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Payne v. Tennessee: The Arbitrary Imposition of the Death Penalty and a Review of Florida Case Law Since: Booth v. Maryland

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Abstract

In *Booth v. Maryland,1* the United States Supreme Court decided that evidence relating to a victim's character and the extent of harm caused to the victim's family and community was inadmissible to determine whether a defendant convicted of a capital crime should be put to death. The majority in *Booth,* while empathizing with the grief of a victim's family, recognized the potential danger such evidence has on a jury to sentence defendants to death based on such arbitrary factors as what kind of person the victim was and the unforeseeable harm the victim's death had on others.

KEYWORDS: opinions, facts, victims

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I. INTRODUCTION

In *Booth v. Maryland*,[1] the United States Supreme Court decided that evidence relating to a victim's character and the extent of harm caused to the victim's family and community was inadmissible to deter-

1. 482 U.S. 496 (1987), *overruled in part by* Payne v. Tennessee, 111 S. Ct. 2597 (1991) (overruling *Booth* as to a victim's character and the extent of harm to the victim's family and community).

mine whether a defendant convicted of a capital crime should be put to death. The majority in *Booth*, while empathizing with the grief of a victim's family, recognized the potential danger such evidence has on a jury to sentence defendants to death based on such arbitrary factors as what kind of person the victim was and the unforeseeable harm the victim's death had on others. The Court held that the Eighth Amendment[2] required a per se rule against victim impact evidence because it could lead to the imposition of death for "arbitrary and capricious" reasons which are not relevant to the defendant's blameworthiness.[3] Subsequently, the Court applied the same reasoning to prevent prosecutors from presenting similar victim impact evidence in *South Carolina v. Gathers*.[4]

However, in *Payne v. Tennessee*,[5] under the lead of Chief Justice Rehnquist, the Court overruled *Gathers* and *Booth*, and determined that victim impact evidence was relevant and necessary to assess the defendant's "moral culpability and blameworthiness."[6] In effect, the Court held that victims' families and prosecutors should be able to tell the jury at sentencing that defendants deserve the death penalty because their victim was "a religious man and registered voter,"[7] or the victim's family "received over one thousand sympathy cards, some from total strangers."[8]

Payne v. Tennessee is significant for a number of reasons. First, considering the current conservative judiciary, the return of victim impact statements bodes ill for opponents of capital punishment; the result is the potential for a significant rise in the number of death sentences. Second, *Payne* creates the risk that capital sentencing will turn into "a kind of 'moral postmortem' on the relative worth of the deceased,"[9] and, strategically, defendants may be compelled to wage their own offensive against the presumed good name of the victim, set-

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

3. *Booth*, 482 U.S. at 503.

4. 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

5. 111 S. Ct. 2597 (1991).

6. *Id.* at 2608.

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

8. *Booth*, 482 U.S. at 499, n.3.

9. Mark Hansen, *Limiting Death Row Appeals — Final Justice*, 78 A.B.A. J. 64, 67 (1992) (quoting unnamed experts and death-penalty litigators).

ting the stage for a drawn out mini-trial into the victim's character. Finally, defendants may be sentenced to death over life imprisonment based primarily on the relative social worth and popularity of their victims and juries may be swayed to impose death based on the eloquence of family members' and their testimonials of grief rather than the defendant's character and the circumstances of the crime.

This Comment analyses the arguments of the Court in *Payne* and concludes that the Court decided *Payne* wrongly because evidence relating to a victim's character and the extent of harm to the victim's family is legally irrelevant and creates an impermissible risk of imposing the death sentence in an "arbitrary and capricious" fashion.[10] Furthermore, this Comment explores an alternative view of *Payne* and suggests that the Court could have avoided overruling the sound holdings in *Booth* and *Gathers* by affirming the Tennessee Supreme Court's death sentence based on the relevant evidence directly relating to the "circumstances of the crime"[11] and under harmless error analysis. Additionally, this Comment will review relevant Florida case law developed since *Booth* and *Gathers* and discuss the effect *Payne* has had on Florida's standard of review for use of victim impact statements at a capital trial.

II. *PAYNE V. TENNESSEE*

A. *Facts*

On Saturday, June 27, 1987, Pervis Payne ("Payne") visited the upstairs apartment of his girlfriend with the expectation of her return from her mother's home in Arkansas.[12] Finding her not home, Payne returned several times throughout the day, and on one visit left his overnight bag in the hall. In between visits, Payne spent much of the day drinking beer and injecting cocaine with a friend while driving around town.

Later that afternoon, Payne returned to the apartment and, finding his girlfriend not home, went across the hall to the apartment of 28-year-old Charisse Christopher and her two young children, two-year-old daughter Lacie and three-year-old son Nicholas.[13] Desiring

10. *See Booth*, 482 U.S. at 503.
11. *Id.* at 507 n.10.
12. *Id.* at 2601.
13. *Id.*

sex, Payne became violent after Charisse thwarted his advances, and a struggle ensued. Using a butcher knife from the kitchen, Payne brutally attacked the family and murdered Charisse and Lacie — Charisse died as a result of eighty-four wounds to the abdomen, arms, and hands, while Lacie sustained mortal wounds to the chest, head, abdomen, and back. Miraculously, Nicholas survived despite numerous wounds that penetrated his entire body.

During the struggle, the neighbor in the apartment below called the police after hearing screams from the Christopher apartment.[14] As the first officer arrived, Payne was descending the stairs covered with blood. Payne first stated to the officer that he was the "complainant" and then suddenly struck the officer with his overnight bag and fled. He was arrested a day later hiding in a friend's attic, claiming: "Man, I ain't killed no woman."[15]

B. *Procedural Background*

The Tennessee trial court convicted Payne on two counts of first degree murder for Charisse and Lacie, and one count of assault with attempt to commit murder in the first degree for Nicholas.[16] During the sentencing phase of the trial, Payne presented the testimony of four witnesses in an effort to mitigate punishment.[17] Payne's parents testified that Payne was a "good son" with no prior criminal or arrest record or "history with alcohol or drug abuse"; Payne's girlfriend testified that she met Payne at church and that he was "a very caring person" who "devoted much time and attention to her three children" and believed he was incapable of having committed such crimes; and Dr. Huston, who testified as an expert in "criminal court evaluation work," stated that Payne was " 'mentally handicapped' " based on IQ test scores and was "the most polite person he had ever met."[18]

The State presented the testimony of Charisse's mother who described how Nicholas had been traumatized by the loss of his mother and sister.[19] During closing argument, the prosecutor, arguing for the

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14. *Id.*

15. *Payne*, 111 S. Ct. at 2602.

16. *Id.* at 2601.

17. *Id.* at 2602. Payne's mother, father, and girlfriend, and Dr. John T. Huston, a clinical psychologist, all testified on Payne's behalf. *Id.*

18. *Id.* at 2602-2603.

19. *Payne*, 111 S. Ct. at 2603. Charisse's mother testified:

[Nicholas] cries for his mom. He doesn't seem to understand why she

death penalty, spoke of the character of the victims and the continuing effects their murder had on Nicholas and the families involved.[20]

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doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him yes. He says, I'm worried about Lacie.

Id.

20. *Id.* During closing argument and rebuttal, the prosecutor stated:

But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.

There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer . . . .

You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives . . . .

No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody there to take her to her high school prom. And there won't be anybody there—there won't be his mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby.

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

The jury sentenced Payne to death on each count of murder.[21] Payne appealed, contending that the grandmother's testimony and the prosecutor's closing argument were constitutionally impermissible and conflicted directly with the Supreme Court's holdings in *Booth*[22] and *Gathers*,[23] respectively. The majority in both cases[24] held that the inclusion of victim impact statements at capital sentencing created an unacceptable risk that the jury may impose the death penalty in an "arbitrary and capricious" manner in violation of the Eighth Amendment's proscription against cruel and unusual punishment.[25]

Nevertheless, the Supreme Court of Tennessee upheld Payne's conviction and death sentence, stating that the grandmother's testimony, while " 'technically irrelevant,'. . . did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty, and was harmless beyond a reasonable doubt.' "[26] The Tennessee Su-

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Id.

21. *Id.* at 2601. Payne was sentenced also to 30 years for the assault with attempt to commit murder on Nicholas Christopher. *Id.*

22. The trial court in *Booth* convicted the defendant on two counts of first degree murder and sentenced him to die for the stabbing death of one of his victims. Booth v. Maryland, 482 U.S. 496, 501 (1987), *overruled in part by* Payne v. Tennessee, 111 S. Ct. 2597 (1991). The Court held that the Maryland statute requiring a victim impact statement (describing the emotional impact on the victims' family, the character of the victims, and the family members' opinion on the crimes and character of the accused) in a presentence report used by the jury during the sentencing phase of a capital murder trial, violated the defendant's Eighth Amendment rights. *Id.* at 498-509.

23. In *Gathers*, the defendant was convicted of first degree murder and sentenced to death for beating and stabbing a victim to death in a park. Gathers v. South Carolina, 490 U.S. 805, 807-808 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991). During sentencing, the prosecutor presented no evidence other than comments about the victim's character as " 'a religious man and a registered voter.' " *Id.* at 810 (quoting State v. Gathers, 369 S.E.2d 140, 144 (S.C. 1988)). The Court reasoned that statements about a victim's character posed the same risk of arbitrary sentencing whether the source is the victim's family or the prosecutor; therefore, the Court held that evidence of victim character presented by the prosecution during capital sentencing violated the Eighth Amendment. *Id.* at 810-812.

24. In *Booth*, Justice Powell delivered the opinion of the Court, which Justices Brennan, Marshall, Blackmun and Stevens joined. *Booth*, 482 U.S. at 497. In *Gathers*, Justice Brennan delivered the opinion of the Court, in which Justices White, Marshall, Blackmun, and Stevens joined. *Gathers*, 490 U.S. at 805-806. Justice White filed a brief concurring opinion where he stated that unless *Booth* was to be overruled, he would join the majority. *Id.* at 812 (White, J. concurring).

25. *Booth*, 482 U.S. at 503-509; *Gathers*, 490 U.S. at 810-812.

26. *Payne*, 111 S. Ct. at 2604 (quoting State v. Payne, 791 S.W.2d 10, 18 (Tenn. 1990)).

preme court reasoned further that the prosecutor's comments concerning the victims' personal characteristics and the emotional harm to the families involved were " 'relevant to [Payne's] personal responsibility and moral guilt' " and not prejudicial under harmless error analysis.[27]

C. *United States Supreme Court Opinion*

1. Majority Opinion

Chief Justice Rehnquist, writing for the majority,[28] began the *Payne* opinion by attacking what the Court believed were the two main premises underlying the holdings in *Booth* and *Gathers*: (1) evidence relating to a victim's character or the effect of the crime on a victim's family does not reflect on a victim's "blameworthiness" and (2) only evidence that is relevant to "blameworthiness" is permissible at the sentencing phase of a capital trial.[29] The Court, nonetheless, claimed that "an assessment of harm caused by a defendant" has always been of relevant concern throughout the history of the criminal law, and although the principles that shape punishments to fit crimes have varied, the sentencing authority has always possessed great latitude in considering relevant evidence.[30] Along these lines, the Court argued that merely because victim impact statements are "of recent origin, this fact hardly renders [them] . . . unconstitutional."[31]

The Court next explained that the *Booth* majority simply misread

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27. *Id.*

28. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, O'Connor, Scalia, Kennedy and Souter joined. *Payne*, 111 S. Ct. at 2601. Justice O'Connor filed a concurring opinion, in which Justices White and Kennedy joined. *Id.* at 2611 (O'Connor, J., concurring). Justice Scalia filed a concurring opinion, in part II of which Justices O'Connor and Kennedy joined. *Id.* at 2613 (Scalia, J., dissenting). Justice Souter filed a concurring opinion, in which Justice Kennedy joined. *Id.* at 2614 (Souter, J., concurring). Justice Marshall and Stevens both filed dissenting opinions, in which Justice Blackmun joined. *Payne*, 111 S. Ct. at 2619, 2625 (Marshall, Stevens, and Blackmun, JJ., dissenting).

29. *Id.* at 2605. Evidence about the victim and victim's family were "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," *Booth*, 482 U.S. at 505; therefore, this evidence has no bearing on the "blameworthiness of a particular defendant." *Id.* at 504.

30. *Payne*, 111 S. Ct. at 2605-2606.

31. *Id.* at 2606; *see, e.g.*, Williams v. Florida, 399 U.S. 78 (1970) (upholding the constitutionality of a Florida notice-of-alibi rule, similar to recent enactments by at least 15 other states).

the holding in *Woodson v. North Carolina*,[32] the principal case on which the majority relied.[33] The Court asserted that *Woodson* only addressed the issue that mitigating evidence about the defendant's life and character must not be excluded during the sentencing phase of a capital trial[34] because such evidence necessarily shows the defendant as " 'a uniquely individual human being.' "[35] "The language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received."[36] Therefore, this "misreading of precedent in *Booth* has . . . unfairly weighted the scales in a capital trial"[37] in favor of the defendant and at the expense of the victim, the victim's family, and the community. This argument presumes that a capital trial is a level playing field where each side has equal resources and stakes in the outcome. However, nothing could be further from the truth: the defendant is fighting for his life against the state and all it potentially limitless resources in a criminal prosecution.

The Court also addressed the concerns of the *Booth* majority that admitting evidence of the victim's character during the sentencing phase would create a mini-trial on the victim's character and divert the attention of the jury away from the defendant and the circumstances of

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32. 428 U.S 280 (1976).

33. *Payne*, 111 S. Ct. at 2606-2607.

34. *Id.* at 2607. *Woodson* asserted that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . *requires* consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (emphasis added).

35. *Payne*, 111 S. Ct. at 2606-2607 (quoting *Booth*, 482 U.S. at 504 (quoting *Woodson*, 428 U.S. at 304)). The Court in *Woodson* held that a North Carolina mandatory death penalty statute violated the Eighth and Fourteenth Amendments because:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson, 428 U.S. at 304.

36. *Payne*, 111 S. Ct. at 2607 (emphasis original).

37. *Id.*

the crime.[38] In addition, the Court considered the *Booth* majority's argument that juries would dole out the death penalty based on the comparative worth of the individual to the community.[39]

The Court first explained that while risk of a mini-trial exists, such evidence about the victim's character is likely to be before the jury during the guilt phase regardless, and "for tactical reasons, it might not be prudent for the defense to rebut victim impact evidence . . . ."[40] Second, evidence of a victim's character is not offered to show "comparative judgments" of a victim's worth to society,[41] but is "designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."[42] While this reasoning may explain the purpose of victim impact evidence, it fails to address the obvious issue: the effect such evidence has on a jury. Common sense and logic about human nature dictates that a jury would be less inclined to dole out harsh punishment if, for example, the victim was a convicted felon as opposed to a priest.

Due to the Court's inherent criterion in both the *Booth* and *Gathers* decisions, the *Payne* majority expressly overruled the holdings in *Booth* and *Gathers* because the extent of harm to the victim, the victim's family or community is necessary "to assess meaningfully the de-

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38. *Id.* The *Booth* majority noted:

> [T]he defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family. The prospect of a 'mini-trial' on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime.

Booth, 482 U.S. at 507.

39. *Payne*, 111 S. Ct. at 2607; *see also id.* at 2620, 2626 (Marshall and Stevens, JJ., dissenting). The *Booth* Court stressed that there exists no "justification for permitting [imposition of the death penalty] . . . to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." *Booth*, 482 U.S. at 506. In footnote eight, the Court provided: "We 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." *Id.* at 506 n.8.

40. *Payne*, 111 S. Ct. at 2607. The Court borrows the *Booth* majority's opinion that raises the question of "the strategic risks of attacking the victim's character before the jury" during the sentencing phase of the trial. *Booth*, 482 U.S. at 507.

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

42. *Id.* (emphasis in the original).

fendant's moral culpability and blameworthiness."[43] The Court argued that proscribing victim impact statements that relate to the extent of harm to a murdered victim's family and community "deprive[s] the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder."[44] Thus, the Court agreed with the Supreme Court of Tennessee that the testimony of Nicholas' grandmother and the closing comments by the prosecutor illustrated the extent of the harm caused by Payne, and "that there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."[45]

The Court further justified the introduction of victim impact evidence by asserting the high deference afforded the states in matters relating to crimes against state law, punishments, and procedures.[46] In spite of the holding in *Booth*, the Court noted, without any justification, that victim impact statements serve a "legitimate purpose" of the states,[47] and do not lead to an arbitrary imposition of the death penalty in violation of the Eighth Amendment.[48]

In explaining its criticism of *Booth* and *Gathers* and enumerating

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43. *Id.* at 2608. In a separate footnote, the limitations to the scope of *Payne*'s overruling of *Booth* and *Gathers* states that:

> Our holding today is limited to . . . evidence and argument relating to the victim and the impact of the victim's death on the victim's family . . . . *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

Id. at 2611 n.2.

44. *Id.* at 2608.

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

46. *Id.* at 2607-2608.

47. *Id.* at 2608; *see also Booth*, 482 U.S. at 517 (White, J., dissenting). Justice White stated:

> [T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, *see, e.g.*, Eddings v. Oklahoma, 455 U.S. 104 (1982), 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.

Id.

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

an apparent new standard for *stare decisis*,[49] the Court explained that while *stare decisis* is the "preferred course,"[50] it is less so in "constitutional cases" and in matters "involving procedural and evidentiary rules" where reliance interests are not at their "acme."[51] The Court intimated that merely because *Booth* and *Gathers* were decided by "the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions,"[52] future 5-4 decisions of the Court are ripe for reconsideration and review. The Court attempted to rebut the dissenters' arguments about *stare decisis* by citing reference to thirty-three cases overruled in whole or part during the last twenty terms of the Court.[53]

2. Concurring Opinions

Justices O'Connor, Scalia and Souter each filed concurring opinions in *Payne*[54] and raised their own distinct arguments in favor of victim impact statements in capital offense trials and for overruling *Booth* and *Gathers*.[55] Specifically, Justice O'Connor argued that the states are

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49. *See, e.g.*, David O. Stewart, *Four Spirited Dissenters*, 77 A.B.A. J. 40 (1991).

50. *Payne*, 111 S. Ct. at 2609. "*Stare decisis* . . . promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (emphasis original).

51. *Id.* at 2610. The Court clarified that *stare decisis* is not "an inexorable command," especially in constitutional cases where " 'correction through legislative action is practically impossible' " (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)); furthermore, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ." *Payne*, 111 S. Ct. at 2610 (emphasis original).

52. *Id.* at 2610-2611.

53. *Id.* at 2610-2611 n.1. However, the Court failed to note that "the average age of the overruled precedents in those cases was 40 years, while *Payne* overruled a 2-year-old precedent." Stewart, *supra* note 49, at 41.

54. In *Booth*, Justice White filed a dissenting opinion, in which Chief Justice Rehnquist and Justices O'Connor and Scalia joined. *Booth*, 482 U.S. at 515 (White, J., dissenting). Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justices White and O'Connor joined. *Id.* at 519 (Scalia, J. dissenting).

In *Gathers*, Justice O'Connor filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Kennedy joined. *Gathers*, 490 U.S. at 812 (O'Connor, J., dissenting). Justice Scalia filed a separate dissenting opinion. *Id.* at 823 (Scalia, J., dissenting).

55. *Id.* at 2611-2619 (O'Connor, Scalia, and Souter, JJ., concurring).

free to justly determine whether victim impact statements should be allowed as relevant evidence in a sentencing proceeding to show the extent of harm to the victim's family and community.[56] Juries should be allowed to see " 'a quick glimpse' " of the character of victims to remind them of their uniqueness as human beings.[57]

Starting with the premise that victim impact statements are "potentially relevant,"[58] Justice O'Connor asserted that the Eighth Amendment narrowly limits punishments which are " 'either inherently cruel or which so offend the moral consensus of this society as to be deemed 'cruel and unusual.' "[59] Victim impact statements, therefore, do not implicate Eighth Amendment protection primarily because societal consensus advocates their use, given the recent rise in victim impact legislation.[60]

Also, according to the concurrence, due process under the Fourteenth Amendment affords defendants "appropriate relief" against the threat of arbitrary sentencing.[61] Furthermore, the statements brought before the jury in *Payne* did not violate due process because Charisse's mother's "brief statement did not inflame their passions more than did the facts of the crime,"[62] nor did the prosecutor's comments, as the jury had already seen a videotape of the murder scene.[63]

In contrast, Justice Scalia, in his concurring opinion, reiterated his fundamental opposition to the Court's previous pronouncement that defendants are constitutionally entitled to introduce all relevant mitigating evidence during sentencing for a capital offense.[64] However, Justice Scalia went a step further by stating that even if this precedent did not exist or was overruled,[65] he would still affirm *Payne* because the Eighth

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

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

58. *Id.*

59. *Id.* at 2611-2612 (quoting South Carolina v. Gathers, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting)).

60. *Payne*, 111 S. Ct. at 2612. However, Justice O'Connor pointed out that victim impact statements can be excluded and are subject to appellate review when they reach the level of "unduly inflammable." *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.* at 2613 (Scalia, J., concurring).

65. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 876-877 (1982) (state statute may not preclude the introduction of any relevant mitigating evidence for defendant at capital sentencing).

Amendment provides adequate latitude for society to decide "what is a crime and what constitutes aggravation and mitigation of a crime."[66] Evidently, Justice Scalia sees no inherent problem in a capital sentencing proceeding where the defendant is prohibited by state law to present mitigating evidence but the state is permitted to introduce victim impact evidence.

Justice Scalia also advanced his own views on *stare decisis*. He began by quoting dissenting Justice Marshall's own writings on the subject: " '[*Stare decisis*] is not 'an imprisonment of reason.' "[67] By declaring that *Booth* "defied reason" and "harms our criminal justice system and is egregiously wrong,"[68] Justice Scalia concluded his opinion with a claim that *Booth* itself defied the principles underlying *stare decisis*:

> A decision of this Court [i.e., *Booth*] which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land—such a decision, no less than an explicit overruling, should be approached with great caution. It was, I suggest, *Booth*, and not today's decision, that compromised the fundamental values underlying the doctrine of *stare decisis*.[69]

Likewise, while not one of the original "spirited" dissenters in *Booth* and *Gathers*,[70] Justice Souter concurred with the majority by arguing that *Booth* and *Gathers* were properly overruled because the Eighth Amendment erects no per se bar against victim impact state-

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66. *Payne*, 111 S. Ct. at 2613 (Scalia, J., concurring). Presumably, Justice Scalia does not put much stock in the majority's argument that victim impact statements are necessary for a fair and balanced proceeding. *See id.* at 2607 (the exclusion of victim impact evidence has "unfairly weighted the scales in a capital trial").

67. *Id.* at 2613 (quoting from Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (quoting United States v. International Boxing Club of New York, Inc., 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting)).

68. *Id.*

69. *Id.* at 2614 (emphasis original). The concurrence explained that *stare decisis* "is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts. It is hard to have a genuine regard for *stare decisis* without honoring that more general principle as well." *Id.* at 2613-2614 (emphasis original).

70. South Carolina v. Gathers, 490 U.S. 805 (1989) (Rehnquist, C.J., Kennedy, O'Connor, and Scalia, JJ., dissenting); Booth v. Maryland, 482 U.S. 496, 497 (1987) (Rehnquist, C.J., O'Connor, Scalia, and White, JJ., dissenting).

ments.[71] Justice Souter noted that a victim's uniqueness necessarily includes a group of people close to the victim who are harmed as a result of the murderer's criminal act, and it is that foreseeability that makes their harm morally relevant to punishment.[72] He further echoed the fear of the majority that excluding such evidence would create an unbalanced proceeding, given the defendant's right to present all relevant mitigating evidence.[73]

Justice Souter asserted that *Booth* was decided wrongly not merely on constitutional grounds, but on the basis that it created an "unworkable standard" for admissibility of relevant evidence and undermined "individualized sentencing" for capital defendants.[74] The concurrence explained that evidence relating to a victim's character and the emotional harm to the victim's family, in most cases, will be brought out during the guilt phase of the trial and, consequently, already will be in the minds of the jury during sentencing.[75] In fact, by strictly adhering to *Booth*, courts would be compelled to exclude such evidence as irrelevant and unfairly prejudicial, thereby depriving jurors of "details of context" and requiring states to impanel a new sentencing jury.[76] This result is an impractical evidentiary barrier and an unwarranted imposition on the states.[77] However, this analysis by Justice Souter undermines his argument: if a victim's character and the emotional harm to the victim's family is already in the minds of the jury during sentencing, why does it bear repeating through testimony from the victim's family or the prosecutor? In fact, the repititioned cumulative effect is what creates the impermissible risk of an arbitrary or capricious sentencing.

For Justice Souter, this "unresolved tension between evidentiary standards"[78] at the guilt and sentencing phase provided " 'special justification' "[79] to thwart *stare decisis* and overrule precedent: "*Booth* promises more than it can deliver" which is "a sentencing determina-

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71. *Payne*, 111 S. Ct. at 2614 (Souter, J., concurring).
72. *Id.* at 2615.
73. *Id.* at 2616; *see also* Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting).
74. *Payne*, 111 S. Ct. at 2616 (Souter, J., concurring).
75. *Id.* at 2617.
76. *Id.*
77. *Id.*
78. *Id.* at 2618.
79. *Payne*, 111 S. Ct. at 2618 (Souter, J., concurring) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

tion free from the consideration of facts unknown to the defendant and irrelevant to his decision to kill."[80] With contorted logic, Justice Souter concluded by arguing that *Booth*, not *Payne*, "create[s] a risk of arbitrary results."[81]

3. Dissenting Opinions

Justice Marshall, in his last opinion as a Supreme Court Justice, dissented from the majority in *Payne* by arguing primarily the principle of stare decisis. Justice Marshall harshly criticized the present Court's "staggering" and "radical" approach to subverting constitutional precedent: "Power, not reason, is the new currency of this Court's decisionmaking."[82] "The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case."[83] By exposing the Court's true motivation behind *Payne*, Justice Marshall stated that *Booth* and *Gathers* were overruled not because of flawed principles, but merely because the Court's membership has changed since they were decided.[84]

Justice Marshall argued that the majority failed to present "the type of extraordinary showing that this court has historically demanded

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80. *Id.* at 2618.

81. *Id.*

82. *Id.* at 2619 (Marshall, J., dissenting). Justice Marshall is, of course, referring to the recent changes in the Court's personnel which has resulted in a staunchly conservative Supreme Court with Chief Justice Rehnquist at the helm as its primary driving force. *See* Marcia Coyle, *Complete Control: In 1990-'91, Rehnquist Was at the Helm of a Solidly Conservative Supreme Court*, NAT'L L.J., Aug. 19, 1991, at S1. The recent appointment of conservative Justice Clarence Thomas to the Supreme Court only accentuates Justice Marshall's concern. *But see* Fred Strasser and Marcia Coyle, *Still Searching for the Real Clarence Thomas*, NAT'L L.J., Sept. 30, 1991, at 26 (Clarence Thomas' endorsement of Justice Marshall's views on *stare decisis* in *Payne* and his comments that: "You simply cannot, because you have the votes, begin to change the rules.").

83. *Payne*, 111 S. Ct. at 2619 (referring to the Supreme Court of Tennessee's blatant rejection of the *Booth* and *Gathers* precedents); *see* State v. Payne, 791 S.W.2d 10, 18-19 (Tenn. 1990).

84. *Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting). After *Booth* was decided in 1987, Justice Powell resigned from the Court and was replaced by Justice Kennedy. After *Gathers* was decided in 1989, Justice Brennan resigned in 1990 and was replaced by Justice Souter. Since *Payne*, Justice Marshall has resigned and Clarence Thomas has been confirmed as Justice to the United States Supreme Court in 1991.

before overruling one of its precedents."[85] Citing the traditional bases that justify overturning precedent,[86] Justice Marshall concluded that the majority not only failed to provide such bases, but illustrated "its radical assertion that it need not even try."[87]

Justice Marshall ended his dissent by foreshadowing the demise of numerous cases decided by a 5-4 margin,[88] predicting that the Court's "short-sided strategy for effecting change in the constitutional order"[89] "invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course."[90] The result, according to Justice Marshall, undermines the authority and stature of the Court. He closed with the following remarks:

> Today's decision charts an unmistakable course. If the majority's radical reconstruction of the rules for overturning this Court's decisions is to be taken at face value . . . then the overruling of *Booth* and *Gathers* is but a preview of an even broader and more far reaching assault upon this Court's precedents. Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's 'spirited dissents' will squander the authority and the legitimacy of this Court as a protector of the powerless.[91]

Unwavering in his last stand, Justice Marshall ended his notable and distinguished service with the notion that *Payne* represents a "looking glass" through which the future direction of a predominately conservative United States Supreme Court can be predicted.[92] Only time will reveal whether his dire foreshadowings come true.

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85. *Id.* at 2621.

86. *Id.* at 2621-2622. The traditional bases are: (1) "advent of 'subsequent changes or development in the law' that undermines a decision's rationale" *id.* at 2621 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)); (2) "the need 'to bring [a decision] into agreement with experience and facts newly ascertained,' " *id.* at 2621-2622 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)); and (3) "a showing that a particular precedent has become a 'detriment to coherence and consistency in the law.' " *Id.* at 2622 (quoting *Patterson*, 491 U.S. at 173).

87. *Payne*, 111 S. Ct. at 2621 (Marshall, J., dissenting).

88. *Id.* at 2624.

89. *Id.* at 2625.

90. *Id.* at 2624.

91. *Id.* at 2625.

92. Coyle, *supra* note 82, at S1, col. 2.

In contrast, Justice Stevens' five part dissent concentrated less on *stare decisis* than on the majority's flawed reasoning and lack of judicial precedent.[93] First, Justice Stevens traced a line of decisions which supported the holdings of *Booth* and *Gathers*, and inherently discredited the use of victim impact statements in death penalty cases due to the risk of arbitrary sentencing and irrelevance.[94]

Next, Justice Stevens responded to the Court's contention that the liberal introduction of mitigating evidence for the defendant creates a "significantly imbalanced sentencing procedure" by explaining that it is based on an inaccurate conclusion and premise. "This argument is a classic *non sequitur*: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance."[95] The concurrence pointed out that whereas the defendant is allowed to introduce all relevant mitigating evidence during sentencing, the state may rebut that evidence directly, without the introduction of irrelevant evidence, i.e., victim impact statements, and may "designate any relevant conduct to be an aggravating factor."[96] Additionally, Justice Stevens correctly reminds the majority that a criminal prosecution is not premised on an "even-handed balance" between the state and the defendant; the Constitution protects individual rights and limits the disproportionate power of the state,[97] and, accordingly, rules of evidence are more favorable to the defendant.[98]

Also, Justice Stevens pointed to the two fatal flaws with victim impact statements as they pertain to the Eighth Amendment. First, evidence as to a victim's character which is not foreseen by the defendant is irrelevant to " 'personal responsibility and moral guilt.' "[99] Second, victim impact statements lead to inconsistent punishments and unbri-

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93. *See Payne*, 111 S. Ct. at 2625-2631 (Stevens, J., dissenting).

94. *See id.* at 2625-2627; *see, e.g.*, Zant v. Stephens, 462 U.S. 862, 879 (1983) (death penalty punishment requires determination of "character of the individual and circumstances of the crime"); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (Eighth Amendment requires consideration of individual defendant's character and circumstances of crime in capital sentencing); Enmund v. Florida, 458 U.S. 782, 801 (1982) (in a death penalty case, the "punishment must be tailored to . . . [the defendant's] personal responsibility and moral guilt").

95. *Payne*, 111 S. Ct. at 2627 (Stevens, J., dissenting) (emphasis original).

96. *Id.* at 2627.

97. *Id.*

98. *Id.*; *see, e.g.*, FED. R. EVID. 404(a).

99. *Payne*, 111 S. Ct. at 2628 (Stevens, J., dissenting) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

dled discretion because the quality and quantity of the evidence can only be ascertained after the crime has been committed.[100]

To justify laws that inherently take into account victim character as a mandatory factor, Justice Stevens distinguished between legislative determinations and judicial sentencing: statutes which take into account victim character act as notice to a defendant,[101] whereas general sentencing cannot foresee the character of every conceivable victim.[102] Additionally, allowing the sentencer to consider a wide range of evidence[103] excludes victim impact evidence because, much like the threat of a mini-trial on the victim's character,[104] it "distracts the sentencer from the proper focus of sentencing and encourages reliance on emotion and other arbitrary factors [which] necessarily prejudices the defendant."[105]

However, while Justice Stevens conceded that much of the victim impact evidence would have been properly admitted during the guilt phase of *Payne*, and that the jury had sufficient evidence to justify a verdict of death, the primary concern of the justices should be in cases where victim impact statements will make a difference in the verdict.[106] In addition, Justice Stevens rebutted the proposition of the majority that victims require evidence to show they are unique human beings; he stated that such a notion is obvious and a jury does not need to be reminded of that fact during a capital sentencing phase.[107] Furthermore, victim impact evidence to show unique character leads to risks of imposition of the death penalty based on the victim's perceived social worth.[108]

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100. *Id.*

101. *See id.* (explaining that there exists a rational correlation between moral culpability and foreseeable consequence). For instance, the imposition of the death penalty for assassinating the President or Vice President is consistent with the Eighth Amendment because the statutory provision supplies the criminal with notice, i.e., foreseeability. *Id.* at 2628 n.2.

102. *See id.* at 2628. "[T]he majority cites no authority for the suggestion that unforeseeable and indirect harms to a victim's family are properly considered as aggravating evidence on a case-by-case basis." *Id.* at 2628-2629.

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

104. *See Booth*, 482 U.S. at 507.

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

106. *Id.* at 2630.

107. *Id.* at 2631.

108. *Id.* ("Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black.")

Obviously disturbed by the Court's lack of judicial restraint, Justice Stevens concluded by pointing out that the majority's decision rests on "the current popularity of capital punishment" and "the political strength of the victims' rights movement,"[109] and that these factors were predominant in the Court's decision to grant certiorari, rather than the Tennessee Supreme Court's rationale.[110]

III. Discussion and Analysis

A. *Politics of Victims' Rights*

Before analyzing the Court's decision in *Payne*, a brief discussion into the background, evolution and objectives of the victims' rights movement is appropriate. This section will illustrate that the justices who decided to allow the use of victim impact statements at death penalty sentencing failed to concern themselves with these germane issues.

Since the 1960's, the victims' rights movement has grown rapidly, undergoing both numerous changes and shifts of focus. These transformations have ranged from compensation programs concentrating on victim restitution, to a more dynamic role involving direct victim participation in sentencing.[111] A byproduct of the victims' rights movement has been the victim rights statement: a statement outlining the impact of crime on a victim and a victim's family, and which typically is included in a pre-sentencing report that is either statutorily mandated or recommended by the court.[112] Currently, a large majority of the states have enacted some form of victim impact statement legislation.[113] A

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109. *Id.*

110. *Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting). The Court, thwarted in its earlier attempts to overrule *Booth* in *Gathers* and Ohio v. Huertas, 59 U.S.L.W. 1176 (U.S., May 14, 1991), granted certiorari in *Payne*; however, because the petitions did not raise the constitutional issues, the Court ordered the petitioners to brief and argue whether *Booth* and *Gathers* should be overruled. Coyle, *supra* note 82, at S1.

111. *See* Maureen McLeod, *Victim Participation at Sentencing*, 22 Crim. L. Bull. 501, 502 (1986).

112. Victim impact statements (oral or written) potentially provide information about the circumstances of the crime, the victim's identity and character, the extent of the harm caused to the victim and the victim's family, and an opinion as to an appropriate punishment for the defendant. Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. Rev. 199, 200-211 (1988).

113. *See id.* As of 1988, thirty-eight states had enacted victim impact statements legislation. *Id.* at 200 n.12.

few states, like Florida, have gone a step further by amending their state constitutions providing a victim's right to be heard under constitutional dimensions.[114]

However, the use of victim impact statements has raised critical concerns. One important criticism has centered on the objectives behind the use of victim impact statements, and whether those objectives are being achieved. Whether the objective is satisfactory victim retribution,[115] enhanced efficiency or effectiveness of the criminal justice system,[116] or successful criminal deterrence, incapacitation or rehabilitation,[117] there exists considerable doubt and lack of consensus among practitioners and scholars as to whether these ends are being achieved. For instance, judges and prosecutors have shown a reluctance to use victim impact statements or direct victim participation — reasons ranging from inconvenience or a belief that victim participation will not be helpful,[118] to fear of liability in a civil action.[119] In addition, legal scholars continue to debate the legal relevance of victim impact state-

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114. *See infra* p. 42 and note 172; *see also* Patrick B. Calcutt, Comment, *The Victims' Rights Act of 1988, The Florida Constitution, and the New Struggle for Victims' Rights*, 16 FLA. ST. U. L. REV. 811 (1988); Debra Cassens Moss, *New Tack for Victims' Rights*, 74 A.B.A.J. 32 (1988) (constitutional amendments have been implemented in Florida, Arizona, Delaware and Rhode Island but not without criticism from defense attorneys and prosecutors).

115. *See* Talbert, *supra* note 112, at 211 (referring to the Sentencing Reform Act of 1984, codified at 18 U.S.C. § 3553(a)(2) (Supp. IV 1986), where Congress delineated the four purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation); *see, e.g.*, Richard S. Murphy, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1306-1309 (1988). Arguably, "the retribution theory of punishment, as properly understood, focuses on what the defendant deserves, not what would benefit society . . . [and] the Supreme Court's decision in *Booth* . . . is completely consistent with and in fact required by the retributivist model of punishment." *Id.*

116. *See* McLeod, *supra* note 111, at 505. System efficiency means minimal resistance to process a maximum number of criminal cases; system effectiveness refers to a more just sentence if the victim participates. *Id.*

117. *See* Talbert, *supra* note 112, at 215-219. Deterrence discourages potential criminals from committing crimes and punished criminals from repeating crimes; incapacitation removes criminals from society due to future dangerousness; and rehabilitation reforms criminals and modifies their behavior. *Id.*

118. *See* McLeod, *supra* note 111, at 507.

119. *See* Moss, *supra* note 114, at 32. Florida State Rep. Hamilton Upchurch on the impending constitutional amendment for victims' rights in Florida, and the potential that victims could sue prosecutors for infringing their constitutional rights stated: "Can you imagine a prosecutor having to contact and consult with the victim at every juncture?". *Id.*

ments at criminal sentencing,[120] the constitutional issues that are consequently implicated,[121] and the underlying motives behind the victim impact movement.[122] While it is difficult to deny that victims' rights is good politics, it is also equally difficult to prove that victims' rights legislation has achieved its promised goals.[123]

Apparently, the six justices comprising the majority in *Payne* did not feel that this lack of consensus and debate on the utility of victim impact statements bore mentioning, or perhaps they were uninformed on the subject. The majority, while recognizing that victim impact statements are a new phenomenon,[124] avoided the issue of whether they

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120. *See, e.g.*, Eric S. Newman, Note, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial: South Carolina v. Gathers, 109 S. Ct. 2207 (1989)*, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1248-1255 (1990) ("We cannot begin to draw lines with regard to appropriate punishment in capital cases based on subjective determinations of the worth of the victim."). *But see, e.g.*, Jackson R. Sharman, III, *Recent Developments—Constitutional Law: Victim Impact Statements and the Eighth Amendment—Booth v. Maryland, 107 S. Ct. 2529 (1987)*, 11 HARV. J.L. & PUB. POL'Y 583, 584-86 (1988) (explaining extent of harm is irrelevant during the guilt stage of the trial, but extent of harm and the victim's character is relevant during the sentencing stage to show the gravity of the criminal act).

121. *See* Jonathan Willmott, *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, 1057-1071 (1990) (classifying citizens based on their character to deprive them of life, liberty or property violates the equal protection clause of the Fourteenth Amendment); Note, *supra* note 120, at 1248 (commenting by a prosecutor on a victim's character violates the Eighth Amendment because the jury may impose death based on the victim's character and not the defendant's culpability).

122. Some argue that revenge and retaliation are legitimate and intelligent goals at the root of victims' rights. *See, e.g.*, George Will, *The Value of Punishment*, NEWSWEEK, May 24, 1982, at 92 ("The element of retribution — vengeance, if you will — does not make punishment cruel and unusual, it makes it intelligible."); Murphy, *supra* note 115, at 1333 (utilitarian theories of punishment, such as vengeance to avoid vigilantism and mob violence, while debatable as an appropriate reason for punishment, nonetheless are constitutionally valid). *But see* Lynn N. Henderson, *The Wrongs of Victim Rights*, 37 STAN. L. REV. 937, 994-995 (1985) (vengeance connotes a level of depravity equal to the criminal act and is "uncivilized").

123. *See, e.g.*, Robert Elias, *The Symbolic Politics of Victim Compensation*, 8 VICTIMOLOGY 213 (1983) (victim compensation has only strengthened police control and has failed to achieve its goals of crime control and improving cooperation with law enforcement).

124. Payne v. Tennessee, 111 S. Ct. 2597, 2606 (1991). Given the level of the legal debate over victim impact statements and their effects on juries, an enlightened majority opinion might have addressed some of these concerns by recognizing a need

actually promote any constructive social purpose such as victim satisfaction or participation by victims in the criminal justice process.[125] Justice Scalia charged that the decision in *Booth* "conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement," without commenting on the merits of the movement.[126] Justice O'Connor came closest to recognizing the lack of consensus on the use of victim impact statements by pointing to "considerable confusion in the lower courts" regarding the breadth of the holding in *Booth*.[127] Moreover, the justices who decided to overrule *Booth* and *Gathers* did so without any apparent concern whether victim impact statements accomplished the objectives set out by their proponents.

B. *Victim Impact Statements and the Death Penalty*

The Court in *Payne* specifically rejected the holdings in *Booth* and *Gathers* that evidence of a victim's character and the extent of harm suffered by the victim's family, presented through either direct testimony of the victim's family or by the prosecutor, is inadmissible at the sentencing phase of a capital trial.[128] This discussion will analyze the issues of admissability of victim character, and address the relevance and constitutional flaws in the majority's reasoning.

1. Victim Character

The *Payne* decision rested on the principle that evidence of the victim's character is relevant to the victim's " 'uniqueness as a human being' "[129] which is necessary to avoid "turning the victim into a 'face-

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for further empirical studies.

125. Victim impact statements "are simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id.* at 2608.

126. *Id.* (Scalia, J., concurring). Justice Scalia's religion, if you will, appears to be the will of the people and justice by the public, irrespective of individual constitutional freedoms.

127. South Carolina v. Gathers, 490 S. Ct. 805, 813 (O'Connor, J., dissenting). Justice Marshall criticized the majority's reliance on Justice O'Connor's dissent in *Gathers* over the prosecutorial use of the victim's character by reminding them that the confusion created by *Booth* was the issue that was specifically decided in *Gathers*. *Payne*, 111 S. Ct. at 2622 (Marshall, J., dissenting).

128. *See Payne*, 111 S. Ct. at 2609-2611.

129. *Id.* at 2606-2607 (quoting Woodson v. North Carolina, 428 U.S. 280, 304

less stranger at the penalty phase of a capital trial'. . . ."[130] The majority argued that just as the defendant is able to present all relevant mitigating evidence of the defendant's character, fairness dictates that the victim be given the same opportunity.[131]

Relevance in evidentiary procedure has been defined as "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable."[132] Using this definition, the character of the murdered victim is irrelevant as to the issue of a defendant's guilt — that is, whether he committed the act.[133] But the question raised by *Payne* is whether this same evidence should be relevant to determine whether a defendant, who has already been adjudicated guilty, should be put to death. The *Payne* majority has expanded the scope of relevancy for punishment to include victim character and, in the process, has replaced the stricter concept of legal relevance with a more flexible concept of general relevance. General relevance is open-ended and without practical limitation, and can encompass a wide array of factors without consideration as to their prejudicial effect. Legal relevance, on the other hand, requires more stringent legal reasoning and sufficient probative value, and conditions admissibility of evidence based on relative probative weight verses prejudicial effect.[134] Moreover, the Court's assertions that victim character is relevant to determine the imposition of the death penalty employs the broader concept of relevancy without regard for probative and prejudicial considerations.[135]

The majority's position also raises evidentiary and constitutional dilemmas. First, the introduction of victim character invites the prospect of a mini-trial where the defendant may cross-examine character witnesses for the victim or present extrinsic witnesses to rebut the testimony of the same character witnesses.[136] Consequently, the defendant may also call witnesses to impeach the credibility of the victim's vari-

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(1976)).

130. *Id.* at 2608 (quoting *Gathers*, 490 U.S. at 821 (O'Connor, J., dissenting)).

131. *Id.*

132. FED. R. EVID. 401 advisory committee's note.

133. *But see Payne*, 111 S. Ct. at 2628 (Stevens, J., dissenting) (statutory exception for public officials where defendant has been given notice).

134. *See* FED. R. EVID. 401 advisory committee's notes.

135. *See Payne*, 111 S. Ct. at 2628-2630 (Stevens, J., dissenting).

136. *See id.* at 2607. There is nothing in the majority's opinion that indicates the defendant would be prohibited from conducting such a "mini-trial"; the Court merely pointed out that it might not be tactically beneficial to the defendant's case. *Id.*

ous character witnesses.[137] Not only does the prospect of a mini-trial raise concerns of judicial economy,[138] it also shifts the focus of the jury during sentencing from the defendant and the circumstances of the crime, to the victim and his character — neither of which is on trial.[139] While in certain contexts a victim's character is relevant to a defendant's criminal culpability, i.e., when the victim's character is an element of the crime, generally such evidence risks exclusion on grounds of "unfair prejudice, confusion of issues, or misleading the jury."[140]

Second, and more importantly, evidence as to the victim's character admitted during the sentencing phase of a capital trial violates the Eighth Amendment's protection against cruel and unusual punishment because it creates an impermissible risk that the jury might impose the penalty of death for reasons other than the culpability of the offense and the character of the defendant.[141] For instance, family members who testify are frequently upset and highly agitated, and erupt in courtroom outbursts. These displays of emotion by a victim's family and the resulting jury empathy creates the impermissible risk that juries will sentence a defendant to death based on an emotional reaction rather than the character of the defendant and the circumstances of the crime.

Third, admission of victim character evidence permits the sentencer to impose the death penalty based on the comparative social worth of citizens.[142] This disturbing notion that a defendant who murders a sterling member of society as opposed to a reprobate should be more deserving of the death penalty is unwarranted and shocking by implication.[143] Furthermore, this elitist view of social worth is in direct

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137. *See* FED. R. EVID. 608-609, 613.

138. *See* FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration . . . [and] *elimination of unjustifiable expense and delay* . . . .") (emphasis added).

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

140. FED. R. EVID. 403 (evidence which is unfairly prejudicial is excluded primarily because it tends to result in improper decisions based on emotion).

141. *See Payne*, 111 S. Ct. at 2627 (Stevens, J., dissenting); U.S. CONST. amend. VIII.

142. *See Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting) ("Evidence offered to prove . . . [differences in character and reputation] can only be intended to identify some victims as more worthy of protection than others."). The majority replies to Justice Stevens' dissent by stating the empty conclusion that "victim impact evidence is not offered to encourage comparative judgments of this kind." *Id.* at 2607.

143. Justice Stevens points out that if a defendant accused of murdering a store clerk attempted to introduce evidence that the clerk had an immoral character, such

conflict with equality under the law. The equal protection clause of the Fourteenth Amendment requires that the law protect each person equally, regardless of a person's perceived character.[144] Therefore, it is not surprising that the majority left unanswered the methods for quantifying and qualifying the effect to be given victim character evidence.

The majority's attempt to discount fears that evidence of a victim's character does not create the risk that juries are more likely to sentence defendants to death based on the social worth of victims and the loss suffered by the community is sheer sophistry. Quite simply, the Court and the concurring justices failed to give credence to such an obvious risk which common sense, logic, and human experience dictates. One inevitable conclusion can be drawn: the present Supreme Court is blindly motivated by a solidly conservative political agenda which advocates a "tough on crime" stance and espouses victims' rights, irrespective of constitutional liberties.[145]

2. Extent of Harm

The majority opinion in *Payne* held that evidence of the extent of harm to the victim and the victim's family is relevant to determine a defendant's moral culpability and blameworthiness, and that states may properly admit such evidence as necessary to determine whether a defendant should be sentenced to death.[146] Accordingly, it would logically follow that an assessment of the extent of harm to the victim's family and the community is a necessary prerequisite to determine the

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evidence would be excluded on the grounds of irrelevance; however, "[e]venhanded justice requires the same constraint be imposed on the advocate of the death penalty." *Payne*, 111 S. Ct. at 2625 (Stevens, J., dissenting).

144. *See* U.S. CONST. amend. XIV ("No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."). For example, if a defendant is given a lighter sentence for killing victims with character type A as opposed to victims with character type B, victims with character type A are afforded less protection under the law. *See* Willmott, *supra* note 121, at 1058 n.60.

145. Similar sentiments have been recently expressed more eloquently by a current prisoner residing on Pennsylvania's Death Row: "Where the issue of the death penalty is concerned, law follows politics, and conservatives won the sociopolitical battles of the 1980's on the basis of an agenda which included a ringing endorsement of capital punishment. The venerated principle of stare decisis meant little in the politically charged judicial arena." Mumia Abu-Jamal, *Teetering on the Brink: Between Death and Life*, 100 YALE L.J. 993, 999 (1991).

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

proper punishment for a criminal defendant,[147] even when the defendant had no pre-knowledge of the uniqueness of the victim nor contemplated the consequences of his act.[148]

In so holding, the majority in *Payne* failed to make an important distinction between two kinds of harm that may result from a criminal act of a defendant: physical and emotional. Certainly a criminal defendant should be held accountable for all physical and emotional harm that may befall the victim as a result of a criminal act. Also, it is the ultimate harm to that victim — death — for which a murderer may potentially suffer the ultimate penalty — the death sentence. But *Payne* proposes to go a step further by making a criminal defendant accountable for the emotional harm suffered by the family of the victim. In essence, the majority believes that the death sentence may be imposed based on evidence of the infliction of emotional distress to a third party.[149]

Practical and fair limits on culpability, or liability, for emotional

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147. *Id.* at 2605.

148. *Id.* at 2615 (Souter, J., concurring). Justice Souter, in an effort to justify allowing extent of harm evidence to be included at sentencing to show the defendant's culpability argued:

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

Id. However, as Justice Stevens explained, "[t]he fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support." *Id.* at 2631 (Stevens, J., dissenting). If a defendant can be saddled with this foreknowledge of the victim's uniqueness as a human being to show the defendant's culpability, certainly a competent jury is capable of the same, that all victims are unique humans.

Additionally, Justice Souter leaves us with more questions than answers. May a friend or dependent of a victim testify as to emotional harm suffered during capital sentencing? May a lover? May a homosexual lover? Are we to assume that all victims have "survivors" that are qualified to testify? What are those qualifications? Who would not be allowed to testify? Could an abused spouse testify at sentencing as to a her husband's (the victim) bad character?

149. *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, 1185 (1988).

harm to third parties have been spelled out in a different but comparable context. Simply put, in a civil context, the Restatement of Torts section 46 recognizes limits on liability for outrageous acts — like murder — that cause severe emotional distress to third parties, even if the third party is a member of the victim's family.[150] The limitations on liability for emotional distress to third parties in tort is analogous to the extent of emotional harm to members of a victim's family in the criminal context; out of "practical necessity" there must be a limit on the number of people who could recover from suffering emotional distress as a result of an outrageous act, even when the act was murder.[151] However, under *Payne*, evidence of third party emotional distress that is insufficient for monetary damages in civil proceedings may be admitted in criminal proceedings to put a person to death. Thus, it seems from the majority's position that any person, however remote, who might conceivably have suffered harm as a result of the murder of a victim, could testify as to the extent of their harm at the capital sentencing of a defendant.

Furthermore, victim impact evidence which relates the extent of emotional harm to the victim's family violates the Eighth Amendment's

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150. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965); *see, e.g.*, Koontz v. Keller, 3 N.E.2d 694 (Ohio Ct. App. 1936) (denying recovery for intentional infliction of emotional distress from defendant upon plaintiff's discovery of sister's murdered body).

For instance, if A murders B, B's family, C, cannot recover for severe emotional distress unless C witnessed the murder, *see, e.g.*, Calliari v. Sugar, 435 A.2d 139 (N.J. Super. Ct. Ch. Div. 1980) (denying plaintiff's relief for intentional infliction of emotional distress after buying home from defendant and finding defendant's murdered wife buried in the back yard) or, in some jurisdictions, only if A had knowledge of the presence of C. *See, e.g.*, Taylor v. Vallelunga, 339 P.2d 910 (Cal. Dist. Ct. App. 1959) (victim's daughter denied recovery after witnessing brutal beating of her father by defendant because the defendant did not know the victim's daughter was witnessing the beating).

151. *Compare* RESTATEMENT (SECOND) OF TORTS § 46 comment 1 (1965) ("Practical necessity [requires]. . .drawing the line somewhere since the number of persons who may suffer emotional distress at the news of the assassination of a president is virtually unlimited . . . .") *with* interview comments made by the Tennessee Attorney General Charles Burson who argued *Payne* before the Court:

> The point of our position is that the death of some person may have a greater societal impact. We used the example of a homeless person and the President — that homeless person's life as a matter of sanctity and worth is worth as much as the President's life, but the harm that is inflicted upon society, it's clear, in dislocation of that society, is much greater.

Review of 1991 Supreme Court Term, (C-SPAN television broadcast, July 20, 1991).

proscription against cruel and unusual punishment.[152] This proposition is based on established judicial precedent that the discretion of the jury in imposing the ultimate penalty of death "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"[153] and must be "an individualized determination based on the character of the individual and the circumstances of the crime."[154] By introducing evidence of the extent of emotional harm to the victim's family, the state creates a constitutionally impermissible risk that the jury's discretion will be unduly swayed by sympathy for the victim's family and loss to the community. The majority in *Payne*, however, ignored judicial precedent and the inherent risk that victim impact statements leads to arbitrary and capricious sentencing of death.

C. *Alternative View of Payne v. Tennessee*

Throughout the *Payne* majority opinion and concurring opinions is the notion that *Booth* and *Gathers* went too far in creating a per se Eighth Amendment prohibition against the use of victim impact statements at capital sentencing.[155] This section discusses how *Payne* should have been decided without overruling *Booth* and *Gathers* based on *Booth*'s built-in caveat and harmless error.[156]

The *Booth* majority recognized that there existed cases where the information contained in a victim impact statement would be relevant and permissible in the proper context: "Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime."[157] While

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152. *See* Booth v. Maryland, 482 U.S. 496, 509 (1987), *overruled in part by* Payne v. Tennessee, 111 S. Ct. 2597 (1991); *see also* U.S. CONST. amend. VIII.

153. *E.g.*, Gregg v. Georgia, 428 U.S. 153, 189 (1976).

154. Zant v. Stephens, 462 U.S. 862, 879 (1983).

155. *Payne*, 111 S. Ct. at 2608-2609 (misreading of *Woodson* precedent); *id.* at 2612 (O'Connor, J., concurring) ("[P]ossibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence should never be admitted."); *id.* at 2614 (Scalia, J., concurring) (claiming *Booth* "compromised the fundamental values underlying the doctrine of stare decisis"); *id.* at 2614 (Souter, J., concurring) (lack of legal tradition for excluding a crime's effects on its victims).

156. *See Booth*, 482 U.S. at 507-508 n.10.

157. *Id.* It was specifically this language that prompted Justices O'Connor and Souter to criticize *Booth* because they believed it caused "considerable confusion in the

there have been numerous writings on the meaning of this footnote in *Booth*,[158] it appears that the facts in *Payne* fall neatly within this built-in caveat exception.

When the defendant, Payne, murdered Charisse and Lacie, and attempted to murder Nicholas, he did so with the knowledge that Lacie and Nicholas were Charisse's children.[159] In addition, Nicholas was an intended victim who miraculously survived.[160] Any evidence as to the extent of physical or emotional harm suffered by Nicholas was relevant and should have been admitted at the sentencing phase under *Booth* because that type of information "relates directly to the circumstances of the crime."[161] Therefore, evidence as to the extent of harm suffered by Nicholas, communicated to the court through his grandmother, was relevant to Payne's moral culpability and blameworthiness. However, even if prejudicial to the defendant, the extent of Nicholas' harm should have been permitted because it directly related to the gruesome facts surrounding the crime. In contrast, the prosecutor's closing comments during sentencing did not pass the *Booth* exception. The prosecutor's closing comments that related to the impact of harm suffered by Charisse's parents and Payne's parents, and statements about the personal character of Charisse and Lacie,[162] were irrelevant and impermissible under *Booth* because they did not directly relate to the circumstances of the crime and Payne had no pre-knowledge of their

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lower courts about the precise scope of its holding", Gathers v. South Carolina, 490 U.S. 805, 813 (1989) (O'Connor, J., dissenting), and created "an unworkable standard of constitutional relevance . . . ." *Payne*, 111 S. Ct. at 2616 (Souter, J., concurring).

158. *See, e.g.*, Willmot, *supra* note 121, at 1071-1076. One can only surmise the kind of case to which the majority in *Booth* was referring, but a classic example would be that of a defendant who murders a victim in the presence of another person for the sole purpose of causing that person severe emotional distress. But this scenario would be the exception rather than the rule.

159. *See* State v. Payne, 791 S.W.2d 10, 14 (Tenn. 1990). Payne testified: "And she [Charisse] was watching my movement in the kitchen, like she—I had saw her. It had been almost a year off and on in the back yard because her kids had played with Bobbie's kids. And I had seen her before." *Id.*

160. *Id.* at 12.

161. *Booth*, 482 U.S. at 507 n.10. For example, Payne had pre-knowledge about the victim's family, namely Nicholas; Payne knew that Nicholas was witnessing his act of violence and any reasonable person would know that to brutally murder a young boy's mother and little sister in his presence would cause extensive harm.

162. *See Payne*, 111 S. Ct. at 2603 (quoting from State v. Payne, 791 S.W.2d 10 (1990), " '[t]here is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do . . . for Charisse and Lacie Jo.' ").

existence.[163]

Additionally, the majority failed to take the opportunity to specify whether harmless error could be applied to the impermissible use of victim impact statements. Harmless error analysis in constitutional issues first requires that the Court determine whether harmless error analysis applies,[164] and then whether the error committed was harmless.[165] The Supreme Court of Tennessee hesitantly applied harmless error analysis in affirming Payne's convictions and sentence of death[166] primarily because *Booth* and *Gathers* failed to specify whether harmless error would apply in capital cases where victim impact statements were introduced. Recognizing this shortcoming in *Booth*, Justice Stevens properly stated what the majority's position in *Payne* should have been:

> In the case before us today, much of what might be characterized as victim impact evidence was properly admitted during the guilt phase of the trial and, given the horrible character of this crime, may have been sufficient to justify the Tennessee Supreme Court's conclusion that the error was harmless because the jury would necessarily have imposed the death sentence even absent the error. The fact that a good deal of such evidence is routinely and properly brought to the attention of the jury merely indicates that the rule of *Booth* may not affect the outcome of many cases.[167]

Thus, the majority in *Payne* unnecessarily overruled *Booth* and *Gathers*, by ignoring the exception in *Booth* for evidence directly relating to the circumstances of the crime, and failing to affirm the Tennessee Supreme Court's use of harmless error analysis to victim impact

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163. *See Booth*, 482 U.S. at 507-508 n.10.

164. *See* Chapman v. California, 386 U.S. 18 (1967). The *Chapman* rule essentially states that not all constitutional errors in a criminal trial require automatic reversal of a conviction, and it is the responsibility of the United States Supreme Court to determine what constitutional violations should receive harmless error analysis. *See id.* at 20-21 (when constitutional rights are violated "it is our responsibility to protect by fashioning the necessary rule"). To date, the Court has denied harmless error to only two violations: the right to counsel and an impartial judge. *Id.*; *see also* Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (overruling previous precedent which held that harmless error could never be applied to coerced confessions).

165. The Court must determine whether the evidence obtained by constitutional error was harmless beyond a reasonable doubt. *See, e.g., Chapman*, 386 U.S. at 24.

166. *See* State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990) (stating "we think" victim impact statements are subject to harmless error analysis).

167. *Payne*, 111 S. Ct. at 2630 (Stevens, J., dissenting).

statements. Consequently, the *Payne* majority has directly undermined the Court's authority and laid the groundwork for future overruling of the Court's precedents.[168]

IV. Florida Case Law and Victim Impact Statements

This section will briefly review a chronological sampling of the Florida Supreme Court's treatment of the use of victim impact statements during the sentencing phase of a capital trial before and after the Supreme Court decided *Booth*, and since *Payne*. This section will conclude by speculating how *Payne* might affect future court decisions and constitutional protection afforded defendants facing the death penalty in Florida.

A. *Before Booth*

Prior to the Supreme Court's decision in *Booth*, the Florida legislature in 1984 amended its previous victims' rights legislation by allowing the victim's next of kin, during sentencing in a homicide case, to testify as to the extent of harm caused by the victim's death, including social, psychological, or physical harm.[169] Moreover, victim impact statements in pre-sentence reports that described the victim's character, the extent of harm to the victim's family, and the victim's opinion as to an appropriate punishment were routinely utilized by sentencing

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168. *See id.* at 2625 (Marshall, J., dissenting).

169. *See* Fla. Stat. § 921.143 (1991). The statute states:

> (1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or nolo contendere to any crime, including a criminal violation of a provision of chapter 316, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced, *or the next of kin if the victim has died from causes related to the crime*, to:
> (a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or
> (b) Submit a written statement under oath to the office of the state attorney, which statement shall be filed with the sentencing court.
> (2) The state attorney or any assistant state attorney shall advise all victims or, when appropriate, their next of kin that statements, whether oral or written, shall relate solely to the facts of the case and *the extent of any harm, including social, psychological, or physical harm*, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced.

Id. (emphasis added).

authorities in capital and non-capital cases.[170] Subsequently, Florida became one of a small number of states[171] to amend its state constitution to elevate the rights of victims to constitutional proportions.[172]

B. *After Booth*

The first case that came before the Florida Supreme Court, and the first case in the country to vacate a death sentence pursuant to *Booth*, was *Patterson v. State*.[173] The defendant, Patterson, was convicted of first degree murder and sentenced to death.[174] At the sentencing hearing, the victim's niece testified about the effect the murder had on the victim's children and expressed her opinion that the defendant should die.[175] In vacating the death sentence and remanding for a new sentencing hearing on the grounds that *Booth* prohibited such evidence, the Florida Supreme Court appeared uncertain as to the precise limits of *Booth* or whether harmless error analysis was applicable: "Allowing this type of evidence *appears to be* reversible error in view of the United States Supreme Court decision in *Booth* . . . ."[176]

This uncertainty was soon dispelled four months later in the watershed case of *Grossman v. State*.[177] In *Grossman*, the defendant was convicted of murdering a state wildlife officer and sentenced to death.[178] On appeal, the defendant argued that permitting the victim's family members to testify to the judge during sentencing was in violation of *Booth* and reversible error.[179] The Supreme Court of Florida

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170. *See, e.g.*, Howard v. State, 473 So. 2d 10 (Fla. 3d Dist. Ct. App. 1985).

171. *See* Moss, *supra* note 114, at 32.

172. The amendment reads:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with constitutional rights of the accused.

FLA. CONST. art. I, § 16(b). The amendment was approved overwhelmingly by the voters of Florida by a 9 to 1 margin. *See* Comment, *supra* note 114, at 812 n.4.

173. 513 So. 2d 1257 (Fla. 1987); *see also* Talbert, *supra* note 112, at 227 n.125.

174. *Patterson*, 513 So. 2d at 1258.

175. *Id.* at 1263.

176. *Id.* (emphasis added); *see also Booth*, 482 U.S. at 496.

177. 525 So. 2d 833 (Fla. 1988).

178. *Id.* at 835.

179. *Id.* at 836. The following is an example of the testimony from the father of

affirmed the sentence on the basis that the defendant failed to object to the introduction of the victim impact statement at trial.[180] By narrowly interpreting *Booth*, the court explained that "nothing in the *Booth* opinion . . . suggests that it should be retroactively applied to the cases in which victim impact evidence has been received without objection."[181] Additionally, the Supreme Court of Florida distinguished the two cases on the basis that the defendant in *Booth* was sentenced by a jury pursuant to Maryland law, whereas in the present case, the defendant was sentenced by a judge pursuant to case law after giving great weight to the jury's recommendation of death.[182]

Grossman illustrates the Florida Supreme Court's uneasiness with *Booth*'s broad holding. In lengthy dicta, the court ventured into a comprehensive analysis of judicial precedent for harmless error analysis,[183] and concluded that since *Booth* could be read to hold that not all victim impact statements might promote an arbitrary or capricious imposition of death by a jury, impermissible victim impact evidence would in the future be subject to harmless error analysis on a case-by-case basis.[184] The court went on to establish a standard for review of victim impact statements presented during a capital case. First, the defendant must object to the victim impact evidence when introduced during sentencing phase.[185] Second, the jury should not hear victim impact evi-

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the victim:

> I think he's shattered our family. This girl [victim] was kind of the center of our family. It's like taking my heart out. It will hurt me the rest of my life. We have all seen a psychiatrist or psychologist at least twice including my other two children. My personal feeling is that he should receive the death penalty.

Id. at 842-843 n.6.

180. *Id.* at 842.

181. *Id.*

182. *Grossman*, 525 So. 2d at 845. To justify the distinction, the court stated that "[i]f the mere fact that the trial judge (the sentencer in Florida) is exposed to such a victim impact report is sufficient to render the error per se reversible, all death penalties in Florida are potentially subject to automatic reversal." *Id.* at 842-843 n.6. Additionally, "judges are routinely exposed to inadmissible or irrelevant evidence but are disciplined by the demand of the office to block out information which is not relevant to the matter at hand." *Id.* at 846 n.9.

183. *See id.* at 842-844.

184. *Id.* at 844-845. In so holding, the Court invalidated the provisions of section 921.143 of the Florida Statutes because it violated *Booth* insofar as it allowed victim impact statements to serve, in effect, as an aggravating factor in death sentencing. *Id.* at 842; *see also* FLA. STAT § 921.143 (1991) (still in effect as unchanged).

185. *Grossman*, 525 So. 2d at 842.

dence at sentencing.[186] And, finally, the appellate review court may apply harmless error analysis on a case-by-case basis.[187]

This new standard for reviewing capital cases where victim impact evidence has been introduced was put to its first test later that same year in two cases. In *Preston v. State*, the Florida Supreme Court refused to vacate a death sentence because the defendant failed to object to the introduction of comments made by the prosecutor during sentencing regarding the character of the victim and her relationship to her family and friends.[188] Next, in *LeCroy v. State*, the Supreme Court of Florida affirmed a death sentence over objections by the defendant that the introduction of victim impact statements by the victim's family unduly influenced the sentencer.[189] The majority pointed out that the jury did not hear the evidence, and the trial judge, who erred in allowing the testimony over objection, did so without the benefit of *Booth* and *Grossman*, and did not use the statements to determine punishment.[190] Therefore, the trial judge committed harmless error.[191]

The following year, the Florida Supreme Court was again confronted with victim impact statements in *Jackson v. Dugger*.[192] In *Jackson*, the defendant, who was convicted for the murder of a police officer and sentenced to death, argued that the testimony of a fellow officer during the penalty phase of the trial was unduly prejudicial and specifically prohibited under *Booth*.[193] The testimony provided the jury, over objection, with information about the slain officer's good character and the impact the officer's death had on the community and the other officers on the force.[194] The court agreed, vacated the sentence, and remanded for a new sentencing proceeding on the grounds that the evidence was not harmless beyond a reasonable doubt.[195]

Since *Jackson*, the Florida Supreme Court has had to rule on the use of victim impact statements in an increasing number of direct and

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186. *Id.*
187. *Id.* at 844-845.
188. 531 So. 2d 154, 160 (Fla. 1988).
189. 533 So. 2d 750, 755 (Fla. 1988).
190. *Id.*
191. *Id.*
192. 547 So. 2d 1197 (Fla. 1989).
193. *Id.* at 1198.
194. *Id.*
195. *Id.* at 1198-1199. The court believed that the evidence had been offered expressly to inflame the passions of the jury and "was designed to induce a fear for public safety and to elicit sympathy for the victim." *Id.* at 1199.

postconviction appeals. For example, in *Reed v. State*, the defendant was procedurally precluded from claiming relief for failing to object to the introduction of the statements;[196] and in *Freeman v. State*, the court held that the testimony of a woman, married to a victim murdered by the defendant in a previous conviction, constituted harmless error.[197] Also, in *Jennings v. State*, the Florida Supreme Court denied a defendant's petition for habeas corpus based on statements made by the victim's father and school principal during sentencing that "on the day she was killed the child was going to be narrator at her school play because she had learned to read faster than her classmates."[198] The court stated that the statements were not so prejudicial to require reversal under *Booth*.[199]

C. *Payne and Beyond*

Since the Court decided *Payne*, the Florida Supreme Court recently has had occasion to restate and apply *Payne's* holding in two capital cases. In *Hodges v. State*, the court recognized *Payne*'s recent overruling of *Booth* and *Gathers*, but held that the statements complained of by the defendant were not the type of victim impact evidence that is still prohibited by *Booth*.[200] In *Owen v. State*,[201] the court applied harmless error to statements made by the victim's father, in spite of the court's recognition that *Payne* allowed the use of some types of victim impact evidence.

In light of *Payne*, Florida's victims' rights constitutional amendment[202] and criminal statutes[203] are virtually unrestricted with regard to the use of victim impact statements during the sentencing phase of a capital trial. With the exception of statements expressing an opinion as to an appropriate punishment for the defendant, the victim's family[204]

196. 560 So. 2d 203, 207 (Fla. 1990) (stating in dicta, even in the event of an objection, the evidence was harmless error).

197. 563 So. 2d 73, 75-76 (Fla. 1990).

198. 16 Fla. L. Weekly S452 (Fla. June 13, 1991).

199. *Id.*

200. 17 Fla. L. Weekly S74 (Fla. Jan. 23, 1992) (allowing testimony about the victim's prosecuting the defendant for indecent exposure, and the victim's sister's breaking down while testifying).

201. 17 Fla. L. Weekly S71 (Fla. Jan. 23, 1992).

202. FLA. CONST. art. I § 16(b).

203. *E.g.*, FLA. STAT. § 921.143 (1991).

204. In addition to the victim's family, apparently anyone who was so closely

is now free to give evidence relating the victim's character and the extent of harm to the victim's family and the community, subject only to due process restrictions. In effect, future cases like *Patterson* and *Jackson* will be affirmed, unless the evidence introduced is so prejudicial and inflammatory that the court decides that the death sentence violated a defendant's due process rights. The result means less protection for the criminal defendant against the imposition of the death penalty in Florida. Also, juries in Florida, in recommending sentencing, potentially will be swayed by sympathy for the emotional loss and suffering of the victim's family, friends, and the loss to the community based on their subjective view of the social worth of the victim.

V. CONCLUSION

In essence, *Booth* and *Gathers* placed limitations on the use of victim impact statements by creating an exception for death penalty cases under the Eighth Amendment. The majority in both cases strongly believed that consideration of the gravity and finality of the death sentence compelled the conclusion that the use of highly emotional and prejudicial testimony from victim's families and prosecutors about the victim's character and extent of harm to the community created a palpable and impermissible risk that juries would be unduly and unfairly swayed. The *Booth* and *Gathers* majorities based their fears on what common sense and logic tells us about human nature when confronted with the grief and emotional pain of others.

However, the Court in *Payne*, in overruling *Booth* and *Gathers*, ignored this rational and cogent approach by incorrectly reasoning that the victim's character and extent of harm to the victim's family did not create an impermissible risk that the jury might, based on sympathy and emotion for the victim and the victim's family, impose death in an arbitrary and capricious manner. Instead, the Court relied on a faulty concept of evidentiary relevance and a severely narrow view of Eighth Amendment protections against cruel and unusual punishments. In so doing, the *Payne* majority trivialized *stare decisis* by providing no credible justification for overturning judicial precedent. Furthermore, the Court set the stage for drawn out morality plays in which the victim's character takes center stage with the net effect that death sentences

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related to the victim that they suffered harm is entitled to testify as to the extent of that harm. *See Payne*, 111 S. Ct. at 2615 (Souter, J., concurring) ("close associates," "friends," and "dependents").

will be handed down based on the comparative social worth of victims and their popularity in the community.

As of this writing, Florida currently has 325 persons on death row and ranks third among states with death row inmates;[205] *Payne* has the potential to substantially increase that number. Criminal defendants who face the death penalty in our state courts will have their fates decided by arbitrary and irrelevant factors inherent in victim impact statements, instead of the character of the defendant and the circumstances of the crime.

Michael P. Koller

205. Martin E. Marty, *Death Penalty: What story will we tell about it?*, THE MIAMI HERALD, Apr. 19, 1992, at C1.