capital punishment, or (iii) the gain is not justified because it is too insignificant and at odds with other ethical principles.

#### I. JUDICIAL REASONING FROM *BOOTH* TO *PAYNE*

In *Booth*, the defendant and an accomplice robbed an elderly couple in their home and then murdered them to avoid identification (the victims were neighbors of the defendant).<sup>17</sup> The victims were bound, gagged, and stabbed repeatedly in the chest with a kitchen knife.<sup>18</sup> The victims' son discovered the bodies two days later.<sup>19</sup> Capital trials are bifurcated in Maryland.<sup>20</sup> The first phase is to determine guilt or innocence.<sup>21</sup> The second phase is to sentence.<sup>22</sup> In the first phase, the jury found Booth guilty of two counts of first-degree murder, two counts of robbery, and conspiracy to commit robbery.<sup>23</sup> As required by a Maryland statute, the presentence report included a victim impact statement.<sup>24</sup> Over objections of defense counsel, the prosecutor introduced victim impact evidence during the sentencing phase of the trial.<sup>25</sup> The jury then sentenced Booth to death. On automatic appeal, the Maryland Court of Appeals affirmed the conviction and sentence.<sup>26</sup> The Supreme Court, in a five-to-four decision, reversed.<sup>27</sup>

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

18. *Id.* at 498.

19. *Id.*

20. MD. CRIM. LAW CODE ANN. § 413(a)(1992).

21. *Id.*

22. *Id.*

23. *Booth*, 482 U.S. at 498.

24. See *supra* note 7 and accompanying text.

25. *Booth*, 482 U.S. at 500.

26. *Id.* at 501.

27. *Id.* at 501-02. Justice Powell wrote the opinion for the Court, and was joined

The Court reasoned that the Eighth Amendment requires “individualized determination” in capital sentencing, which means that sentencing must be based on “the character of the individual and the circumstances of the crime.”<sup>28</sup> While the Court did not define “circumstances,” it did state that individual determination is a function of the defendant’s “personal responsibility and moral guilt.”<sup>29</sup>

The State argued that harm, specifically the negative impact of the crime on the victim and his family, is part of the circumstances of the crime, and thus should be considered.<sup>30</sup> Although the Court acknowledged that harm might be relevant in civil or non-capital criminal contexts, it disagreed with respect to capital sentencing.<sup>31</sup> The focus during capital sentencing, must be on the defendant as a “uniquely individual human being[.]”<sup>32</sup> Victim impact evidence, by definition, does not focus on the defendant.

In so holding, the *Booth* Court embraced a mens rea retributive theory of culpability,<sup>33</sup> noting that reliance on victim impact statements causes the capital punishment determination to turn on “factors about which the defendant was unaware, and that were irrelevant to the decision to kill.”<sup>34</sup> Such factors “may be wholly unrelated to the blameworthiness of a particular defendant.”<sup>35</sup>

Turning to procedural concerns, the Court held that the mere introduction of victim impact evidence would be unduly prejudicial, greatly increasing the likelihood of arbitrary and capricious decisions<sup>36</sup> in three ways. First, whether one gets the death penalty would depend on mere luck.<sup>37</sup> Some victims will not have families. Of those that do,

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by Justices Brennan, Marshall, Blackmun and Stevens. Justice White wrote a dissenting opinion, joined by Chief Justice Rehnquist, Justice Scalia and Justice O'Connor. Justice Scalia also wrote a dissent, in which Justices White, O'Connor and Rehnquist joined.

28. *Id.* at 502 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

29. *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

30. *Id.* at 503.

31. *Id.* at 509 & n.12. For a discussion of the different contexts in which harm may be a relevant consideration, see *infra* notes 142-53, 192-98 and accompanying text.

32. *Booth*, 482 U.S. at 504 (alteration in original) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

33. See *infra* notes 114-15, 129-39 and accompanying text. See also *Murphy*, *supra* note 9.

34. *Booth*, 482 U.S. at 505.

35. *Id.* at 504.

36. *Id.* at 502-03.

37. *Booth v. State*, 507 A.2d 1098, 1129 (Md. 1986) (Cole, J., concurring and dissenting) (“[I]t is arbitrary to make capital sentencing decisions based on [victim impact statements], ‘which vary greatly from case to case depending upon the ability of a family member to express his grief.’”).

some families will be more articulate on the witness stand than others.<sup>38</sup> Second, there would be no principled way of determining who is put to death and who is allowed to live.<sup>39</sup> Consideration of the victim's worth is not a principled way to mete out capital punishment. According to what moral principle can the legal system place a higher value on an upper-middle-class suburbanite's life than a homeless person's life? In the words of the Court: "[W]e are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions."<sup>40</sup> Third, due to the inflammatory nature of victim impact evidence, decisions would be arbitrary and capricious by being based on emotion rather than reason.<sup>41</sup>

The Court had one final procedural concern. Fourteenth Amendment due process requires that the defendant have a fair opportunity to rebut contrary evidence.<sup>42</sup> Victim impact evidence, however, is virtually impossible to rebut.<sup>43</sup> The defendant stands to gain little by attacking the credibility and character of the victim's grieving wife and children.<sup>44</sup> Further, if the defendant does choose to attack the victim, introducing evidence as to the victim's "dubious moral character," unpopularity or estrangement from his family, such a "mini-trial" of the victim would not only be unappealing, but would impermissibly distract the jury from its constitutionally mandated task: to make an individualized determination of whether to execute the defendant given the character of the individual defendant and the circumstances of the crime.<sup>45</sup>

Foreshadowing the majority's arguments in *Payne*, the four-justice minority vigorously contested the Court's substantive theory, claiming that the degree of punishment one deserves is a function of not only one's internal disposition—one's mental state or subjective blameworthiness—but of the "full extent of harm" caused.<sup>46</sup> As Justice White pointed out, if one drives recklessly and kills, one's punishment will be

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38. *Booth*, 482 U.S. at 505 & n.7.

39. *Id.* at 506.

40. *Id.* at 506 n.8.

41. *Id.* at 508 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (opinion of Stevens, J.)).

42. *Id.* at 506.

43. *Id.*

44. *Id.* at 506-07 (citing *Gardner*, 430 U.S. at 362).

45. *Id.* at 507.

46. *Id.* at 516 (White, J., dissenting).



greater than if one drives recklessly and does not kill. Why? Because the harm is greater.<sup>47</sup>

Indeed, fairness demands consideration of the harm. "The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in . . . by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."<sup>48</sup> By offsetting the unrestricted mitigating evidence that the defendant is allowed to introduce, victim impact evidence helps balance the scales of justice.<sup>49</sup>

On the procedural side, the dissenters observed that the family's ability to articulate grief is no more arbitrary or fortuitous than the ability of any two prosecutors to make arguments or any two witnesses to express themselves.<sup>50</sup> Moreover, luck is often a factor in determining punishment. For instance, the reckless driver who has the misfortune of killing someone suffers a more severe punishment than the one who has the good fortune of being apprehended before injuring anyone.<sup>51</sup> As for the lack of a principled way of distinguishing between the worth of victims, the minority noted that our justice system already makes such a distinction for punishment purposes. One is subject to the death sentence for the assassination of the President or Vice-President, a Congressperson, Cabinet official and various other public officials.<sup>52</sup>

While recognizing the potentially inflammatory nature of victim impact evidence, the minority insisted that such evidence need not be treated differently than other evidence. If certain victim impact evidence is too inflammatory or otherwise objectionable—such as evidence of the victim's race—Fourteenth Amendment due process requires the judge to keep it from the jury.<sup>53</sup>

The minority showed little sympathy for the defendant's difficulties in rebutting victim impact evidence. The dissenters noted that although the defendant has the opportunity to rebut any evidence, he may, for tactical reasons, choose not to do so.<sup>54</sup>

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47. *Id.* (White, J., dissenting).

48. *Id.* at 517 (White, J., dissenting) (citation omitted).

49. *See id.* at 520 (Scalia, J., dissenting). *See also* South Carolina v. Gathers, 490 U.S. 805, 817 (O'Connor, J., dissenting), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

50. *Booth*, 482 U.S. at 517-18 (White, J., dissenting).

51. *Id.* at 519 (Scalia, J., dissenting).

52. *Id.* at 517 n.2 (White, J., dissenting).

53. *Id.* at 517 (White, J., dissenting). *See also*, *Gathers*, 490 U.S. at 821 (O'Connor, J., dissenting) ("It would indeed be improper for a prosecutor to urge that the death penalty be imposed because of the race, religion, or political affiliation of the victim.") (emphasis omitted); *Payne*, 111 S. Ct. at 2608.

54. *Booth*, 482 U.S. at 518 (White, J., dissenting). *See also*, *Payne*, 111 S. Ct. at

Finally, the minority pointed out that "determinations of appropriate sentencing considerations are 'peculiarly questions of legislative policy.'"<sup>55</sup> When *Booth* was decided, victim impact statement statutes had been adopted in at least thirty-six states.<sup>56</sup> By August 1987, at least forty-seven states had such statutes.<sup>57</sup> Deference to the legislature requires their admissibility.

Between *Booth* and *Payne*, the Supreme Court considered, for the second time, the appropriateness of victim impact evidence in the sentencing phase of a capital trial.<sup>58</sup> In *South Carolina v. Gathers*,<sup>59</sup> Gathers was convicted of murder and first degree sexual misconduct.<sup>60</sup> Gathers and three friends encountered the victim, Haynes, sitting on a bench in a park.<sup>61</sup> Haynes had a history of mental problems. He "referred to himself as 'Reverend Minister' . . . [and] would 'tal[k] to people all the time about the Lord.'"<sup>62</sup> When Haynes refused to carry on a conversation with Gathers and his cohorts, Gathers and two others assaulted him, breaking a bottle over his head.<sup>63</sup> Gathers continued to beat the victim with an umbrella, and then sexually assaulted him, forcing the umbrella up his anus. Gathers left the scene, only to return shortly thereafter, whereupon he stabbed the victim to death.<sup>64</sup>

2607 ("The mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of dilemma.")

55. *Booth*, 482 U.S. at 515 (White, J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153; 176 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ)).

56. *See, e.g., Booth*, 482 U.S. at 509 n.12 (stating that at least 36 states permit the use of victim impact statements in some contexts).

57. Young, *supra* note 2, at 65.

58. *See South Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by Payne v. Tennessee*, 111 S. Ct. 2597 (1991). Prior to *Gathers*, the Court decided *Mills v. Maryland*, 486 U.S. 367 (1988), vacating a death sentence on grounds unrelated to the victim evidence issue. *Id.* at 369. Nevertheless, the issue was raised because a victim impact statement was introduced. The victim impact statement was short, just three paragraphs, and contained only evidence of the victim's personal history and characteristics. *Id.* at 396-97 (Rehnquist, C.J., dissenting). Writing for the dissent, Justice Rehnquist stated that he continued to believe *Booth* was wrongly decided. *Id.* at 397 (Rehnquist, C.J., dissenting). The newly appointed Justice Kennedy joined the dissent, signalling the eventual demise of *Booth*.

59. 490 U.S. 805 (1989), *overruled by Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

60. *Id.* at 807-08.

61. *Id.* at 806-07.

62. *Id.* at 807.

63. *Id.*

64. *Id.*

During the closing argument at sentencing, the prosecutor made several remarks about the personal characteristics of the victim. The jury subsequently sentenced Gathers to death.<sup>65</sup> The Supreme Court of South Carolina, however, found that the prosecutor's "extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime," and "conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter."<sup>66</sup> The court reversed Gathers' death sentence and remanded for a new sentence hearing.<sup>67</sup>

The Supreme Court of the United States granted certiorari, and in another five-to-four decision,<sup>68</sup> affirmed. In so doing, the Court confirmed its holding in *Booth* that evidence of a victim's personal characteristics is impermissible in capital sentencing. The Court went one step further, however, by extending *Booth* to prosecutorial statements about the victim's personal qualities.<sup>69</sup>

Just two years later, having invited the State to renew the challenge,<sup>70</sup> the Court once again considered the admissibility of victim impact evidence in capital sentencing in *Payne v. Tennessee*.<sup>71</sup> In *Payne*, as in *Booth* and *Gathers*, the Court confronted a brutal murder. Payne had entered the apartment of a twenty-eight-year-old mother and her children, ages two and three. When the woman rebuffed Payne's

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65. *Id.* at 806.

66. *State v. Gathers*, 369 S.E.2d 140, 144 (S.C. 1988).

67. *Gathers*, 490 U.S. at 810.

68. By the time of *Gathers*, Justice Powell, who had delivered the majority opinion in *Booth*, had been replaced by Justice Kennedy. In *Gathers*, Kennedy joined Justices O'Connor and Scalia and Chief Justice Rehnquist in dissent. But Justice White, who had written a dissent in *Booth*, sided with the majority in *Gathers*, apparently out of respect for precedent. In his concurring opinion, White stated, unless *Booth* "is to be overruled, the judgment below must be affirmed." *Gathers*, 490 U.S. at 812 (White, J., concurring).

Justice O'Connor argued that there was no need to overrule the *Booth* decision because its holding could be limited to statements about harm to the victim's family. *Id.* at 812-13 (O'Connor, J., dissenting). In the instant case, at issue were prosecutorial comments about the victim himself. *Id.* at 814 (O'Connor, J., dissenting). She was willing, however, to overrule *Booth* if necessary. *Id.* at 813-14 (O'Connor, J., dissenting).

Justice Scalia rejected any attempt to distinguish between statements made about the victim's personal characteristics and those relating to the harm to the victim's family or society. *Id.* at 823-24 (Scalia, J., dissenting). He too was willing to overrule *Booth*. *Id.* at 824 (Scalia, J., dissenting).

69. *Id.* at 811-12.

70. *Payne v. Tennessee*, 111 S. Ct. 2597, 2691 (1991) (Marshall, J., dissenting).

71. 111 S. Ct. 2597 (1991). During the interim between *Gathers* and *Payne*, the Court passed up an opportunity to reconsider *Booth* by denying certiorari in *Ohio v. Huertas*, 111 S. Ct. 805 (1991) (per curiam).

sexual advances, Payne killed her and her daughter, repeatedly stabbing them with a butcher knife.<sup>72</sup> The son, also stabbed, survived.<sup>73</sup> Payne was convicted of two counts of first-degree murder and one count of assault with intent to commit murder in the first degree.<sup>74</sup>

During the sentencing phase, the victim's mother testified that the surviving son missed his mother and sister and cried for them.<sup>75</sup> In calling for the death penalty, the prosecutor repeatedly referred to the continuing effects of the crime on the boy and the surviving family.<sup>76</sup> The jury sentenced Payne to death on each of the murder counts and to thirty years in prison for assault.<sup>77</sup> The Supreme Court of Tennessee affirmed the conviction and sentence.<sup>78</sup> The Supreme Court of the United States granted certiorari.<sup>79</sup>

With *Booth's* four minority justices now in the majority,<sup>80</sup> the Court overruled *Booth* and *Gathers*,<sup>81</sup> primarily for the reasons stated in the *Booth* dissents: (i) punishment is a function of subjective guilt and objective harm,<sup>82</sup> (ii) fairness requires the State be permitted to introduce victim impact evidence to offset the defendant's unrestricted mitigating evidence,<sup>83</sup> (iii) difficulty in rebutting victim evidence is simply one of many tactical concerns,<sup>84</sup> and (iv) deference to the legislature requires admission of victim impact evidence.<sup>85</sup> In contesting the claim that evidence of the victim's personal characteristics would lead to imposition of the death penalty based on the relative worth of the victim, the *Payne* majority offered a defense not raised in *Booth*. Victim impact evidence, "as a general matter," is "not offered to encourage compara-

72. *Payne*, 111 S. Ct. at 2601-02.

73. *Id.* at 2602.

74. *Id.* at 2601.

75. *Id.* at 2603.

76. *Id.*

77. *Id.* at 2601.

78. *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990) (holding that the prosecutor's discussion of son's mental suffering did not violate either *Booth* or *Gathers*).

79. *Payne v. Tennessee*, 111 S. Ct. 1031 (1991) (granting writ of certiorari and specifically requesting parties to brief whether *Booth* and *Gathers* should be overruled).

80. Chief Justice Rehnquist delivered the opinion of the Court, and was joined by Justices O'Connor, Scalia, Kennedy, Souter and White, the last having apparently overcome his qualms about overruling *Booth*. *Id.* at 2601.

81. *Id.* at 2611.

82. *Id.* at 2605-06.

83. *Id.* at 2607-09.

84. *Id.* at 2607.

85. *Id.* at 2607-08.

tive judgements” of social worth of victims. Rather, its purpose is to show each victim’s “uniqueness as an individual human being.”<sup>86</sup>

Writing now in dissent, Justices Marshall and Stevens not only reiterated previous positions but raised new arguments and objections. To the *Payne* majority’s contention that harm has long been a relevant factor in fixing punishment, Marshall countered that “[n]othing in *Booth* or *Gathers* . . . conflicts with this unremarkable observation.”<sup>87</sup> At issue is simply one particular kind of harm (that associated with the victim’s personal characteristics)<sup>88</sup> in one particular context (the sentencing phase of a capital trial). As noted in *Booth*, the Court has long recognized that death is a punishment different from all others.<sup>89</sup>

Justice Stevens observed that while harm is relevant in determining punishment, such harm is limited to that which is foreseeable or “clearly identified in advance of the crime by the legislature as a class of harm that should in every case result in more severe punishment.”<sup>90</sup> By not providing guidance as to how much or what kind of harm is sufficient to tip the balance from life in prison to capital punishment, the majority’s decision allows the jury or trial judge to consider victim impact on an ad hoc and post hoc basis. Such unguided discretion increases the likelihood of inconsistent judgments and “conflicts with the principle central to our capital punishment jurisprudence that, ‘where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.’”<sup>91</sup>

Requiring harm to be foreseeable or legislatively defined in advance also provides the basis for Stevens’ response to White’s argument in *Booth* that our legal system does in fact recognize the different worth of individuals in meting out punishment. White had pointed out that statutes authorize the death penalty for the assassination of the President, Vice President and various other public officials.<sup>92</sup> But such statutory provisions, Stevens noted, provide the potential offender with no-

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86. *Id.* at 2607.

87. *Id.* at 2620 n.1 (Marshall, J., dissenting).

88. By interpreting *Booth* and *Gathers* narrowly as rejecting only evidence about the victim’s personal characteristics, Justice Marshall appears to be abandoning the fight against evidence of impact on the victim’s family. *See id.*

89. *Booth*, 482 U.S. at 509 n.12 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (plurality opinion of Stewart, Powell, Stevens, JJ.)). For a discussion of why death is different, see *infra* notes 155-59 and accompanying text.

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

91. *Id.* at 2628 (Stevens, J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell and Stevens, JJ.)).

92. *See supra* note 52 and accompanying text.

tice of the legislatively determined punishment corresponding to his intended crime.<sup>93</sup> Thus, the imposition of the death penalty in such cases is not merely the ad hoc and post hoc judgment of the jury or trial judge.

Stevens also dismissed the majority's contention that evidence of the victim's personal characteristics is designed, not to demonstrate the comparative social worth of the victim, but to show the jury that the defendant is a unique individual.<sup>94</sup> Justice Souter observed in his concurring opinion that "every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person who will be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death."<sup>95</sup> But if every defendant knows this, Stevens replied, then so surely does every juror and trial judge.<sup>96</sup> Introduction of such evidence is superfluous, serving only the illicit purpose of inflaming the jury.

Both Marshall and Stevens criticized the majority for reducing the *Booth* Court's procedural concerns to a mere tactical worry. Marshall and Stevens were not concerned with the defendant's strategic problem of rebutting victim evidence; rather, they believed that victim impact evidence creates an unacceptable risk of arbitrariness. The probative value of victim evidence is simply outweighed by its prejudicial effect due to its "inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime."<sup>97</sup>

The dissenters next took aim at the *Payne* majority's argument that fairness requires the admission of victim impact evidence to offset the unrestricted mitigating evidence of the defendant. Justice Marshall asserted that the majority's position simply begs the question. To determine what evidence may be fairly introduced, one must first determine what evidence is permissible in light of the substantive standards of the Eighth Amendment.<sup>98</sup> Stevens deemed the majority's argument a "classic non sequitur."<sup>99</sup> Although it is true that the defendant is able to introduce evidence about his character, why should that entitle the State

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93. *Payne*, 111 S. Ct. at 2628 n.2 (Stevens, J., dissenting).

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

95. *Id.* at 2615 (Souter, J., concurring).

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

97. *Id.* at 2620 (Marshall, J., dissenting); *id.* at 2629-30 (Stevens, J., dissenting).

98. *Id.* at 2621 n.1 (Marshall, J., dissenting).

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

to respond with similar evidence about the victim? "The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance."<sup>100</sup>

Further, Stevens argued, the procedures are already fair. Just as the defendant cannot introduce irrelevant evidence about the immoral character or personal shortcomings of the victim, neither can the State offer irrelevant evidence about the victim's moral character and personal qualities.

[I]f a defendant, who had murdered a convenience store clerk in cold blood in the course of an armed robbery, offered evidence unknown to him at the time of the crime about the immoral character of his victim, all would recognize immediately that the evidence was irrelevant and inadmissible. Evenhanded justice requires that the same constraint be imposed on the advocate of the death penalty.<sup>101</sup>

The State is treated fairly in that it is given an opportunity to rebut any mitigating evidence that the defendant introduces.<sup>102</sup>

Finally, and more fundamentally, Stevens pointed out that the premise that there should be an "even-handed balance between the State and the defendant is . . . incorrect. The Constitution grants certain rights to the criminal defendant and imposes special limitations on the State designed to protect the individual from overreaching by the disproportionately powerful State."<sup>103</sup> The State, for instance, must prove guilt beyond a reasonable doubt.<sup>104</sup> Similarly, rules of evidence are weighted in the defendant's favor. The prosecution is not permitted to "introduce evidence of the defendant's character to prove his propensity to commit a crime, but the defendant can introduce such evidence to show his law-abiding nature."<sup>105</sup>

In Stevens' view, the majority's overruling of *Booth* and *Gathers* reflects not the force of reason and new argument, but the "current popularity of capital punishment in a crime-ridden society," and the political appeal and strength of the victims' rights movement.<sup>106</sup> Marshall, for his part, noted that "[n]either the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did."<sup>107</sup> "Power," he concluded, "not reason, is the new currency of this Court's decisionmaking."<sup>108</sup>

Of course, the reasonableness of the *Payne* Court's ruling depends in

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

101. *Id.* at 2626 (Stevens, J., dissenting).

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

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

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

105. *Id.* at 2627-28 (Stevens, J., dissenting) (citing FED. R. EVID. 404(a)).

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

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

108. *Id.* (Marshall, J., dissenting).

no small measure on the justifiability of the underlying substantive claim. If, as the *Payne* Court claims, victim harm is a morally relevant factor in meting out punishment, then the procedural question of whether the introduction of victim impact evidence is "unduly" inflammatory will be answered, in most instances, in the negative.<sup>109</sup> An inflamed jury is precisely what is required: the brutal details of the murder of an elderly couple, a solitary and helpless man, or a mother and her child ought to incite moral indignation in the jury. Similarly, if harm is relevant, then *Payne* supporters have a ready response to the *Booth* Court's concern that moral principles provide no justification for distinguishing between defendants whose victims are deemed socially worthy and those whose victims are judged less worthy. The factor that distinguishes the one from the other is simply the harm caused.<sup>110</sup>

Conversely, if victim harm—or perhaps only unforeseen and unforeseeable victim harm—is irrelevant, then the *Payne* Court's argument that fairness requires evidence about such harm to the victim and his family is simply a nonstarter. As for deference to the legislature, the Court's capital punishment jurisprudence requires the death penalty be imposed on the basis of "rational criteria" and be proportionate to the offense.<sup>111</sup> If such information is morally irrelevant, then it can hardly provide a rational and proportionate basis for capital punishment. By the Court's own lights, such information would be constitutionally impermissible, and as acknowledged in *Payne*, "state laws respecting crimes, punishments, and criminal procedure are of course subject to the overriding provisions of the United States Constitution."<sup>112</sup>

Thus, little progress can be made on the procedural issues without first coming to grips with the substantive issue.<sup>113</sup> Part II lays the ground-

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109. Undoubtedly, all aggravating evidence inflames the jury. See Susan A. Jump, Note, *Booth v. Maryland: Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 GA. L. REV. 1191, 1212 (1987). But even the *Payne* court recognized that not all potentially inflammatory facts about the victim are constitutionally admissible. *Payne*, 111 S. Ct. at 2608-09.

110. Murphy, *supra* note 9, at 1316. Whether this response is sufficient to meet a Fourteenth Amendment equal protection challenge is another issue, and beyond the scope of this article. See Willmott, *supra* note 13.

111. *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987).

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

113. This is not to say that none of the procedural disputes are capable of independent resolution. For instance, Justice Marshall is correct in pointing out that the *Payne* Court's fairness argument begs the substantive question. *Id.* at 2621 n.1 (Marshall, J., dissenting). But even accepting the substantive penal theory of the *Payne*



work for an assessment of the particular substantive claim in *Payne* by examining the more general substantive penal theory underlying the *Payne* Court's reasoning.

## II. THE PENAL THEORY OF *PAYNE*

Both the *Booth* and the *Payne* Courts agree that punishment is to be proportionate to desert. They disagree, however, over the proper scope of desert.

The *Booth* majority seeks to limit the scope of desert by imposing a mens rea requirement.<sup>114</sup> One deserves to be punished for the acts and the consequences of those acts for which one has the requisite mental state. Conversely, one does not deserve to be punished for acts or consequences for which one does not possess the proper mens rea.

The focus of a victim impact statement . . . is not on the defendant, but on the character and reputation of the victim and . . . his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered. Allowing the jury to rely on a victim impact statement therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrele-

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Court, Justice Stevens appears to have the better of the argument. As a procedural matter, the criminal process does not afford the State an even-handed balance. *Id.* at 2627 (Stevens, J., dissenting).

Further, the *Payne* Court never adequately addressed the *Booth* Court's argument that admission of victim impact evidence would introduce an element of luck, rendering the imposition of the death sentence impermissibly arbitrary and capricious. *Booth v. Maryland*, 482 U.S. 496, 504-05 (1987). Justices White and Scalia did point out that luck inevitably does enter the process, and that the defendant's misfortune in having murdered a victim with an eloquent family is no greater than the misfortune the defendant encounters in facing a particularly eloquent prosecutor or witness. *Id.* at 517-18 (White, J., dissenting). Commentators have noted, however, that the ineradicable element of luck in the criminal process provides no moral justification for introducing additional elements of chance. See Jeffrey Stoner, Comment, *Constitutional Law—Cruel and Unusual Punishment—Eighth Amendment Prohibits Introduction of Victim Impact Evidence at Sentencing Phase of Capital Murder Trial*. *Booth v. Maryland*, 107 S. Ct. 2529 (1987); *Another View*, 19 RUTGERS L. J. 1175, 1184 (1988); Howard, *supra* note 7, at 718 n.104.

Arguably, however, even this procedural dispute turns on a substantive moral one: namely, whether the injustice of the additional element of luck is outweighed by an enhancement in justice, if any, from the inclusion of harm in the punishment calculus.

114. Kant would impose an intent requirement on criminal punishment. See *supra* note 4 and accompanying text. By contrast, the Court endorses a lower mens rea standard—recklessness—at least with respect to the harm of taking another life. See *infra* notes 129-39 and accompanying text.

vant to the decision to kill.<sup>115</sup>

In contrast, the *Payne* Court widens the scope of desert. One may be punished not only for acts and consequences for which one possesses "subjective guilt,"<sup>116</sup> but also for *all* the harmful consequences of one's acts, regardless of one's subjective mental state or mens rea with respect to these consequences. Harm is "a measure of the seriousness of the offense and therefore . . . a standard for determining the severity of the sentence [to be] meted out."<sup>117</sup> Punishment, therefore, is a function of both subjective guilt and objective harm.<sup>118</sup>

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

116. *Payne*, 111 S. Ct. at 2605-06.

117. *Id.* at 2606 (quoting STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 56 (1988)).

118. The *Payne* Court referred to the subjective element of desert as guilt or blameworthiness. *Payne*, 111 S. Ct. at 2605. Guilt and blameworthiness are often used interchangeably with culpability and responsibility. Justice Scalia, however, had previously distinguished between moral guilt and responsibility: "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Booth*, 482 U.S. at 519 (Scalia, J., dissenting). Similarly, Justice O'Connor used the term "culpability" to encompass harm, stating that "one essential factor in determining the defendant's culpability is the extent of the harm caused." *South Carolina v. Gathers*, 490 U.S. 805, 818 (O'Connor, J., dissenting).

Desert, guilt, blameworthiness, culpability and responsibility can be and are used in more than one way. Construed narrowly, they can be limited to only intentional acts (or acts for which one has the requisite mens rea, if lower than intent). More broadly, one can speak of someone being guilty of causing great harm, even if not intended and unforeseen. Such a person could be blamed, and held responsible. Thus, Scalia is not wrong in his use of responsibility; nor has O'Connor abused the English language in using culpability to refer to harm.

Nevertheless, the danger of speaking of harm in terms of responsibility and culpability—words often, if not usually, associated with intention and volition—is that it threatens to cloud the distinction between mens rea-based punishment and consequence-based punishment. To be sure, this was not Scalia's intent in his *Booth* dissent. Having distinguished between moral guilt and responsibility, he argued that "the principle upon which the Court's opinion rests—that the imposition of capital punishment is to be determined solely on the basis of moral guilt—does not exist, neither in the text of the Constitution, nor in the historical practices of our society, nor even in the opinions of this Court." *Booth*, 482 U.S. at 520 (Scalia, J., dissenting). Both one's mental state and the harmful consequences of one's acts must be considered in meting out punishment.

In *Payne*, the Court takes pains to distinguish between guilt (blameworthiness) and objective harm. Rather than attempting to argue that harmful consequences are part of one's responsibility or guilt, the Court squarely faces the mens rea-conse-

The issue, moreover, is not whether the *Payne* Court's consequence-based theory is best labelled retributivist or utilitarian.<sup>119</sup> That will depend on how one defines these terms, and they have been defined in more than one way.<sup>120</sup> One way to distinguish the two is on the basis of their temporal focus: retributivism is retrospective, while utilitarianism is prospective.<sup>121</sup> Judged by the criterion of temporal focus, both the *Booth* and *Payne* majority are best characterized as retributivist.<sup>122</sup> Both

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quence distinction, claiming that both subjective guilt and objective harm are relevant factors in determining the appropriate punishment. *Payne*, 111 S. Ct. at 2605-06. *But see id.* at 2615-16 (Souter, J., concurring), discussed *infra* notes 125-38 and accompanying text.

119. The Court has declared that punishment that does not contribute to either deterrence or retribution "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment." *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion of White, J.)).

120. Compare JOEL FEINBERG & HYMAN GROSS, *PHILOSOPHY OF LAW* 628 (4th ed. 1991) with J.L. Mackie, *Retributivism: A Test for Ethical Objectivity*, in *PHILOSOPHY OF LAW* 679 (4th ed. 1991). As Feinberg and Gross note, some authors, Feinberg being one, define utilitarianism very specifically, and then consider all non-utilitarian theories retributivist. *See id.* The more typical route is to first define retributivism, usually in moralistic terms (punishment as one's just desert, proportional to one's guilt, culpability, blameworthiness or personal responsibility), and then consider all non-retributive theories utilitarian. *Id.*

121. *See* John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 5 (1955). Rawls, however, attempts to reconcile retributivism with utilitarianism by distinguishing justification of the practice (or institution) of punishment and justification of a particular act of punishment (within that practice or institution).

The temporal distinction works as follows. The retributivist determines when to punish by looking back to a violation of the law; who to punish by looking back to the person who violated the law; how much to punish by looking back to the guilt of the person and the crime committed, but always in proportion to desert. Why is one punished? Because one has committed a crime, and deserves to be punished. Again, the retributivist looks backward.

Conversely, the utilitarian determines when to punish by looking forward to the benefit of punishment, that is, when the gains of punishing outweigh the costs. This is the great trump card of utilitarians against retributivists who would punish past wrongs even if nobody stood to gain in any way, shape or form. To determine who to punish, the utilitarian again looks forward to the benefit to be derived from the punishment. In theory, the person punished could be innocent. A continuing embarrassment to utilitarians, this is the trump card of the retributivist who punishes only those who have violated the law. To determine how much to punish, the utilitarian calculates what punishment is sufficient to produce the maximum social benefit. Maximization of social welfare is, after all, why the utilitarian punishes.

122. Other criteria have been suggested. Feinberg suggests three:

1. Guilt is a necessary condition for justified punishment.
2. Guilt is a sufficient condition ("irrespective of consequences") for justified punishment.
3. The proper amount of punishment to be inflicted upon the . . . guilty offender is that amount which fits, matches, or is proportionate to the . . .

determine when to punish by looking back to a violation of law, namely, murder. Both determine whom to punish by looking back to those who commit the murder. Neither would punish an innocent party simply for utilitarian gains. Both would punish the murderer because he is guilty and deserves it, and both claim that the murderer is to be punished proportionately to desert. The two theories differ over whether to look back to only the mental state of the murderer or to both the mental state and harmful consequences to determine desert.

A priori, there is no reason to limit desert, and hence retributive punishment, to subjective guilt defined in terms of some mental state. Little is gained by scouring the historical record to verify that Kant or anyone else has interpreted retributivism in a particular way.<sup>123</sup> Interpretations

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gravity of the offense.

FEINBERG & GROSS, *supra* note 120, at 647. See also Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179, 180 (1987). "The distinctive aspect of retributivism is that the moral desert of an offender is a sufficient reason to punish him or her." *Id.* (emphasis in original). Even according to Feinberg's more elaborate criteria, the Court's position in *Payne* must be considered retributivist.

However, one might claim that the essential aspect of retributivism is that punishment is a morally necessary consequence of guilt. One who is guilty *must* be punished. On this score, the Court's position would not be retributivist because it recognizes the right of other government actors to grant pardons and the right of states not to impose capital punishment on the basis of victim harm. But to define retributivism in this way would be odd. Surely, other moral considerations may outweigh the state's duty to punish, assuming there is such a duty.

123. Nor will it suffice to appeal to the ordinary language usage of the term. See *supra* note 118.

In his insightful analysis of the Supreme Court's penal theory in *Booth*, Richard Murphy defines retributivism narrowly. Retributivism is Kantian retributivism, with punishment scaled to moral culpability defined in terms of one's intentions. Murphy, *supra* note 9, at 1308. In contrast, punishment based on (unintended) consequences is "vengeance . . . a utilitarian theory . . . antithetical to retributi[vism] in the sense of desert for culpability." *Id.*

Murphy recognizes, however, that some claim "that an individual's moral culpability includes responsibility for the harm caused. It is a common belief that an offender should not complain when foreseeable results come about and he is punished for them." *Id.* Despite the currency of this view, Murphy is adamant in his rejection: "[W]hatever theory exists to justify this belief, it is not retribution." *Id.* And indeed, if retributivism is defined narrowly in terms of subjective intent, Murphy is right, by definition. Under Murphy's analysis, the *Booth* majority's position would not be retributivist because its requisite mens rea for punishment is not intent, but the lower standard of recklessness. See *infra* notes 129-39 and accompanying text.

If, on the other hand, retributivism is defined in terms of retrospective focus, or

can change, and there can be more than one interpretation. This article refers to the *Booth* Court's position as mens rea retributivism and to the *Payne* Court's as consequentialist retributivism.<sup>124</sup> The former includes Kantian intent-based theories as well as theories which set a lower mens rea standard. The latter allows consideration of all harmful consequences, whether intentional, unforeseen or unforeseeable. But if one does not want to call the *Payne* Court view retributivist, fine. One may label the positions as one fancies so long as what is signified is clear. The real issue is not what we call the Court's position, but whether it can be justified morally, politically, and legally.

Justice Souter attempts to sidestep the central substantive issue of whether the better view imposes a mens rea requirement or encompasses all harmful consequences. He argues that even on the minority's mens rea theory of retributivism, evidence about victim harm is admissible because every murderer possesses the requisite mens rea with respect to such harm.

Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and after it happens other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death . . . . The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

That foreseeability of the killing's consequences imbues them with direct moral relevance, and evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence of the risk that the defendant originally chose to run despite the kinds of consequences that were obviously foreseeable.<sup>125</sup>

Souter's remarks emphasize the foreseeability of harm to the victim and his community. Foreseeability implies a negligence standard. Although mens rea is often loosely used to include negligence,<sup>126</sup> it literal-

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in terms of mens rea less than intent, or even simply in terms of just or proportional desert, then both the *Booth* and *Payne* Courts' penal theory may be characterized as retributivist.

124. For a somewhat similar distinction, see Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 212-14 (1988). Talbert, however, refers to what I have called mens rea retributivism as "moral retribution" and labels consequentialist retribution as "social retribution."

125. *Payne v. Tennessee*, 111 S. Ct. at 2615-16 (Souter, J., concurring) (citation omitted).

126. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 212 (2d ed. 1986).

ly refers to a guilty mind, connoting a subjective awareness which is not an element of negligence. Negligence is an objective standard.<sup>127</sup> Foreseeability is measured not by the particular defendant but by the standard of a reasonable person similarly situated.<sup>128</sup>

As Souter himself notes, the *Booth* majority rejects a foreseeability-negligence standard for capital crimes.<sup>129</sup> The *Booth* Court requires, at minimum, subjective awareness of the probable consequences. In *Tison v. Arizona*,<sup>130</sup> a felony murder case, the defendants did not themselves kill or intend that a killing take place. Nevertheless, the Court upheld capital punishment upon finding the "culpable mental state of reckless indifference to human life."<sup>131</sup> Acknowledging *Tison*, the *Booth* majority stated that the "defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability."<sup>132</sup> Thus, at least with felony murder homicides involving extreme indifference to life, the *Booth* majority appeared willing to set the mens rea level as low as recklessness.<sup>133</sup> Recklessness is a higher standard than negligence,<sup>134</sup>

127. Some courts have distinguished between criminal and tort negligence, requiring subjective awareness of the risk for the former. See *id.* at 236-37. The motivation would appear to be the belief that to deserve criminal punishment, one must possess some subjective culpability.

128. *Id.* at 233, 235.

129. *Payne*, 111 S. Ct. at 2615 (Souter, J., concurring) (quoting *Booth v. Maryland*, 482 U.S. 496, 504 (1987)).

130. 481 U.S. 137 (1987).

131. *Id.* at 151. It is debatable whether *Tison* can be reconciled with *Enmund*, a prior felony murder case where the Court held that the death penalty is inherently disproportionate when imposed on one who "does not himself kill, attempt to kill, or intend that a killing take place." *Enmund v. Florida*, 458 U.S. 782, 797 (1982). The *Tison* court attempted to distinguish *Enmund* by claiming that *Enmund* only applied to the minor actor who had no culpable mental state. *Tison*, 481 U.S. at 149-52.

132. *Booth*, 482 U.S. at 505.

133. The *Booth* Court's position on harmful consequences that accompany the harm of killing another person is not entirely clear. Nothing in *Booth* or *Tison* would prevent the Court from allowing the lower recklessness standard with respect to the underlying killing and yet require a higher mens rea—intent, purpose or knowledge—with respect to accompanying victim harm. This would make sense because the harm of the killing is much greater than the accompanying harm; hence, one should pay greater heed to the risk of killing. Furthermore, the potential punishment, execution, is proportionately much greater vis-à-vis the accompanying harm than it is vis-à-vis the harm of the killing. Given the severity of the punishment, one might require a higher mens rea with respect to the lesser harm.

134. Dissenting in *Payne*, Justice Stevens hinted that he might be willing to set the mens rea standard at negligence. He noted that "there is a rational correlation between moral culpability and foreseeable harm caused by criminal conduct," and that

and is consistent with the principle that the punishment should reflect the defendant's subjective guilt, as defined in terms of some degree of mental culpability.<sup>135</sup> Indeed, the *Payne* Court, by contrasting the defendant's subjective guilt with objective harm, also appears to draw the mens rea line at recklessness.

In any event, even were foreseeability sufficient to establish the requisite mens rea, one would still have to specify what must be foreseeable. To be distinguished is the general harm that accompanies every murder (for which one is already subject to a severe punishment) and the specific harm to the particular victim (on the basis of which the jury or trial judge imposes the death penalty).<sup>136</sup> In every murder, there is always harm to a unique individual, and in many cases to the survivors, should there be any. This much, it is true, is known and foreseeable to all.<sup>137</sup> However, one is not subject to capital punishment for the generic harm of murder. If such were the case, then capital punishment would be appropriate for every murderer. Rather, one is punished for consequences of a very specific sort, measured by the peculiar personal characteristics of the victim and the specific impact on his family. This is what distinguishes the fate of two murderers, each of whom killed with the same mens rea culpability, and inflicted the same general harm inflicted on the victim, the victim's survivors and society. One gets a life sentence, the other capital punishment, simply because one victim is socially valuable and belongs to a particular community (a grieving, well-spoken, loving family) while the other victim is not. Therefore, foreseeability of the

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the legislature may properly consider such harm in defining the offense and setting the punishment. *Payne v. Tennessee*, 111 S. Ct. 2597, 2628 (1991) (Stevens, J., dissenting). This suggests that he might lower the requisite mens rea standard to negligence and punish for foreseeable consequences. But he hastens to point out that the specific harm must be legislatively defined in advance. *Id.* (Stevens, J., dissenting). Further, he claimed there is no authority for the majority's view that unforeseeable and indirect harms to the victim and his family may be considered by the capital sentencer on a case-by-case basis. *Id.* at 2628-29 (Stevens, J., dissenting).

135. The felony murder rule has been widely criticized precisely because it subjects one to severe punishment, even execution, on the basis of unintended and perhaps unforeseen and unforeseeable results. See, e.g., Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1542-43 (1974) (noting actual risk of felony resulting in homicide is very low). See also, MODEL PENAL CODE § 201.2 cmt. 4 (Tentative Draft No. 9, 1959). Many states have limited the felony murder rule. See LAFAVE & SCOTT, *supra* note 126, at 623.

136. See Howard, *supra* note 7, at 714.

137. As Stevens points out, "[E]very juror and trial judge knows this much as well." *Payne*, 111 S. Ct. at 2630 (Stevens, J., dissenting). Thus if the only purpose of victim impact evidence is to bring home the truth about this general harm, the point is already well taken. Introducing evidence to that effect then runs the risk of prejudicing the jury for no gain.

general harm that accompanies every murder does not provide the requisite mental culpability for capital punishment. If capital punishment is to be imposed on the basis of specific harm, one must have the proper mental state with respect to that harm.<sup>138</sup>

Further, this argument applies to all mens rea standards: foreseeability, recklessness, knowledge or intent. For example, one could modify Justice Souter's argument to meet the *Booth* majority's recklessness standard. Victims generally have families; families generally will be harmed by the crime; the risk of causing victim harm is therefore substantial; such a risk is clearly unjustified (how could any risk of harm resulting from the murder of an innocent person be justified?); all defendants know this; therefore any murder is reckless. But reconstructing the argument in this way is futile. The defendant must still be reckless with respect to the particular harm. He must be subjectively aware that his victim possesses the kinds of personal characteristics and family relations that a jury or sentencing judge will hold dear. The defendant must then consciously disregard the risk that his victim will be one that the jury or judge will find sympathetic.

Not all victims have families, however. Even those who do often do not have loving ones that are able to articulate their anger and grief to a jury. Sometimes the defendant may even have reason to believe the victim does *not* have a family or that the family will *not* be adversely affected. In short, there is not always a substantial risk of causing the particular harm.

But even if the risk of killing someone with the right kind of family were substantial, the defendant would also have to be subjectively aware of this risk and consciously disregard it in order to be reckless. As the *Booth* Court noted, most defendants do not murder with an eye to the particular characteristics of the victim and the potential harm to the family.<sup>139</sup> The particular harm to the victim's family might never even have crossed the defendant's mind. Thus, many defendants will never have been subjectively aware of the particular risk, and that they reflected on the risk and consciously disregarded it is even less likely.

Moving up the mens rea ladder, Souter's argument, even modified, will fail if the proper mens rea is neither foreseeability nor recklessness, but

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138. If one does have the requisite mens rea (at least recklessness for the *Booth* Court) then the harmful consequences constitute part of the circumstances of the crime and are admissible, even under *Booth*.

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



intent. Most murderers simply do not intend harm to the victim's family, much less the particular harm at issue in *Payne*.

There are then two main issues. The first is the scope of desert, and whether mens rea is required at all. The second is what the proper mens rea standard should be. The *Payne* Court rejects a mens rea requirement; *Payne*, in effect, imposes strict liability with respect to victim harm. Justice Souter sides with the *Payne* majority in rejecting mens rea in the literal sense of a subjectively guilty mind, settling instead for the objective standard of negligence and foreseeability—but he believes all defendants meet that standard. The *Booth* majority requires some subjective awareness—at minimum, recklessness. I argue for intent.

But even were the *Booth* majority to adopt Souter's lower foreseeability standard, it would still be at odds with the *Payne* Court as long as in some instances the specific harm to the victim and his family was not foreseeable. While the *Booth* majority would consider such unforeseeable harm irrelevant, the *Payne* Court would include it in the punishment calculus, and stand ready to dole out capital punishment on that basis. Thus, despite Justice Souter's efforts, the substantive dispute between the *Booth* and *Payne* Courts is alive and well, and must be addressed.

### III. THE SUBSTANTIVE THESIS OF *PAYNE*

The *Payne* Court must justify the following. Defendant one (D1) murders victim one (V1), a wealthy doctor with a loving family who grieves for him. D1 did not know that V1 was a wealthy doctor with a loving family. Neither V1's personal characteristics nor the impact on V1's family influenced D1's intention or motive in killing V1, nor were they foreseeable. D1 is sentenced to death. Defendant two (D2) murders victim two (V2) with the same knowledge and intent as D1. V2, however, is an unemployed homeless person without a family who has fallen on hard times. D2 is not given capital punishment but life in prison.

As the hypothetical illustrates, the issue in *Payne* is starkly drawn and quite specific. To be justified is a particular punishment: capital punishment based on harmful consequences, even if unforeseen and unforeseeable, as measured by the personal characteristics of the victim and the impact of the crime on the victim's family.

The hypothetical is sufficient to test the justifiability of *Payne*, which sanctions the death penalty for unforeseen and unforeseeable consequences. But to measure the distance between the strong thesis (intent is required with respect to the harmful consequences for which one is given capital punishment) and the weak thesis (recklessness is sufficient), a new defendant, D3, is needed. D3 is identical to D1, and V3 identical to V1, except D3 was aware of and consciously disregarded the risk of causing harm based on V3's particular characteristics and family rela-

tions. D3, like D1, is sentenced to death. D2, as before, is given life imprisonment.<sup>140</sup> Just as *Payne* supporters must justify D1's execution in light of D2's lesser punishment, so must defenders of the weak thesis justify D3's execution.

Having stated what must be justified, it is important to note what need not be. Not at issue is the justifiability of capital punishment per se, or the execution of intentional murderers.<sup>141</sup> In the preceding hypothetical D1, D2 and D3 intentionally commit murder, but D1 and D3 are sentenced to death, D2 to life in prison. What distinguishes D1 and D3 from D2 are the harmful consequences of their acts, and hence what must be justified is the relevance of those consequences to capital punishment.

Also not at issue is the justifiability of non-capital punishment based on harm, foreseen or unforeseen, to the victim and his family or otherwise.<sup>142</sup> The relevance of harm to capital punishment and to non-criminal or non-capital criminal punishment must be treated separately.

Undeniably, harm to the victim is a factor in the non-criminal tort context. Courts regularly look to the personal characteristics of the victim and the impact on the family in calculating damages for lost earnings, pain and suffering and so forth.<sup>143</sup> Indeed, under the "eggshell plaintiff" rule, one may be liable for even unforeseen and unforeseeable harm if one acts negligently.<sup>144</sup> But tort law is about monetary compen-

140. The complete hypothetical is as follows: D3 murders V3, a wealthy doctor with a loving family who grieves for him. D3 was aware of and consciously disregarded V3's personal characteristics and family relations. But neither V3's personal characteristics nor the impact on V3's family were part of D3's intention or motive in killing V3. D3 is sentenced to death.

141. Booth, Gathers and Payne were all guilty of intentional murders. Indeed, they were all guilty of brutal murders, and perhaps for that alone deserve the death penalty. Payne might well have been given the death penalty even had the Court prohibited victim impact evidence. The Tennessee Supreme Court had ruled that introduction of the victim evidence was "harmless error." Given the brutality of the murder, the court concluded that "the death penalty was the only rational punishment available." *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990). *But see Payne*, 111 S. Ct. at 2624 n.4 (Marshall, J., dissenting) (explaining that the court should not have "automatically" found harmless error, but instead should have assessed the impact of the error on the sentencer's discretion). In any event, the appropriateness of capital punishment for intentional murder where aggravating circumstances (other than harm to the victim) are present is a separate issue.

142. *Booth*, 482 U.S. at 504, 507 n.10, 509 n.12.

143. *See generally* 1 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 422 (1992) (pain and suffering); 8 *id.* §§ 110.10-15 (economic loss).

144. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at

sation, not punishment (and certainly not capital punishment). Hence, one might reasonably accept harm as relevant in the non-criminal tort context and yet not in the criminal, or more narrowly, capital, context.<sup>146</sup> It is one thing to ask one to pay for the consequences of one's acts with money, and quite another to require one to pay with one's life.

The *Payne* Court noted that in the non-capital criminal context, harm to the victim is considered in defining and grading an offense and in choosing the punishment within the specified range.<sup>146</sup> But the *Payne* Court never offered an argument to justify the relevance of harm, and in particular unforeseen harm in a capital context. Rather, it simply observed that in practice, harm is a factor considered by legislatures and courts, implying by analogy that harm, and the particular kind of harm sanctioned by *Payne*, ought to be considered in capital contexts as well.

Two objections are possible. One could deny the analogy by distinguishing between the non-capital and capital contexts. Alternatively, one could challenge the justifiability of non-capital punishment based on harm, or at least on unforeseen and unforeseeable harm to the victim.

Take the latter first. Unforeseen and unforeseeable harm enters the criminal process at several junctures. There are strict liability crimes for which one is held liable despite the absence of any mens rea or even negligence.<sup>147</sup> The justifiability of these crimes has been challenged precisely because they subject an actor wholly lacking in subjective guilt to criminal punishment. Thus the Model Penal Code limits strict liability to "violations" that are not considered "crimes" and that are punishable only by fine, forfeiture, or other civil penalty.<sup>148</sup> Whatever the label, the presence of such offenses cannot, ipso facto, justify the imposition of the death penalty for unforeseeable (or even reckless) harm.

To be sure, the defendants in *Booth*, *Gathers* and *Payne* are hardly lacking in mens rea culpability. They all intentionally killed their victims. They lack, however, intent (and *Gathers* in particular arguably even the lower mens rea of recklessness) with respect to the specific victim harm

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290-93 (5th ed. 1984).

145. See *infra* notes 192-98 and accompanying text.

146. *Payne v. Tennessee*, 111 S. Ct. 2597, 2605-06 (1991). The Model Penal Code, for instance, takes harm as an aggravating circumstance in grading some crimes, including burglary. Burglary is a felony of the third degree. However, if the offender "purposely, knowingly or recklessly inflicts or attempts to inflict injury" in the process, then it is a second degree felony. See MODEL PENAL CODE § 221.1(2) (1985). Here, the mens rea is recklessness, not foreseeability. But one may also be strictly liable with respect to some aggravating circumstances. Many jurisdictions, for example, grade larceny according to the value of the property taken. See LAFAVE & SCOTT, *supra* note 126 at 718-24.

147. LAFAVE & SCOTT, *supra* note 126, at 242-50.

148. MODEL PENAL CODE § 1.04(5) & explanatory note (1985).

for which they may be executed under *Payne*. Thus, a closer analogy is the criminal liability of a defendant who possesses the requisite mens rea with respect to some crime (or element of a crime), but not to the specific result or harm. For instance, suppose *A* intentionally throws a rock at a window, misses and hits *B*. Is *A* guilty of battery or only a lesser crime against property? The general rule is that "intention to cause one type of harm cannot serve as a substitute for the statutory or common-law requirement of intention as to another type of harm."<sup>149</sup>

Now suppose *A* intentionally punches *B* lightly in the mouth, but *B* is a hemophiliac who ends up bleeding to death.<sup>150</sup> It is true that some courts would find *A* guilty of involuntary manslaughter, which is not a capital offense, even though *B*'s death from bleeding was entirely unforeseeable.<sup>151</sup> The Model Penal Code, however, finds this result objectionable:

Whether the matter is viewed in relation to the just condemnation of the actor's conduct or in relation to deterrence or correction, neither the terminology nor the sanctions appropriate for homicide may fairly be applied when the fatality is fortuitous. The actor's conduct in causing or intending to cause injury is a crime . . . and should be dealt with as such, *i.e.*, as a crime defined in reference to the specific evil of bodily injury that it portends. [To do otherwise] serves no proper purpose of the penal law and is abusive in itself.<sup>152</sup>

Where the actual harm exceeds the harm intended, it is arguably better to limit punishment to the offense defined by the intended harm.<sup>153</sup>

Thus, it is debatable whether the consideration of unintended and unforeseeable harm sanctioned in *Payne* is even justifiable in a non-capital criminal context. Consequently, appeal to the non-capital context does not resolve the dispute. It simply changes the arena. At the very least, some supporting argument is required.<sup>154</sup>

But even if one could justify consideration of such harm in a non-capital context, one would still have to justify its relevance to capital punishment. As the *Booth* majority noted, the Court has long recognized that

149. LAFAVE & SCOTT, *supra* note 126, at 273. The Model Penal Code reaches the same conclusion for recklessness and negligence with respect to the type of harm. MODEL PENAL CODE § 2.03(3) (1985).

150. This example is drawn from LAFAVE & SCOTT, *supra* note 126, at 275.

151. *Id.*

152. MODEL PENAL CODE AND COMMENTARIES § 210.3 cmt. 8 (1980).

153. See LAFAVE & SCOTT, *supra* note 126, at 276.

154. Nor has anything said thus far established the contrary thesis, namely, that consideration of unintended or unforeseeable harm in the non-capital context is unjustifiable.

death is qualitatively different from other punishments. Accordingly, there is a need for greater reliability in capital sentencing.<sup>155</sup> Death is different because of its severity and irrevocability.<sup>156</sup> Death is also different because of the inherent value or sanctity of human life.<sup>157</sup> The value of human life is captured in the notion of a "right to life." Even criminals have certain rights, of which the right to life is surely the most fundamental.<sup>158</sup> As will be argued in Part V, if the right to life is to be worth anything, it must protect the individual against the State and others who wish to take away that right for what are, at best, meager utilitarian gains.<sup>159</sup>

Just as the relevance of harm in non-capital contexts is not at issue, neither is the relevance of *some* harm in the capital context. There must, of course, be some harm before there can be capital punishment. As the *Payne* Court correctly observed, what distinguishes all murder from attempted murder is simply the harm caused.<sup>160</sup> D1 shoots to kill and does so; D2 shoots to kill but misses. Both have the same intent but the first may be executed while the latter may not. *Ergo*, harm is relevant to capital punishment.<sup>161</sup>

The problems with this argument are twofold. It is true that harm is a necessary condition for capital punishment. That much may be conceded.<sup>162</sup> Not any harm will suffice, however. For there to be capital punishment, there must first be a particular kind of harm: the death of an-

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155. See *supra* note 89 and accompanying text. Murphy points out that reliability is an issue primarily for the guilt phase of the trial. One must ensure that only the guilty are punished. In contrast, the *Booth* Court would prohibit victim impact evidence during the sentencing phase "even if factually correct." Murphy, *supra* note 9, at 1332 (emphasis in original). But such evidence, even if factually reliable, may not produce reliable sentences because of its inflammatory nature—as Murphy himself is forced to concede. *Id.* at 1331-32.

156. *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens J., concurring and dissenting).

157. See *infra* notes 223-24 and accompanying text.

158. See SHELDON KRANTZ, *THE LAW OF CORRECTION AND PRISONER'S RIGHTS* 292-537 (3d ed. 1986).

159. See *infra* notes 220-40 and accompanying text.

160. *Payne v. Tennessee*, 111 S. Ct. at 2597, 2605 (1991) (quoting *Booth v. Maryland*, 482 U.S. 496, 519 (Scalia, J., dissenting)). See also Murphy, *supra* note 9, at 1325.

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

162. Note that this would not be conceded by those who do not want to distinguish between attempt and completed crimes. See, e.g., R. Parker, *Blame, Punishment, and the Role of Result*, 21 AM. PHIL. Q. 1-11 (1984) (arguing that blameworthiness and hence punishment is to be determined on the basis of the risk of harm the conduct creates). See also, MODEL PENAL CODE § 5.05 (1985) (providing that attempted crimes, other than those of first degree felonies, receive the same punishment as completed crimes).

other.<sup>163</sup> But just because the harm from killing another may be relevant to capital punishment, that does not mean that other kinds of harm are also relevant.

Further, while the harm from killing another is a necessary condition for capital punishment, it is not sufficient. Manslaughter and negligent homicide both result in death and yet one is not subject to capital punishment for either crime. To use the Court's example, a reckless driver who kills someone will not be executed.<sup>164</sup> In addition to the harm of killing another person, one must have the proper mens rea with respect to that particular harm—at minimum, reckless indifference to human life.<sup>165</sup>

In sum, *Payne* endorses capital punishment based on consequences. But not any consequences will do; nor will any person who happens to cause the particular harmful consequences do. The defendant must first have committed murder. *Payne* does not sanction the execution of innocents, of criminals, or even of all those guilty of homicide—despite the fact that in the case of manslaughter and negligent homicide, the victim is just as dead and the victim, victim's family and society are just as harmed as if the victim had been murdered. *Payne* does not even sanction capital punishment for all murderers who cause great harm. Capital punishment may be imposed, however, if one causes a particular kind of harm, as evidenced by the personal characteristics of the victim and the impact on the family.

None of the analogies to harm in non-capital contexts justify the substantive normative thesis endorsed by *Payne*: that capital punishment may be imposed and the life of a human being (albeit a murderer) taken on the basis of harm to the victim, even if unforeseeable. Parts IV and V explore, respectively, possible retributivist and utilitarian justifications for the *Payne* ruling.

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163. Standing alone, no other harm will do, not even that of rape. See *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977) (plurality opinion of White, J.) (though "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim, . . . in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder").

164. See *supra* note 51 and accompanying text.

165. Of course even if one intentionally kills another, so that there is both harm and the requisite mens rea with respect to the harm, one will not be subject to capital punishment, or any other punishment, if one acted in self-defense.

#### IV. RETRIBUTIVIST JUSTIFICATIONS

Why should one who commits a crime be punished? One justification is J.G. Cottingham's desert theory, which states that one is punished because one deserves it.<sup>166</sup> In the eyes of the *Payne* Court, one deserves to be punished for both subjective guilt and objective harm.<sup>167</sup> Unfortunately, the desert theory is a hopeless failure. Apart from the obvious difficulty of providing no assistance in determining what one deserves, the desert theory fails as a justification of punishment, as John Mackie has pointed out, because it is not a justification at all. Rather, it is simply a restatement of the retributivist position.<sup>168</sup> One must still provide a reason why one punishes, and why one punishes in a particular way.<sup>169</sup>

One traditional retributivist response is that people will their own punishment. *Ex ante*, one chooses to be punished for committing crimes.<sup>170</sup> If one in fact consented to a particular punishment, that

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166. J.G. Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 239 (1979).

167. See *supra* notes 116-18 and accompanying text.

168. John L. Mackie, *Retributivism: A Test for Ethical Objectivity*, in PHILOSOPHY OF LAW 679 (4th ed. 1991).

169. A moral intuitionist might claim that no reason is necessary: the correctness of the claim that a criminal deserves to be punished (in a particular way) is simply intuited. Cf. Murphy, *supra* note 14, at 228. As noted, however, the Court requires the death penalty be meted out on the basis of rational criteria. *McClesky v. Kemp*, 481 U.S. 279, 305 (1987). In the absence of contrary reasons, perhaps intuition could constitute a rational criterion. But where there are rational arguments to the contrary, to stubbornly cling to intuition does not seem rational. The desired rational state would seem to be one of "reflective equilibrium" in which intuited moral principles are brought into harmony with one's considered judgments. See JOHN RAWLS, A THEORY OF JUSTICE 20-22, 48-51 (1971).

170. See Mackie, *supra* note 168, at 681. Why would one choose to be punished? In Kant's view, one wills one's own punishment because, as a rational being, one wills the universalization of the maxim or rule by which one acts. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 44-58 (Lewis W. Bech trans., 1969). Thus, if one murders, one wills the universalization of murder, and hence may be murdered in return; if one steals, one may be stolen from, and so on. This argument justifies, indeed requires, the biblical punishment of *lex talionis*: "An eye for an eye, a tooth for a tooth." *Exodus* 21:22-23. Obviously we do not punish in this way, nor could we even if we thought it justified. How can one steal from one who has nothing to be stolen? To take the *Payne* case, would one kill Payne by repeatedly stabbing him with a butcher knife? Even if one would—Eighth Amendment prohibitions against cruel and unusual punishment aside—would one also do the same to his daughter, supposing he had one? And how would one ensure that the impact on the families would be the same?

The idea of universalization of the will underwrites the curious arguments that punishment respects the dignity of humans as rational beings and that the criminal has a right to be punished. For a discussion, see Mackie, *supra* at 168. EDMUND PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 7-14 (1966).

would provide a powerful justification. The immediate problem, however, is that no reason exists to believe that Booth, Gathers or Payne ever consented.

An alternative is to rest one's justification on hypothetical consent, that is, to argue not that one actually consented but that a rational person would consent. Of course, what is rational depends on the circumstances. The rational choice of one who has just committed murder will be *contra Payne*. Thus, the choice must be considered *ex ante*. But even *ex ante*, one's choice will be influenced by one's personal characteristics. If one is violent and likely to commit murder, one will not consent to *Payne*. To ensure a rational choice, knowledge of one's personal characteristics must be limited. Assume then that one does not know whether one will be defendant or victim; for all one knows, one might equally be the murderer or the murdered, or family of the murdered. Having eliminated such biasing contingencies, one is now in a position to make a rational choice.<sup>171</sup>

Would one choose capital punishment based on harm to the victim?<sup>172</sup> No. *Ex ante*, one does not know whether one will be a murderer or a victim. Consequently, one must protect against the possibility of ending up on either side. The stakes on one side are high: one's life. Thus, to opt for capital punishment based on harm to the victim's family, or on the victim's character traits, would be to expose oneself to incredibly high cost. Moreover, one would be doing so for no gain because by definition, harm to the victim and the victim's family is irrelevant to one's intention in killing. Unless one is a sadist, one gains nothing from the

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171. Precisely what information must be restricted may be debated. For present purposes, one need only ban information that makes it more or less probable that one would be either victim or defendant. Information and ideas that affect how one would treat a defendant are permissible. Thus one may have theories of justice, just desert, mercy, as well as emotions such as the desire for vengeance and, conversely, compassion.

172. If so, then one has a response to the question, "What gives the State the right to punish?" If not, then one has an argument against punishment, even if that punishment is in fact chosen by others. Indeed, that one would not make that choice from an *ex ante* position, unbiased by personal characteristics, suggests that actual consent might be tainted by personal circumstances and immediate self-interest. At the very least, the discrepancy should give one pause and call into question the moral relevance of the reasons given by those who support such punishment. Of course one may argue that moral judgments made *ex post* in light of the full circumstances are superior to purified *ex ante* judgments. But at least the burden shifts, requiring more than mere appeal to vague intuition to justify punishment for all harmful consequences, whether foreseeable or not.



suffering of the victim and family. To risk one's life for no gain hardly seems like a rational choice.

Indeed, not only would one's life be at stake, but one would be gambling on the particular characteristics of one's potential victim because *Payme* sanctions the death penalty for certain victim harm even if unforeseen and unforeseeable. One would be laying one's life on the line on the basis of circumstances beyond one's control.<sup>173</sup>

The best way to flesh out the argument may be to consider possible objections. First, one could argue that while it might be true that there is nothing to gain should one turn out to be a murderer, there is something to be gained should one be a victim: vengeance.<sup>174</sup>

Vengeance is generally considered a utilitarian justification of punishment. This utilitarian version of vengeance holds that legal punishment provides a socially sanctioned "escape valve" for anger and aggressive feelings, thus avoiding the disutility of citizens taking justice in their own hands.<sup>175</sup> Hedonistic vengeance, on the other hand, simply holds that utility is increased by punishment because some people enjoy the suffering of criminals.<sup>176</sup> The problems with vengeance as a utilitarian justification of punishment are considered in Part V. At present, our concern is with vengeance as a rational choice factor.

One could avoid the problem by defining it away. We are interested in rational choice. Rational beings are not moved by certain emotional and psychological propensities. Vengeance, a morally suspect emotion to begin with, could be stipulated as one of those emotions. That the Supreme Court has repeatedly insisted capital punishment must be based on reason, not emotion, provides some justification for such an exclusion.<sup>177</sup> But to rule out emotion by fiat weakens the argument. A better solution is to allow vengeance as a choice factor but argue that one would not choose the proposed punishment anyway.

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173. Of course one would first have to commit murder or be engaged in felony murder. To that extent, one would have some control. Further, under the weak thesis, which imposes punishment only if one is at least reckless, one would be aware of the potential harm and hence able to consciously weigh the risks.

174. Other potential utilitarian gains from rehabilitation, deterrence, incapacitation, and denunciation are considered *infra* notes 189-91, 206-21 and accompanying text.

175. JAMES STEPHENS, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 75-83 (1882); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41-42 (1881).

176. FEINBERG & GROSS, *supra* note 120 at 650.

177. *Booth v. Maryland*, 482 U.S. 496, 508 (1987) (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (opinion of Stevens, J.)). As Murphy has noted, *supra* note 9, at 1313, the Court's position on vengeance is not entirely clear. Some statements appear to reject it. See *Enmund v. Florida*, 458 U.S. 782, 798 (1982). On the other hand, the Court at times has conflated vengeance and retribution. See *Furman v. Georgia*, 408 U.S. 238, 304 (1972).

One immediate difficulty with this alternative is that vengeance may justify too much. For instance, given the brutality of the murders in *Booth*, *Gathers* and *Payne*, it is perhaps understandable that one would desire vengeance. But would the demand for vengeance be any less if the victim did not possess socially valuable characteristics? What if the murder was less brutal, but the victim was a member of one's family? If one is vengeful, would one not want capital punishment for anyone who murders one's family member, regardless of the personal characteristics of the victim and the perceived impact on the family? If so, then vengeance justifies not only the particular act of capital punishment endorsed by *Payne*, but capital punishment more generally. To consider vengeance as a justification for *Payne*, one must be willing to accept capital punishment at least in every instance where there are survivors and perhaps in other situations, such as brutal murders. Of course, one could turn out to be the murderer, so this exposes one to greater risk. Many might decide against *Payne* for this reason alone. But some might be willing to bear the greater risk, so additional argument is needed.

The best argument is simply that one would not opt for capital punishment even if vengeance is allowed as a choice factor. Vengeance, in the eyes of many, is a base and barbaric emotion not fit for civil society.<sup>178</sup> To be sure, vengeance may seem desirable when one is doing the avenging, but would one risk one's life for it? *Ex post*, as victims, in the immediate aftermath of a brutal murder or senseless killing of a loved one, we may desire vengeance.<sup>179</sup> But *ex ante*, in one's cool-headed and rational moments, when one does not know whether one will be victim or murderer, would one wager one's life for such an ignoble emotion as vengeance, particularly if the harm for which one is to extract vengeance was unintended, perhaps even unforeseen and unforeseeable?<sup>180</sup> In such

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178. One might argue that vengeance is simply not a moral trait and hence cannot provide a moral justification for anything. But that begs the question. Vengeance may be a contemptible emotion, but one still might base choices on it, and those choices provide the moral basis for punishment.

179. *But see* Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 74 (1989) (studies show that most crime victims are not "bloodthirsty vigilantes" bent on extracting punishment); Deborah P. Kelly, *Delivering Legal Services to Victims: An Evaluation and Prescription*, 9 JUST. SYS. J. 62, 74-75 (1984) (studies show victims' satisfaction depends more on involvement in the criminal process than on whether the defendant is ultimately punished).

180. On the escape valve theory, there is some utility to society in vengeance. But that utility is spread out over society. Weighed against one's own death, the gain seems trivial. Taking the hedonistic view, one would have to get a whole lot of plea-

moments, will the desire for the death of another not be offset by mercy and compassion? After all, if we allow vengeance as a choice factor, we must allow for mercy and compassion as well.

On balance, then, a rational person would not subject herself to the risk of capital punishment for unintended (or at least unforeseen and unforeseeable) harm, even though she might be a victim and desire, *ex post*, vengeance.

A second objection is that victims, including the family, will gain psychologically from a criminal process that seriously considers harm to the victim and affords victims an opportunity to participate in bringing the defendant to justice. Allowing family members to testify as to the impact of the crime on their lives may be a healing experience, instrumental to the recuperative process. Playing an active role in the process may foster in victims the belief that they are not powerless and that the world is not radically out of order. As a result, one may feel that one has regained control over one's life.

But it is debatable whether victims are better off in a criminal process that affords them a more central role. For starters, such a process may not be psychologically beneficial. At least one scholar and victim has suggested that the process is often counterproductive.<sup>181</sup> In her view, victims need to move beyond the tragic event, resume their lives, and take responsibility for their futures.<sup>182</sup> The judicial focus on assigning blame and the victim's own quest for vengeance are backward, not forward, looking.

Further, by testifying, the victim becomes a target for blame and censure during cross-examination. The prospect of being forced to relive events often long past by the time of trial might be unappealing to many. But sympathetic victims who do not want to testify may face pressure from prosecutors who realize a jury will be moved by a firsthand account of the victim's suffering.<sup>183</sup> Conversely, less sympathetic victims who do not possess characteristics deemed socially valuable but who want to testify might be denied the opportunity to do so, further crushing already fragile egos and diminishing already low self-esteem. Of course, downtrodden victims and estranged family members may have no choice but to testify. If a victim's positive characteristics and laudable family relations are relevant, then a victim's deviant characteristics and broken family relations are presumably also relevant, and hence admissi-

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sure out of the suffering of others to think it worth the chance of losing one's life.

181. See Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 997-99 (1985).

182. *Id.* at 961-63.

183. See Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992).

ble—a feature of *Payne* the Court may have overlooked in assuming that defendants would not attack their victims for strategic reasons.<sup>184</sup>

In any event, all those who testify—“good victims” or “bad victims”—might suffer pangs of guilt if the defendant is ultimately given the lesser punishment. Members of the family might take this as a sign of their own shortcomings, thereby exacerbating their feelings of inadequacy.<sup>185</sup> Finally, in some cases victims will not want vengeance, and may even be opposed to the death penalty. This may put them at odds with prosecutors. But even when, in the immediate aftermath of the crime, victims do desire vengeance and willingly aid the prosecutor in pursuing the death penalty, they may later, when emotions die down, come to regret their role in the death of another.<sup>186</sup>

Taken together, these points cast serious doubt on the contention that one would choose capital punishment based on victim harm because of the benefits from a greater role for the victim in the criminal process.

A third objection is that the argument proves too much. One version is that the argument would put an end to all capital punishment because no rational person would risk one's life for anything. But this is misguided.<sup>187</sup> People do not place infinite value on their lives; otherwise, there would be no suicide or euthanasia. One may be willing to risk one's life to gain something else one values. The problem with *Payne* is that one exposes oneself to high risk for no gain, or at best, little gain.<sup>188</sup> But capital punishment on non-*Payne* grounds may provide some gain. For instance, suppose capital punishment deters murder.<sup>189</sup> Then one might consent to capital punishment on the grounds that one's life, or the lives of others, might be saved by the deterrent effect of capital punishment.

Alternatively, one might think that children and the elderly are particularly vulnerable and deserving of protection. Again, if one believes that capital punishment deters, then it might be rational to risk death by sanc-

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184. *Id.* See also *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding that a defendant may not be prevented from offering evidence relevant to issues in criminal trial); *Green v. Georgia*, 442 U.S. 95, 96-97 (1979) (per curiam) (stating that the same rule applies in a capital sentencing hearing).

185. *Berger*, *supra* note 183.

186. *Id.*

187. Even if correct—and the argument ultimately supports an end to all capital punishment—so be it. There should then be less capital punishment, not more.

188. In addition to vengeance, there may be slight utilitarian gains from deterrence and incapacitation. See *infra* notes 189-90, 206-21 and accompanying text.

189. This article takes no position on the actual deterrence of capital punishment.

tioning capital punishment for killing children or the elderly. One might take the risk because one presumably will also be a child and an elder; hence, one will be protecting one's own life. Or, one might take the risk simply because one feels that protecting the lives of children and elderly is valuable in itself. Either way, one would only risk capital punishment if one believed such punishment would deter the particular kind of killing. However, where the status of the victim is unforeseeable, nothing (or very little) in the way of deterrence is gained through capital punishment.<sup>190</sup>

Moreover, capital punishment under *Payne* will not act as a deterrent because one may be executed for harm that is not part of one's intention or motive in killing, and may not even be foreseeable. Of course, one could argue that imposing capital punishment will provide the defendant with an incentive to investigate his victims more carefully in order to ascertain their socially valuable characteristics and the state of their family relations beforehand. But that is, to put it charitably, far-fetched. As the *Booth* Court noted, defendants do not select their victims with an eye on anyone's harm other than the victim's.<sup>191</sup> At most, the deterrent effect would be minimal.

A second version of the third objection holds that the argument proves too much because one would not choose punishment based on unforeseen consequences in any context. This too is misguided. A rational person might consent to strict liability offenses even if she would not consent to *Payne*. At least as defined by the Model Penal Code, the potential cost, and hence risk, is much less. As noted previously, the Code would limit punishment for strict liability offenses to a fine, forfeiture or other civil penalty.<sup>192</sup> One would not be imprisoned, much less subject to death. Further, one would not suffer the social stigma and moral condemnation of being labelled a criminal. The Code refers to strict liability offenses as "violations" and requires that a conviction "not give rise to

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190. Thus, one might consent to statutes authorizing the death penalty for the assassination of the President and other various public officials on the grounds that such persons are of great social value and deserving of protection, or because one might oneself be such a person. But again, one will consent only if one believes there is a deterrent, and hence would reject capital punishment where the status of the victim was unforeseeable and unforeseen (given the unlikely effect of deterrence as an incentive to investigate).

One could argue that capital punishment provides additional deterrence. The simple fact that more murderers will be killed will make all murder less likely, including murder accompanied by the kind of harm at issue in *Payne*. But if the goal is to deter all murder, then one should make the punishment for any murder more severe. See *infra* note 213 and accompanying text.

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

192. MODEL PENAL CODE § 1.04(5) (1985).

any disability or legal disadvantage.<sup>193</sup> On the benefit side, there are considerable potential gains. Strict liability offenses, which are best limited to regulatory offenses, are designed to enhance public safety. By lowering the burden on the prosecutor, strict liability statutes allow for greater apprehension of those who endanger the public. This stops the immediate offense and provides both a deterrent and mild denunciatory effect, culminating in enhanced safety. Given the low cost, a rational person might conclude the benefits outweigh the costs and consent to such punishment.

The costs are obviously higher for criminal punishment based on an unforeseeable type or degree of harm. Consequently, a rational person would be less likely to consent to such punishment than to strict liability sanctions. But this squares with earlier observations.<sup>194</sup> In actual practice, the general rule is not to punish based on the type of harm caused when the requisite mens rea with respect to that particular harm is lacking. While some courts have punished according to the degree of harm even in the absence of the requisite mens rea, that practice has been condemned by the Model Penal Code and others.<sup>195</sup> That there would be some debate on this subject is understandable. The costs are not as high as in *Payne*, but they are higher than for strict liability. The gain then becomes all the more important. If the degree of harm is unforeseeable, then there will usually be no gain from the additional harm.<sup>196</sup> However, if the defendant was reckless with respect to the degree of harm, one might conclude that opting for the punishment would enhance caution, thereby providing sufficient deterrent gain.

As discussed previously, one may be liable even for unforeseen consequences in the non-criminal tort context.<sup>197</sup> But this too is understandable, and arguably a rational choice. The law of torts concerns not capital punishment, but monetary compensation. The issue is who should bear the economic loss. *Ex ante*, one will not know whether one will be the compensator or the compensated.<sup>198</sup> Compared to *Payne*, the poten-

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193. *Id.*

194. See *supra* notes 147-48 and accompanying text.

195. See *supra* notes 150-53 and accompanying text.

196. In some instances there will be gain. For instance, a mugger whose victim happens to have \$1000 instead of the anticipated \$10 will gain from the additional economic harm. But in many cases, there will be no gain. Indeed, the defendant might even regret the additional harm. An example would be a defendant who merely wants to scare someone but who breaks that person's nose.

197. See *supra* notes 142-45 and accompanying text.

198. In economic terms, one will not know whether one will be the least cost

tial gains are higher and the risk lower. If the risk still seems too high, in many instances one may purchase insurance.

Another objection is that one might, despite the risks, choose capital punishment for reckless or unforeseen harm on account of either of two traditional retributivist reasons for punishment: annulment of the crime or fair play. The annulment theory, as the name suggests, holds that punishment somehow annuls the crime.<sup>199</sup> If the idea is simply that punishment restores the status quo ante, then the theory is clearly absurd. Although restitution may be possible in some instances, such as those involving monetary crimes, it is obviously not possible to restore a murder victim to life or a rape victim to an unviolated state. An alternative interpretation is that the wrong that is annulled is the general infringement of another's rights.<sup>200</sup> However, punishing the criminal cannot undo that infringement. Perhaps a more plausible view is that what is annulled is the unfair advantage one gains if one is allowed to break the law and go unpunished. But this interpretation is better understood in terms of the fair play argument.

The fair play argument begins with the observation that we live in a competitive society of scarce goods and limited resources. Laws regulate the competition, imposing constraints on what one can do to secure available goods. One who violates the law gains an unfair advantage. Punishment offsets the unfair advantage and restores equilibrium.<sup>201</sup>

Of course, under *Payne*, the murderer is going to be punished, and severely. Thus he will not gain an unfair advantage in the sense that he will have gotten off scot-free. Nevertheless, one could argue that there is still an unfair advantage. In our earlier hypothetical, D1, who murdered the wealthy doctor with the loving family, caused greater harm than D2, who murdered the homeless person without kin. To give both D1 and D2 the same punishment would not be fair to D2 or to the family of D1's victim. Capital punishment is that little something extra that offsets the greater harm and restores fairness.

Does D1 actually gain an extra advantage for which he is not punished? Both D1 and D2 killed with the same intentions and for the same motives. The additional harm to the victim and family at issue in *Payne* was not part of D1's intent. Indeed, the harm was unforeseen and perhaps unforeseeable. Again, unless D1 is a sadist, he gains nothing from the additional harm to the victim. It is not some added benefit thrown in to sweeten the deal. In fact, had he known, he might not have committed

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avoider.

199. The most famous spokesperson for this view is Hegel. See GEORGE HEGEL, *PHILOSOPHY OF RIGHT* 69-70 (1942); Cottingham, *supra* note 166, at 244-45.

200. Cf. PINCOFFS, *supra* note 170, at 10-12.

201. Mackie, *supra* note 168, at 680; Cottingham, *supra* note 166, at 242-43.

the murder. *Ex post*, he might sincerely regret the harm he caused others.

Does D1 at least gain the advantage of a lesser punishment relative to total harm caused? Such an argument puts the cart before the horse. He must first have some independent unfair gain to merit additional punishment. That is, we do not know whether he deserves the greater or lesser punishment until we establish that there has been some unfairness. That requires an independent substantive gain. The lesser punishment itself cannot constitute that gain.

Of course, critics of *Payne* who support the weak thesis may feel that the real unfairness involves not D1 but D3. D3, unlike D1, was subjectively aware of the risk of harm, and hence arguably more culpable than D1. To give D3 the same punishment as D1 and D2 is unfair to the latter two.

The unfair advantage cannot be the harm itself, however, because D3 gains no more from unintended harm than D1. Perhaps what D3 gains is self-indulgence by taking substantial and unjustified risks that those who play by the rules of the law do not. But D1 also does not play by the rules, and in that sense is comparable to D3.

Though one may be hard pressed to say what D3 unfairly gains, the feeling that D3 is nevertheless more culpable than D1 remains. The sense that a reckless defendant deserves to be punished for harm caused provides the basis for one last objection to the rational choice argument.

Though not helpful to *Payne* supporters, one might claim that the argument does indeed prove too much. Even the *Booth* majority appears to recognize that recklessness is sufficient mens rea with respect to victim harm.<sup>202</sup> But the argument suggests an intent standard. After all, if one does not gain anything from the unintended harm to the victim, why expose oneself to the high risk of capital punishment?

Whether one would opt for intent or recklessness is a close call. As a victim, there would be gains from setting the mens rea at recklessness that are not present for unforeseen and unforeseeable harm. The reckless offender is subjectively aware of the risk of harm, and hence deterrable (if deterrence is in fact effective in such circumstances, an assumption questioned previously). To the extent that vengeance is a factor, one would expect a greater demand for revenge where the offender consciously disregarded the risk of causing harm than where the harm was unforeseeable. Indeed, the demand for vengeance may be greater pre-

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202. See *supra* note 133 and accompanying text.



cisely because one feels that the offender is more culpable with respect to consequences for which he possessed at least recklessness.

To set the level at intent would be to allow reckless offenders to go unpunished for harm for which they were subjectively aware and mentally culpable. *Qua* victim, one would find this objectionable. Conversely, *qua* offender, one would be more willing to accept punishment for reckless harm than unforeseen and unforeseeable harm because such harm is within one's control. One is aware of the risk and can choose either to take that risk or not, knowing full well what the cost may be. Recklessness therefore appears to be the point where the interests of the *ex ante* victim and offender converge.<sup>203</sup>

Though perhaps persuasive at first blush, the argument for a recklessness standard is subject to many of the same criticisms aimed at capital punishment based on unforeseen harm. For instance, the reasons why vengeance is insufficient to justify capital punishment remain persuasive even where the defendant is reckless and hence more blameworthy.<sup>204</sup> Similarly, deterrence, though a somewhat more plausible ground with respect to recklessness, is still unlikely to tip the scales in favor of capital punishment. Apart from the general question of whether capital punishment does in fact deter, one may doubt whether someone about to commit murder and already running the risk of capital punishment will be greatly deterred by the additional threat of execution for reckless harm to the victim.

To be sure, one who recklessly causes harm may be more culpable than one who could not have foreseen the harm caused, and hence may deserve more punishment. But capital punishment? Would one want to execute someone—or be executed—on the basis of unintended but reckless harm? Given the huge difference between life in prison and capital punishment, it is unlikely that one would choose, *ex ante*, to impose such a high cost on recklessness—especially since one does not gain from such unintended consequences.<sup>205</sup> Further, the defendant need not

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203. If this objection holds and the offender would consent to capital punishment for reckless harm, then the state may have the right to execute the offender. Whether the state is right in doing so is another issue. Punishing deserving offenders is not the only goal or moral consideration. One must also consider how the execution of criminals affects other moral principles. Executing some murderers because their victims had certain socially valuable characteristics conflicts with the state's commitment to equal protection for all of its citizens. *See also* Willmott, *supra* note 13. For conflict with other values, see *infra* notes 228-40 and accompanying text.

204. *See supra* notes 177-80 and accompanying text.

205. As one of its aggravating circumstances for capital punishment, the Model Penal Code requires that "[t]he defendant knowingly create[] a great risk of death to many persons." MODEL PENAL CODE § 210.6(3) (1985). Two points are noteworthy. First, knowledge, though less than intent, is a higher standard than recklessness.

go unpunished. There are various punishments short of execution, including delayed parole. Even where the base penalty is life imprisonment without possibility of parole, other punishment possibilities exist, such as withholding various prison privileges.

In sum, the argument that, *ex ante*, a rational person would not consent to the punishment proscribed in *Payne* (or endorsed by the weak thesis) appears to hold against the objections considered thus far, including several standard retributivist arguments for punishment. The next section explores utilitarian justifications for *Payne*.

#### V. UTILITARIAN JUSTIFICATIONS

Part II argued that the *Payne* Court's penal theory is best understood as retributivist. Nevertheless, the Court may be able to draw on utilitarian (or consequentialist) justifications of punishment, broadly construed to include rehabilitation, incapacitation, deterrence, denunciation and vengeance.

Rehabilitation obviously cannot support *Payne* or any capital punishment because a dead person cannot be rehabilitated.

Incapacitation is a utilitarian justification for punishment in that the prisoner is less likely to cause further harm in prison than on the streets. Capital punishment is the ultimate form of incapacitation. As such, execution has certain advantages over imprisonment. A prisoner could escape and cause harm or cause harm within the prison.<sup>206</sup> A dead person obviously could not.

But the chances of a prisoner causing further harm are not great. Only one out of five hundred convicted murderers commits another murder.<sup>207</sup> And convicted murderers are no more likely to commit further crimes than any other class of convicted felons.<sup>208</sup> Further, there is no way of identifying in advance the one in five hundred that will commit another murder, or those who will commit another crime. Thus, to gain

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Second, the harm is *death to many persons*—a harm considerably greater than the victim harm contemplated in *Payne*. Given the severity of the punishment and the lesser harm, to impose a higher mens rea requirement (i.e., intent) would seem reasonable. *See id.*

206. In addition, society is harmed by the cost of imprisonment, though capital punishment is arguably more expensive given the many appeals. *See BEDAU, supra* note 15, at 34-38, 239.

207. *Id.* at 32.

208. *Id.*

the marginal benefit of one less murder and slightly less crime, one would have to execute all five hundred.<sup>209</sup> Our society, which imposes capital punishment on the basis of individualized determination,<sup>210</sup> does not engage in this kind of statistical mass execution. Nor could such a practice be justified on utilitarian grounds.

As a general justification of the death penalty, capital punishment cum incapacitation fails. It, therefore, also fails as a justification of *Payne*. In our earlier hypothetical, D1, D2 and D3 all committed murder. Only D1 and D3 were subject to the death penalty under *Payne* because of unintended (and for D1 unforeseeable) victim harm. But unless the fact that D1 and D3 caused the victim<sup>211</sup> and family harm is an indicator that they are more likely than D2 to commit further harm—which is highly unlikely given that the harm was unintended (and for D1 unforeseeable)—then there is no more reason from the standpoint of incapacitation to execute D1 and D3 than D2. Either one executes them all (and all others) or none. Our legal system has already rejected the former; we do not execute all intentional murderers.

As noted previously, deterrence fails as a justification for *Payne* because the defendant is punished for harm that is not intended and perhaps not even foreseeable.<sup>212</sup> *Payne* does provide an incentive to investigate the personal characteristics and family relations of one's victims. But few murderers are likely to act on that in practice. If the goal is to deter murder, a better approach would be to raise the penalty for murder itself, not for particular results.<sup>213</sup>

The goal might be to deter only the murder of persons with socially valuable characteristics and loving families. If so, then *Payne* can hardly be justified by the expressive or denunciatory function of punishment. Denunciation serves as a utilitarian justification on the theory that punishment educates and instills in the public right-minded values, thereby promoting social cohesion. What message does *Payne* send? That the law

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209. *Id.* at 33.

210. See *supra* notes 28-29 and accompanying text.

211. That is, D1 and D3 would have had to cause harm to society based on the personal characteristics of the victim. Obviously D2 also causes the victim harm.

212. See *supra* notes 190-91 and accompanying text.

213. A similar suggestion was made with respect to felony murder by Oliver Wendell Holmes:

[I]f a man does an act with intent to commit a felony, and thereby accidentally kills another . . . [t]he fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.

HOLMES, *supra* note 175, at 57-58.

will offer greater protection to investment bankers than indigent migrant workers? That all citizens are not equal in the eyes of the law? That people with loving families are more deserving of protection than single people?<sup>214</sup> That a rational murderer should prey on the poor and unwanted? How *Payne* will promote social cohesion is difficult to fathom.<sup>215</sup>

Vengeance was discussed earlier as a rational choice factor. Vengeance, either of the escape valve variety or the hedonistic, is also a utilitarian justification of punishment.<sup>216</sup> However, as a general justification of punishment, vengeance, like all utilitarian justifications, is prone to justify too much. One might punish the innocent in the name of vengeance, even torture them. Of course the defendant in *Payne* is not innocent and one could perhaps construct a utilitarian argument against torture. Nevertheless, as discussed previously, vengeance cannot be so narrowly constrained as to justify only *Payne*.<sup>217</sup> Rather, if one accepts vengeance as a justification, then one must be willing to tolerate a much greater incidence of capital punishment.

One could further chip away at vengeance as a justification of *Payne* by pointing out that the family will not always desire vengeance, given that many consider it a base and morally objectionable emotion, to be offset by the virtues of mercy and compassion.<sup>218</sup> One could also attempt to show less objectionable ways of channeling social and individual anger than capital punishment.<sup>219</sup> Or one could argue that, on balance, utility favors punishment justified on nonvengeance grounds if only because it creates a more humane society, and that there are utilitarian benefits to such a society.

But such arguments are largely beside the point. The main difficulty

214. For an argument that punishment based on victim impact evidence violates the equal protection clause, see Willmott, *supra* note 13.

215. One might argue that the Court is sending the message that victims are not "valueless fungibles," but unique human beings. *Payne v. Tennessee*, 111 S. Ct. 2597, 2615 (1991) (Souter, J., concurring). But, as noted, that much is already known to all and true of all victims. *Id.* at 2631 (Stevens, J., dissenting). Thus, it does not explain the protection that *Payne* affords to certain victims to the exclusion of others.

216. See *supra* notes 175-76 and accompanying text.

217. See *supra* notes 177-78 and accompanying text.

218. See *supra* note 178-79.

219. Cf. Howard C. Rubel, *Victim Participation in Sentencing Proceedings*, 28 CRIM. L. Q. 226, 242 (1986) (arguing in favor of offering victims an opportunity to participate in the sentencing process, and affording them a more effective means of venting their anger and frustration).

with vengeance, and indeed with *Payne*, is that it violates cherished moral principles. There are limits to how far one may be treated as an end. In our society, people have rights.<sup>220</sup> Utilitarian theories, and *Payne*, fail to take these rights seriously.<sup>221</sup>

Of course rights are not absolute. Even the right to life may be overcome. Otherwise there would be no justified killing in self-defense, no war, and no capital punishment.<sup>222</sup> The argument here, however, is that the utilitarian or consequential gains do not sanction the death penalty. The gains are either too small (as with deterrence and incapacitation) or not of sufficient moral worth to override such a fundamental right as the right to life (as with vengeance).

One often suggested justification for overriding the right to life and imposing capital punishment is that a murderer, in violating the rights of another, forfeits his own right to life.<sup>223</sup> But to return to our hypothetical, both D1<sup>224</sup> and D2 committed murder and violated the rights of another. Thus either both have forfeited their right to life, or neither has. If both have, then execute both. To punish only D1 in the name of forfeiture is to claim that D1 forfeits his right to life not for violating another's right to life—for murder—but rather for causing harmful consequences. Thus, D1's right to life is trumped by consequentialist concerns.

But prisoners' rights are not so easily compromised. One cannot do with a prisoner—even a murderer—as one wills.<sup>225</sup> That much is guaranteed by the Fourteenth Amendment. For instance, in the same term it decided *Payne*, the Supreme Court declared: “[W]e have no doubt” prisoners possess “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”<sup>226</sup>

Similarly, the Eighth Amendment, in proscribing cruel and unusual

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220. In the stirring words of two prominent and ideologically disparate philosophers: “Each person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override.” RAWLS, *supra* note 169, at 3. “Individuals have rights and there are things no person or group may do to them [without violating their rights].” ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974).

221. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

222. Nor would there be abortion, assuming the fetus is either a life or a potential life with a right to life.

223. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 172 at 400-01 (Peter Laslett ed., 2d ed. 1970). For a discussion and critique of the notion of forfeiture of rights as a basis for capital punishment generally, see BEDAU, *supra* note 15, at 12-15, 55-59.

224. The argument applies equally to D3, but for the sake of simplicity in explanation I refer only to D1, not D1 and D3.

225. See *supra* note 158 and accompanying text.

226. *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (holding State's procedures in administering medication sufficient to satisfy due process clause).

punishment, also limits what the State may do to criminals.<sup>227</sup> And whether the punishment in *Payne* is cruel and unusual is precisely the issue. A punishment without moral justification is cruel. One that compromises the right to life to secure negligible utilitarian gains or to appease another's appetite for vengeance is both cruel and unusual—cruel because morally unjustified, and unusual because our society is not in the practice of trading human lives for meager utilitarian gains. The utilitarian-vengeance benefit of executing a murderer for unforeseen harm to the victim is nothing compared to the benefit of appropriating his organs to save the lives of five needy people. But surely one would not tolerate or condone as a just punishment the forced donation of a murderer's organs. How then can one justify *Payne* on vengeance-utilitarian grounds?

Even were one to concede that a murderer gives up his right to life, thereby providing the State the right to impose capital punishment, would the State be right to do so under *Payne*? The taking of life based on consequences and for slight utilitarian gains is inconsistent with the importance that our society and the Court places on the preservation<sup>228</sup> and sanctity of human life.<sup>229</sup>

The State's interest in life is manifested in a variety of ways: differential treatment afforded capital punishment, efforts to prevent suicide,<sup>230</sup> statutes restricting abortion,<sup>231</sup> antipathy to wrongful life and birth suits,<sup>232</sup> and opposition to right to die initiatives and living wills.<sup>233</sup> However, the interest is not absolute and may be overridden by individual interests,<sup>234</sup> including autonomy,<sup>235</sup> privacy,<sup>236</sup> and liberty.<sup>237</sup> But

227. U.S. CONST. amend. VII, § 1.

228. In *Cruzan v. Director, Mo. Dep't. of Health*, 110 S. Ct. 2841 (1990), the Court stated that the State "relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest." *Id.* at 2852. See also Phillip G. Peters, Jr., *The State's Interest in Preservation of Life: From Quinlan to Cruzan*, 50 OHIO ST. L.J. 891 (1989).

229. "The State's interest in life embraces two separate concerns: an interest in the prolongation of the life of the individual patient and an interest in the sanctity of life itself." *Cruzan v. Harmon*, 760 S.W.2d 408, 419 (Mo. 1988) (en banc), *aff'd*, *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990). See also *infra* note 234.

230. *E.g.*, *Superintendent of Belchertwon State School v. Saikwicz*, 370 N.E.2d 417, 425 (Mass. 1977).

231. *E.g.*, MO. REV. STAT. § 188.010-220 (1986).

232. *E.g.*, MO. REV. STAT. § 188.130 (1986).

233. *E.g.*, MO. REV. STAT. § 459.010-055 (1986). See also Gregory Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737 (1987); Peters, *supra* note 228 *passim*.

234. See *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976).

our legal system does not sacrifice the State's interest in life for minimal utilitarian gains. Indeed, one often-cited reason opposing suicide and right-to-die actions is that toleration of suicide, withholding medical treatment and allowing voluntary euthanasia may lead us down a slippery slope to *involuntary* withholding of treatment based on social costs and involuntary active "euthanasia" of those deemed to be social liabilities.<sup>238</sup>

In sum, even if the State had the moral right to take life under *Payne*, it arguably would not be right to do so—at least by the Court's own

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"[T]he State's interest [in the preservation and sanctity of life] *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest." *Id.* at 664. In practice, at least prior to *Cruzan*, the interests of the patient in refusing medical treatment were deemed to outweigh State interests. Courts permitted not only terminally ill but nonterminally ill patients to refuse medical treatment, even though in some instances the treatment would have returned the patient to reasonably good health. *E.g.*, *Commissioner of Correction v. Myers*, 399 N.E.2d 452, 458 (Mass. 1979) (holding that the right to privacy from invasion caused by hemodialysis outweighs the State interest in preservation of life, even though not in prison control). Patients were also allowed to refuse less invasive treatment. *Peters*, *supra* note 228, at 897.

The Supreme Court's *Cruzan* decision, however, breathes new life into what was a nearly moribund State interest. In *Cruzan*, the Court acknowledged that a patient has a "liberty interest in refusing unwanted medical treatment" under the Due Process Clause of the Fourteenth Amendment. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. at 2851. *Cruzan* explicitly rejected the right to privacy in favor of a liberty interest as the basis for an individual's right to refuse treatment. *Id.* at 2851 n.7. But that interest must be balanced against the relevant state interests, including the protection and preservation of human life. *Id.* at 2851-52. Further, the Court held that a state may refuse to consider the quality of the individual's life, and "simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." *Id.* at 2853. While not explicitly endorsing a sanctity of life principle, the Court's rejection of quality of life considerations achieves the same end in that, as Judge Robertson noted, "[t]he state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality." *Cruzan v. Harmon*, 760 S.W.2d 408, 419 (Mo. 1988) (en banc), *aff'd*, *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990).

235. For a thorough discussion of the preference for autonomy, see *Peters*, *supra* note 228, at 930-33.

236. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that a woman's right to privacy, though not absolute or "unqualified," outweighs State interest in "protecting potential life").

237. See *Cruzan*, 110 S. Ct. at 2851-52. In *Cruzan*, the Court assumed for the purposes of the case that a competent person had a "constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.* at 2852. While it noted that the "logic of the cases" involving such treatment would implicate a liberty interest, this interest would have to be weighed against the state interests in preservation of life. *Id.*

238. *Peters*, *supra* note 228, at 961-75.

enunciated moral principles.<sup>239</sup>

## VI. CONCLUSION

None of the arguments considered provides a moral justification for the substantive thesis of *Payne*. Neither the retributivist nor utilitarian arguments justify the imposition of capital punishment for unforeseen harm measured by the personal characteristics of the victim and impact on the victim's family. That a rational person would not consent to such a punishment *ex ante* and under conditions of uncertainty as to one's own status as victim or murderer suggests that the Court's decision is misguided. Furthermore, to impose the death penalty for negligible utilitarian gains violates moral principles deeply rooted in our society and championed by the Court itself.

At issue is a particular act of punishment. The arguments are not intended to challenge, nor do they challenge, all capital punishment, all consequence-based punishment, all unforeseen or unforeseeable consequence-based punishment or all punishment based on victim harm. Some capital punishment may be justifiable.<sup>240</sup> Clearly, some consequence-based punishment is permissible. For example, fixing punishment in accordance with the harm caused is not objectionable where the actor possesses the requisite *mens rea* with respect to that harm. Similarly, punishment may be justified if the consequences for which one is to be punished are statutorily defined in advance and foreseeable. Strict liability offenses are arguably justified where there are potential gains and the punishment is limited to relatively minor civil penalties. Victim harm, one type of consequence, will generally be relevant in those instances where consequences are relevant.<sup>241</sup>

The ramifications of the arguments are several. One conclusion is that the instances of morally justified life-taking for consequentialist reasons are limited, and execution on the basis of unforeseen or unforeseeable consequences is not one of those instances. An alternate conclusion, arguments of philosophers and judges notwithstanding, is that rights are

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239. This article does not endorse the "sanctity of life" principle—at least if the principle is understood to place an infinite value on human life or to prohibit all utilitarian trade-offs whatsoever. The point is simply that *Payne* is inconsistent with that principle (and the State's interest in preservation of life).

240. This article takes no position on this issue.

241. In addition, there may be circumstances where victim harm, or a particular kind of victim harm, is especially relevant.



overrated and that human life may be traded for consequentialist reasons, at least more often than is the current practice. This conclusion could in turn influence one's position on other sensitive issues such as abortion, wrongful life, withholding of treatment and euthanasia.

Either way, the impact of *Payne* is likely to be limited. *Payne* does not sanction consequential life-taking of the innocent, or even of those who cause great harm to the victim, the victim's family and society. One must first commit murder. This provides a clear line to distinguish *Payne* from other consequence-based killing, and will almost assuredly prevent the extension of consequentialist reasoning to other areas such as the right to die.<sup>242</sup>

On a less theoretical and more practical level, the impact of *Payne* will most likely also be limited. In many instances, the murderer will be subject to the death penalty even without the additional victim impact evidence. Further, such evidence will often constitute part of the circumstances of the crime and hence be imparted to the jury during the guilt phase of the trial. Often the defendant will be aware of the potential harm and, thus, culpable even under the *Booth* Court's recklessness standard.<sup>243</sup> Nevertheless, as Justice Stevens observed in his *Payne* dissent: "In reaching our decision today . . . we should not be concerned with the cases in which victim impact evidence will not make a difference. We should be concerned instead with the cases in which it will make a difference."<sup>244</sup> To the unfortunate defendant whose victim happens to possess the right combination of socially valuable assets and a loving family, *Payne* will make all the difference in the world.

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242. Of potentially wider theoretical significance is the Court's sanctioning of a substantive penal theory that imposes punishment on the basis of both subjective guilt and objective harm, even where the latter is unforeseen and unforeseeable.

243. They would not be liable for capital punishment if the standard was intent, as argued here.

244. *Payne v. Tennessee*, 111 S. Ct. 2597, 2630 (1991) (Stevens, J., dissenting).