Is *Payne* Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings

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INTRODUCTION

Payne v. Tennessee[1] held that the Eighth Amendment does not preclude a State from introducing victim-impact evidence at a capital sentencing hearing.[2] A flood of critics have alleged that by allowing the admission of victim-impact evidence at capital sentencing, *Payne* permits "arbitrary and capricious" sentencing in violation of the Eighth Amendment.[3] *Payne*'s opponents argue that admitting victim-impact evidence yields arbitrarily imposed death sentences in four distinct ways: it allows the decision whether to impose death to hinge on jurors' perceptions of victims' "worth"; gives jurors unguided discretion to determine the sorts of victim-impact evidence that are sufficient to turn what would otherwise be a sentence of life imprisonment into a death sentence; inflames jurors' emotions and thus produces death sentences based on emotion rather than reason; and results in equally culpable defendants receiving

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1. 501 U.S. 808 (1991).

2. There are three general categories of victim-impact evidence: accounts of the emotional, psychological, and financial harm the crime caused the victim's family members and community; descriptions of the victim's personal characteristics and attributes; and opinions of the crime and/or the appropriate sentence for the convicted defendant. Victim-impact evidence can be presented to the jury in three ways: through live testimony, videotaped testimony, or a written statement. *See* Booth v. Maryland, 482 U.S. 496, 502 (1987).

3. *See, e.g.*, Susan Bandes, *Empathy, Narrative, and Victim-Impact Statements*, 63 U. CHI. L. REV. 361, 390-410 (1996); Vivian Berger, Payne *and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 52-55 (1992); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77; Ashley Paige Dugger, Note, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 382-83 (1996); Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1046-47 (1993); Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim-Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93 (1997). Very few commentators have attempted to defend *Payne*. Among the better efforts are Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863 (1996), and Brian J. Johnson, Note, *The Response to* Payne v. Tennessee*: Giving the Victim's Family a Voice in the Capital Sentencing Process*, 30 IND. L. REV. 795 (1997). Partly because so few have tried to defend *Payne*, many believe that *Payne* rests on political rather than legal reasoning. *See, e.g.*, David R. Dow, *When Law Bows to Politics: Explaining* Payne v. Tennessee, 26 U.C. DAVIS L. REV. 157, 165-76 (1992).

different sentences on the basis of unforeseen harm.[4]

The claims that *Payne* allows "arbitrary and capricious" death sentences are off the mark and miss the real problems both with admitting victim-impact evidence and with the *Payne* Court's reasoning. Indeed, to the extent that the allegations of arbitrariness are convincing, they apply with equal force to much of the mitigating evidence the Court has not only permitted but *required* trial courts to admit during capital sentencing hearings. *Payne* is constitutionally infirm not because it injected a new element of randomness into the capital sentencing process, but rather because it permits negligently caused harm to make the difference between life and death and because it rests on the Justices' misplaced desire to "balance" victims' position at sentencing with that of defendants.

This Comment examines the constitutionality of admitting victim-impact evidence at capital sentencing hearings. I begin in Part I by discussing the three Supreme Court rulings on the admissibility of victim-impact evidence at capital sentencing hearings. Parts II through V analyze the four distinct but related ways in which victim-impact evidence allegedly results in arbitrary death sentences. Part VI explains that, while pointing out the disjunction between harm and culpability does not mean that *Payne* sanctions arbitrarily imposed death sentences, it does shed light on a deeper constitutional flaw in *Payne* and the Court's death penalty jurisprudence in general: the Court's muddled understanding of the penological theory of retribution and the Justices' confusion regarding criminal culpability. Part VII critiques *Payne*'s rationale that victim-impact evidence is relevant at capital sentencing because it helps correct an imbalance between the criminal justice system's treatment of victims relative to defendants. I conclude by briefly examining whether *Payne*'s constitutionality can be successfully defended on the grounds of federalism and deference to public opinion.

I. *BOOTH*, *GATHERS*, AND *PAYNE*

In 1987, the Court's five-four decision in *Booth v. Maryland*[5] held that the Eighth Amendment prohibits a State from allowing a capital sentencing jury to consider victim-impact evidence. The case involved the brutal murders of an elderly couple, Irvin and Rose Bronstein.[6] During the sentencing phase, the prosecutor read a victim-impact statement that was compiled by a probation officer on the basis of her interviews with the Bronsteins' surviving family members.[7] The victim-impact

4. Many commentators have also criticized *Payne* for allegedly violating stare decisis by overruling two cases decided within the four years preceding *Payne*: *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989). This Comment does not address, and takes no position on, whether *Payne* contravenes stare decisis. For a discussion of *Payne* and stare decisis, see Michael Vitiello, Payne v. Tennessee: *A "Stunning* Ipse Dixit", 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165 (1994).

5. *Booth*, 482 U.S. at 501-02.

6. *See id.* at 497.

7. *See id.* at 498-500. Most states do not specify who qualifies as a "victim"; the consequence is that some courts have permitted friends of the victim, coworkers of the victim, and even members of the community who did not know the victim to testify. *See* Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence*

statement included all three forms of victim-impact evidence: accounts of the emotional and psychological impact of the crime on the family, descriptions of the Bronsteins' personal characteristics, and the victims' family members' opinions and characterizations of the crimes and the defendant.[8]

Justice Powell's majority opinion held that all three forms of victim-impact evidence are irrelevant to a determination of whether to impose a death sentence, and that their admission thus risks arbitrary and capricious imposition of the death penalty.[9] Justice Powell maintained that because victim-impact evidence includes facts about which the defendant was unaware at the time of the murder, it is unrelated to the defendant's culpability.[10] Justice Powell said that admitting victim-impact evidence would yield arbitrary results because victim-impact evidence would lead juries to impermissibly base their decision on their evaluation of the "worth" of the victim, and because the capital sentencing decision would partially depend upon the degree to which the victim's family members—if the victim leaves any behind—are able to articulate their loss.[11] Moreover, Justice Powell said, victim-impact evidence improperly shifts the jury's focus from the defendant to the victim,[12] and hence yields death sentences based on emotion rather than reason.[13]

In separate dissents,[14] Justices White and Scalia each made the two main arguments

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in Capital Trials, 41 ARIZ. L. REV. 143, 154-55 (1999). However, because victim-impact evidence is most frequently presented by the members of the victim's family, I will refer throughout this Comment to victim-impact witnesses as "the victim's family members."

Definitions of "victim" that extend beyond the victim's immediate family can be very cumbersome for courts. If numerous people desired to testify regarding a particular murder, the trial could be slowed and the judge's time diverted to considering the admissibility of reams of proffered victim-impact testimony. Indeed, this is precisely what happened during the recent trials of Oklahoma City bombers Timothy McVeigh and Terry Nichols, during which a combined 93 victim-impact witnesses testified. *See id.* at 156-57. Moreover, although a murder affects an entire community, the victim's family members are—other than the victim herself—the persons most directly and severely harmed by a murder. Therefore, if victim-impact evidence is to be admitted, only the victim's family members, or psychologists who have interviewed the family members, should be allowed to offer victim-impact testimony.

8. *See Booth*, 482 U.S. at 499-500.

9. *See id.* at 502-03 (Brennan, Marshall, Blackmun, Stevens, JJ., joining).

10. *See id.* at 505.

11. *See id.* at 505-06. Thus, Justice Powell argued, admitting victim-impact evidence would fail to provide "'a principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not.'" *Id.* at 506 (Stewart, J.) (alteration in original) (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).

12. The Court has held that the focus during a capital sentencing hearing must be on the defendant. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

13. *See Booth*, 482 U.S. at 507-09. The Court has held that the capital sentencing decision must not be based on emotion. *See* Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."), *quoted with approval in* Beck v. Alabama, 447 U.S. 625, 637-38 (1980). However, excluding emotion from the capital sentencing decision is easier said than done. *See infra* Part IV.

14. *See Booth*, 482 U.S. at 515, 519 (White, J., Rehnquist, C.J., O'Connor, Scalia, JJ.,

for including victim-impact evidence.[15] First, they argued that not only the defendant's mental state, but also the harm suffered by the victim's family and community is relevant to the defendant's criminal responsibility, as illustrated by our criminal law's enhancement of punishments on the basis of the harm caused irrespective of the defendant's intentions.[16] Second, they argued that victim-impact evidence balances the effect of the defendant's mitigating evidence and reminds the jury that the victim as well as the defendant is an individual human being whose life deserves respect.[17] It is important to understand the distinction between these two arguments. The second argument, which I shall refer to as the "balancing justification," holds that victim-impact evidence should be admitted to *counter* mitigating evidence and improve the surviving victims' position at sentencing relative to the allegedly improper "privileged" position held by the defendant. In contrast, Justices White and Scalia's first argument, which I shall refer to as the "harm-based justification," does not view the issue in terms of balancing victims' rights against defendants', but rather focuses on the relevance of harm to criminal liability.

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dissenting; Scalia, J., Rehnquist, C.J., White, O'Connor, JJ., dissenting).

15. Victims' rights advocates often make a third argument: that including victim-impact evidence, particularly in the form of oral testimony, assists victims' efforts to cope with the psychological impact of the crime by helping victims regain a sense of control and allowing them to "vent" their anger at the defendant. None of the Justices offered this argument for including victim-impact evidence at sentencing. I shall address this argument along with the "balancing" justification in Part VII. *See infra* text accompanying notes 152-59.

16. *See Booth*, 482 U.S. at 516-17 (White, J., dissenting); *id.* at 519-20 (Scalia, J., dissenting). Both noted that the difference between reckless driving and manslaughter depends not on intent, but rather on the harm caused (the fortuity of whether a pedestrian happened to be crossing the street when the driver passed by). *See id.* at 516 (White, J., dissenting); *id.* at 519 (Scalia, J., dissenting). Justice White's dissent took the harm-based argument particularly far, arguing that the state may, "if it chooses, include as a sentencing consideration the particularized harm that an individual's murder causes to the rest of society." *Id.* at 517. Apparently Justice White would allow a State to make the severity of a murderer's sentence depend in part on the perceived social utility of his victim. *See* Gewirtz, *supra* note 3, at 874-75 n.32.

However, in practice distinguishing between evidence of the victim's personal characteristics and the harm inflicted upon the victim's survivors will often be very difficult: evidence of the latter will often include some evidence of the former. As Justice Scalia asked, "Would the fact that the victim was a dutiful husband and father be [an admirable] personal characteristic or an indication of injury to others?" South Carolina v. Gathers, 490 U.S. 805, 823 (1989). If the victim was an alcoholic who abused his children, however, presumably the victim's family would not suffer the same amount of harm as would the survivors in Justice Scalia's example. *But see* Payne v. Tennessee, 501 U.S. 808, 823 (1991) (arguing that a jury's consideration of the harm visited upon society by the victim's loss need not and should not include a judgment of the victim's personal characteristics—and thus implicitly a judgment of the victim's "worth"—but rather should entail only that the jury consider the victim's "'uniqueness as an individual human being'"). In contrast to Justices White, Scalia, and O'Connor (in their respective *Booth* and *Gathers* opinions), Chief Justice Rehnquist's opinion for the Court in *Payne* presupposes that a distinction can be made between a victim's admirable personal characteristics and the harm visited upon society by the loss of these personal characteristics.

17. *See Booth*, 482 U.S. at 517 (White, J., dissenting); *id.* at 520-21 (Scalia, J., dissenting).

In 1989, *Gathers*—another five-four decision—extended *Booth* to cover prosecutors' comments on murder victims' personal characteristics.[18] *Gathers* involved the brutal murder of and sexual assault on Richard Haynes, a mentally unstable homeless man.[19] In an attempt to enable the jury to more fully comprehend the human loss involved, the prosecutor made various references in his closing argument at the sentencing phase about Haynes's personality and character, including inferring from Haynes's possession of religious articles and voter registration card that Haynes was a man of faith who cared about his community, reading a prayer written by Haynes that was found at the murder scene, and noting that Haynes had mental problems.[20] Writing for the Court, Justice Brennan found the prosecutor's statement "indistinguishable in any relevant respect from that in *Booth*,"[21] and thus likewise violative of the Eighth Amendment. While victim-impact evidence relevant to the circumstances of the crime is admissible, the prosecutor's statements went far beyond those facts.[22]

Justices O'Connor and Scalia dissented. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, argued that *Booth* should not be interpreted as "'foreclosing the introduction of all evidence, in whatever form, about a murder victim.'"[23] Such a "rigid Eighth Amendment rule," she maintained, "is not supported by history or societal consensus," and would exclude evidence which would help the jury understand "the vulnerability and simple humanity of the victim," and thus would help the jury assess the harm caused to society by the loss of this *particular* victim.[24] Therefore, although not explicitly as in White's *Booth* dissent, Justice O'Connor's dissent implicitly approves of having the capital sentencing decision depend in part on jurors' evaluations of victims' worth; if the harm caused to the victims' community by the loss of the victims' attributes is relevant to sentencing, then calculations of—and sentences based on—victims' worth are unavoidable.[25]

Dissenting alone, Justice Scalia argued that *Booth* was wrongly decided and should be overruled.[26] However, Justice Scalia went further than merely arguing, as he did in his *Booth* dissent, that the specific harm inflicted by the defendant may be

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18. *Gathers*, 490 U.S. at 805.

19. *Id.* at 806-07.

20. *See id.* at 808-10.

21. *Id.* at 811. Justices White, Marshall, Blackmun, and Stevens joined Justice Brennan's opinion. Justice White wrote a concurring opinion maintaining that the Court could not approve of the *Gathers* prosecutor's comments without overruling *Booth*. *Id.* at 812.

22. *See id.* at 811-12.

23. *Id.* at 814 (O'Connor, J., dissenting) (quoting Mills v. Maryland, 486 U.S. 367, 398 (1988) (Rehnquist, C.J., dissenting)).

24. *Id.* at 820-21.

25. *See id.* at 821 (O'Connor, J., dissenting).

> That the victim in this case was a deeply religious and harmless individual who exhibited his care for his community by religious proselytization and political participation in its affairs was relevant to the community's loss at his demise, just as society would view with grief and anger the killing of the mother or father of small children.

Id.

26. *See id.* at 823-24 (Scalia, J., dissenting).

considered. Like Justice White's *Booth* dissent, Justice Scalia's dissent explicitly endorses the consideration of "admirable" personal characteristics of murder victims.[27] Justice Scalia said that there is "no basis for drawing a distinction for Eighth Amendment purposes between the admirable personal characteristics of the particular victim and the particular injury caused to the victim's family and fellow citizens. Indeed, I would often find it impossible to tell which was which."[28] For Justice Scalia, the victim's personal characteristics are inextricably intertwined with the extent of the harm visited upon society by her loss.

Five years later, the Court dramatically changed course, overruling *Booth* and *Gathers* in its six-three decision in *Payne*.[29] *Payne* involved a particularly brutal attack on Charisse Christopher and her two small children, two-year-old Lacie and three-year-old Nicholas, that left Charisse and Lacie dead, and Nicholas with stab wounds that went through his body from front to back.[30] At the sentencing phase, the State presented the testimony of the children's grandmother, who testified about the effect of the crimes on the now-orphaned young boy.[31] Additionally, the prosecutor commented extensively on the impact of the murders on Nicholas, and said that Nicholas will "want to know what type of justice was done" when he is older.[32]

Writing for the Court,[33] Chief Justice Rehnquist cited both the "harm-based" and "balancing" justifications for including victim-impact evidence at capital sentencing.[34] "[A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."[35] Furthermore, the Chief Justice argued, *Booth* "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from . . . offering 'a glimpse of the life' which a defendant 'chose to extinguish.'"[36] Therefore, "if the State chooses to permit the admission of victim-

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27. *Id.* at 823.

28. *Id.*

29. Payne v. Tennessee, 501 U.S. 808 (1991). The arguments about admitting victim-impact evidence at capital sentencing remained largely the same. The main differences in *Payne* from the Court's rulings in *Booth* and *Gathers* were personnel changes (Justices Powell and Brennan retired in 1988 and 1990, respectively, and were replaced by Justices Kennedy and Souter) and that Chief Justice Rehnquist and Justices O'Connor and Kennedy believed that the question addressed in *Booth* was squarely presented in *Payne* (they had refrained from voting to overrule *Booth* in *Gathers* because they believed the latter presented a distinct case). Additionally, Justice White overcame his reluctance in *Gathers* to overrule *Booth* even though he continued to believe it wrongly decided.

30. *Id.* at 812-13.

31. *See id.* at 814-15.

32. *Id.* at 815.

33. Justices White, O'Connor, Scalia, Kennedy, and Souter joined Chief Justice Rehnquist's opinion of the Court. *See id.* at 810.

34. *See id.* at 825-27.

35. *Id.* at 825.

36. *Id.* at 822 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)); *see also id.* at 825.

"The State has a legitimate interest in counteracting the mitigating evidence which the

impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar."[37] Importantly, however, *Payne* allows only evidence of the victim's personal characteristics and the harm inflicted upon the victim's family and community. *Payne* did not alter *Booth*'s holding that admitting evidence of the victims' opinions of the crime and of the appropriate sentence for the defendant violates the Eighth Amendment.[38]

Not content with merely allowing victim-impact evidence, Chief Justice Rehnquist announced that courts should handle it just like any other relevant evidence.[39] Thus *Payne* allows a wide variety of victim-impact evidence at capital sentencing, for trial courts need not exercise more caution when dealing with proposed victim-impact evidence than they do with other relevant evidence. Chief Justice Rehnquist noted that "[i]n the event that evidence is introduced that is so unduly prejudicial that it

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> defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

Id. (citation omitted in original) (quoting Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting)).

37. *Id.* at 827 (emphasis omitted).

38. Because *Payne* does not permit evidence of victims' views on whether a capital defendant deserves the death penalty, this Comment focuses on the two other types of victim-impact evidence: evidence of the harm caused by the murder, and evidence of the victims' personal characteristics. *Booth* was correct, however, to preclude the introduction of evidence of victims' views on the appropriate sentence. The adversaries in the criminal process are the people (the State) and the defendant, not the victim and the defendant; ours is not a system of private prosecution. Victims' views are therefore irrelevant to whether the defendant deserves the death penalty. *See* Gewirtz, *supra* note 3, at 870 n.17 (noting that evidence of the victim's "survivors' personal opinions about the defendant and the appropriate sentence . . . is the sort of witness 'opinion evidence' that is typically inadmissible"); Dugger, *supra* note 3, at 382 (pointing out that when vietims state their opinions on the appropriate sentence they are testifying about things other than their personal experience, and their testimony is thus "not only emotional and biased . . . but also uninformed"). Moreover, while jurors are impartial, victims are obviously biased against the defendant. Therefore, "the victim's opinion as to the sentence the defendant deserves tends to inflame the jury and renders it potentially more prejudicial than any other type of victim information." Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 211 (1988). Furthermore, if the victim's family members are allowed to determine, or help determine, whether a defendant lives or dies, this would make the imposition of capital punishment depend on the irrelevant factor of whether the victim's family opposes capital punishment. *See* Catherine Bendor, *Defendants' Wrongs and Victims' Rights:* Payne v. Tennessee, 27 HARV. C.R.-C.L. L. REV. 219, 242 n.119 (1992). Finally, victim opinion evidence "might impermissibly encourage the jury to shirk its ultimate responsibility for the death decision and simply act as the agent of the grieving family." Harris, *supra* note 3, at 93. Admitting victim opinion evidence therefore might contravene the principle of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which held that because jurors must not be tempted to dodge the weighty task of deciding whether to impose death, prosecutors cannot suggest to the jury that ultimate responsibility for a death sentence rests with the appellate court rather than with the jury. *See* Harris, *supra* note 3, at 93.

39. *See Payne*, 501 U.S. at 827 ("There is no reason to treat such evidence differently than other relevant evidence is treated.").

renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."[40]

In her concurring opinion, Justice O'Connor noted the strong public support for admitting victim-impact evidence at sentencing, and expanded upon Rehnquist's due process analysis.[41] Justice O'Connor pointed out that the possibility that victim-impact evidence could be "unduly inflammatory" does not justify excluding all such evidence; "[t]rial courts routinely exclude evidence that is unduly inflammatory," and can handle victim-impact evidence just like any other form of potentially disruptive evidence.[42]

Justice Souter, joined by Justice Kennedy, also concurred, noting that "criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted."[43] But in contrast to Chief Justice Rehnquist's opinion for the Court and the dissenting Justices in *Booth* and *Gathers*, Justice Souter maintained that victim-impact evidence helps the jury assess the defendant's *blameworthiness*. "Murder has foreseeable consequences. . . . Every defendant knows . . . that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death. . . . [H]arm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable."[44]

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40. *Id.* at 825 (citing Darden v. Wainwright, 477 U.S. 168, 179-83 (1986)).

41. *See Tison*, 481 U.S. at 151, 158.

42. *Id.* Justice O'Connor also made the dubious argument that in the instant case, the "brief [victim impact] statement did not inflame [the jury's] passions more than did the facts of the crime." *Id.* at 831-32. But as Jonathan Levy notes, this

> implies that unconstitutionally inflammatory evidence only warrants reversal when it is the most inflammatory evidence put before the jury. The underlying assumption here is that less inflammatory remarks have no effect on jurors when overshadowed by more inflammatory remarks. In other words, either inflammatory comments have no cumulative effect, or jurors reach some saturation point beyond which additional inflammatory comments have no effect.

Levy, *supra* note 3, at 1057 (footnote omitted). Because the facts of the crime tend to be particularly inflammatory in capital cases, Justice O'Connor's argument would permit the most inflammatory victim-impact evidence in capital cases—"the very cases that the Eighth Amendment requires have the most protection." *Id.*

43. *Payne*, 501 U.S. at 835-36. Justice Scalia concurred as well, but did not discuss the relevance of victim-impact evidence at capital sentencing. Instead, Justice Scalia stated that he would vote to allow victim-impact evidence at capital sentencing even if the Court reversed its rulings in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), "requiring the admission of all relevant mitigating evidence," and responded to Justice Marshall's allegation that *Payne* violates stare decisis. *Payne*, 501 U.S. at 833-35. Justices O'Connor and Kennedy joined the portion of Justice Scalia's opinion in which he addressed Justice Marshall's stare decisis argument. *See id.* at 833.

44. *Payne*, 501 U.S. at 838. Justice Souter also briefly stated the balancing justification: "Indeed, given a defendant's option to introduce relevant evidence in mitigation, sentencing without such evidence of victim impact may be seen as a significantly imbalanced process." *Id.* at 839 (citations omitted).

In addition, Justice Souter said that *Booth* "sets an unworkable standard of constitutional relevance."[45] Because *Booth* precludes the sentencing jury from considering victim-impact evidence of which the defendant was unaware when he committed the crime, trial courts will either have to exclude evidence of the victim's personal characteristics and family situation during the guilt phase—even if such evidence is relevant as contextual information—or empanel a separate jury for the sentencing phase.[46] Furthermore, Justice Souter stated, under *Booth*, whether victim-impact evidence is admissible at sentencing depends on the arbitrary fortuity of whether a murder victim's personal characteristics or family members happened to be directly involved in the circumstances of the crime.[47]

Justices Marshall and Stevens dissented; Justice Blackmun joined each dissent.[48] Justice Marshall argued that the principles enunciated in *Booth* remain valid, and responded to the majority's arguments by citing Justice Powell's and Justice Brennan's respective opinions in *Booth* and *Gathers*.[49] Justice Marshall charged that because the majority's arguments were the same as those offered by the dissenting Justices in *Booth* and *Gathers*, the Court's ruling was due solely to a change in personnel.[50] Thus, Justice Marshall said, the Court's decision was based on "[p]ower, not reason"[51] and blatantly violated stare decisis.[52] In response to Justice Souter's foreseeability argument, Justice Marshall said that "even where the defendant *was* in a position to foresee the likely impact of his conduct, admission of victim-impact evidence creates an unacceptable risk of sentencing arbitrariness" by shifting the jury's focus from the defendant to the victim's status in the community and allowing punishment to depend in part upon the extent to which the victim's family can articulately express their grief.[53]

Justice Stevens's dissent argued that victim-impact evidence contravenes the Eighth Amendment's prohibition of arbitrary and capricious imposition of the death penalty in three ways. First, Justice Stevens rejected the harm-based justification, contending that unforeseeable victim characteristics are irrelevant to the defendant's "'personal responsibility and moral guilt'" and thus when considered as a factor at sentencing will lead to sentences out of proportion to the defendant's blameworthiness.[54] Second, Justice Stevens pointed out that "the quantity and quality of victim impact evidence sufficient to turn a verdict of life in prison into a verdict of death is not defined until after the crime has been committed and therefore cannot possibly be applied consistently in different cases" since jurors' discretion is not "'suitably directed and limited.'"[55] Third, Justice Stevens said that victim-impact evidence "serves no

45. *Id.*
46. *See id.* at 841.
47. *See id.* at 839-42.
48. *See id.* at 844, 856.
49. *See id.* at 845-46.
50. *See id.* at 844.
51. *Id.*
52. *See id.* at 844-45, 849-56.
53. *Id.* at 846 (emphasis in original).
54. *See id.* at 860-61 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).
55. *Id.* at 861 (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion)). Justice Stevens' point also raises due process concerns: the specific forms of harm inflicted

purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason."[56]

Commentators on *Payne* have largely just parroted the preceding arguments offered by the Justices in *Booth*, *Gathers*, and *Payne*. None has satisfactorily clarified *Payne*'s flaws. Instead, *Payne*'s critics have made four distinct but similarly problematic arguments that *Payne* permits arbitrary death sentences. Before explaining the real reasons why *Payne* is such a deeply troubling decision, I now proceed to consider the four allegations of arbitrariness in turn.

II. VICTIMS' "WORTH" AND THE CAPITAL SENTENCING DECISION

Opponents of admitting victim-impact evidence at capital sentencing assert that it results in the imposition of capital punishment on the basis of victims' personal characteristics and jurors' perceptions of victims' worth.[57] This argument can be based on either the Eighth or Fourteenth Amendment. The Eighth Amendment claim is that sentencing murderers in part on the basis of their victims' personal characteristics is arbitrary. The Fourteenth Amendment claim is that victim-impact evidence leads juries to discriminate against victims who are members of unpopular groups, thus violating the Equal Protection Clause's requirement that the law protect all persons equally.[58]

A. The Eighth Amendment Claim

Victim-impact evidence may encourage jurors to engage in "selective sympathy"[59] and to be improperly influenced by factors such as the victim's race,

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upon a murder victim's survivors are not statutorily proscribed; thus the defendant has no advance notice that he will be held responsible for this harm. I will return to this point in Part III.

56. *Id.* at 856.

57. *See, e.g.*, Bandes, *supra* note 3, at 406; Beth E. Sullivan, *Harnessing* Payne: *Controlling the Admission of Victim Impact Statements To Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, 628 (1998); Talbert, *supra* note 38, at 209-11; Levy, *supra* note 3, at 1044-48, 1060; Phillips, *supra* note 3, at 105-12. Even proponents of victim-impact evidence recognize the potential problem here. *See* Gewirtz, *supra* note 3, at 874.

58. At first it may appear that a defendant would laek standing to bring this claim, since a jury which devalued the life of the defendant's victim would thereby help, not harm, the defendant. However, the Court held in *Powers v. Ohio*, 499 U.S. 400, 410-15 (1991), that a white defendant has standing to object to a prosecutor's use of peremptory challenges to strike African-American venirepersons. In addition, *McCleskey v. Kemp*, 481 U.S. 279 (1987), said that a defendant has standing to bring an equal protection challenge if he alleges that the State is "bas[ing] enforcement of its criminal laws on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* at 291-92 n.8 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

59. Gewirtz, *supra* note 3, at 879 n.50. However, selective sympathy is as much a problem with mitigating evidence—and all other forms of evidence—as it is with victim-impact evidence. *See id.* For a general discussion of selective sympathy, see Paul Brest, *The Supreme*

ethnicity, social class, occupation, level of education, and perceived "goodness" or "morality."[60] Jurors could also base their decision in part on the victim's family members' articulateness, familiarity with the English language, and ability and willingness to convey their grief and emotional loss.[61] Because testimony regarding the victim's personal characteristics directs jurors' attention to the victim's individuality, jurors are more likely to consider impermissible victim characteristics in their sentencing decision notwithstanding any knowledge of these characteristics that they may have gained from the guilt phase. Even if jurors do not consciously base their sentencing decision on their perceptions of the victim and her family members' "value," victim-impact evidence could increase the extent to which jurors' *unconscious* biases influence their deliberations.[62]

However, many forms of mitigating evidence are as likely as victim-impact evidence to influence a defendant's sentence on the basis of improper factors. Pleas for mercy from the defendant's relatives are perhaps more likely to succeed when these relatives articulately appeal to jurors' selective sympathies than when jurors view them as poorly spoken members of unpopular groups. Yet opponents of victim-impact evidence almost invariably accept the relevance and value of mitigating evidence offered by the defendant's family members and close friends, and the Court has *required* that trial courts permit such mitigating evidence at the sentencing phase of a capital trial.[63] Because the Court has implicitly (by requiring its admission) held that mitigating evidence cannot yield arbitrary death sentences, it would be logically inconsistent for the Court to consider victim-impact evidence arbitrary in violation of the Eighth Amendment.[64] The two types of evidence result in sentences based on

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Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 7 (1976).

60. *See, e.g.*, Bandes, *supra* note 3, at 365, 398, 408; Berger, *supra* note 3, at 52-55; Harris, *supra* note 3, at 96-98.

61. *See, e.g.*, Talbert, *supra* note 38, at 209-10 (noting that different victims' family members have varying degrees of communication skills and willingness to testify); Phillips, *supra* note 3, at 109 (noting the possibility that jurors will place lower values on the lives of recent immigrants whose family members have not yet mastered English because the family members will be unable to effectively convey their loss).

62. *Cf.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the phenomenon of unconscious racism and arguing that equal protection analysis must take it into account).

63. *See* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (holding that the capital sentencing authority may not refuse to consider, as a matter of law, relevant mitigating evidence); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (holding that a state may not preclude the capital sentencing authority from taking relevant mitigating evidence into account). Both *Eddings* and *Lockett* defined "relevant mitigating evidence" as "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings*, 455 U.S. at 110 (quoting *Lockett*, 438 U.S. at 604). By broadly defining mitigating evidence and failing to limit who may offer mitigating testimony, *Eddings* and *Lockett* compel trial judges to admit emotional pleas for the defendant's life by third parties such as the defendant's relatives, friends, and coworkers.

64. In their respective dissents in *Lockett*, however, Justices White and Rehnquist expressed concern that the Court's decision that capital defendants must be permitted to introduce all relevant mitigating evidence at sentencing would result in a return to the situation

analogous fortuities; if one does not inject an "arbitrary and capricious" component into sentencing, then neither does the other.

Defendants, like victims, may be unemployed drifters with no family members or friends able and willing to testify at a capital sentencing hearing. These defendants will be unable to proffer any mitigating evidence, which will likely increase their chance of receiving the death penalty. Other capital defendants, however, may be prominent pediatricians with loving wives, children, fellow doctors, and patients who will plead for the jury to spare these convicted murderers but nonetheless "wonderful" people the death penalty.[65] Similarly, some defendants will have highly educated, physically attractive relatives who can emotionally but articulately plead for the defendant's life, while other defendants will have ugly relatives incapable of

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which *Furman v. Georgia*, 408 U.S. 238 (1972), attempted to remedy. *See Lockett*, 438 U.S. at 623 (White, J., dissenting) ("I greatly fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided . . . ."); *id.* at 631 (Rehnquist, J., dissenting) (arguing that *Lockett* "will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. By encouraging [the] consideration [of] anything under the sun as a 'mitigating circumstance,' it will not guide sentencing discretion but will totally unleash it."); *see also* Richmond v. Lewis, 506 U.S. 40, 54 (1992) (Scalia, J., dissenting).

> In my view this Court has no colorable basis, either in constitutional text or in national tradition, for imposing upon the States a further constitutional requirement that the sentencer consider mitigating evidence, see Walton v. Arizona, 497 U.S. 639, 671-73 (1990) (Scalia, J., opinion concurring in part and concurring in judgment). As this and other cases upon our docket amply show, that recently invented requirement has introduced not only a mandated arbitrariness quite inconsistent with *Furman*, but also an impenetrable complexity and hence a propensity to error that make a scandal and a mockery of the capital sentencing process.

Id.

65. One might raise two objections at this point. First, one might argue that it ignores reality to consider the mitigating testimony that wealthy capital defendants could offer: capital murder defendants are overwhelmingly poor and uneducated, and any wealthy person charged with murder will have paid counsel of sufficient competence to make a death sentence inconceivable. But the examples involving wealthy defendants are intended not to reflect reality, but only to sharpen the main point here, which is that there are significant parallels between how victim-impact evidence and mitigating evidence presented by a defendant's family members or friends can influence a capital sentencing decision, and that these parallels logically preclude considering one but not the other "arbitrary."

Second, and building on the first objection, since capital defendants are more demographically homogeneous than are murder victims, the disparities in capital defendants' abilities to put on convincing mitigating evidence are less significant than are the corresponding disparities for victims' relatives' presentations. Therefore, the objection would continue, victim-impact evidence may arbitrarily influence capital sentencing even if mitigating evidence in the form of third parties' testimonials does not, since victim-impact evidence's influence would vary more from case to case than would the influence of third-party mitigating evidence. But this objection attempts to transform a difference in *degree* into a difference in *kind*: the salient factor here is not the *extent* to which a third party's testimony influences capital sentencing hearings or to which its influence varies from case to case, but rather the *manner* in which it influences capital sentencing hearings.

enunciating a single grammatically correct and cogent sentence or publicly displaying grief; the former category of defendants will, other things being equal, evade the death penalty more often than the latter.[66] If it is not arbitrary to allow jurors to *refuse to impose* a death sentence on the basis of their perceptions of the *defendant's* and his family members' personal characteristics, then it cannot be arbitrary to allow jurors to *impose* a death sentence on the basis of their perceptions of the *victim's* and her family members' personal characteristics.[67]

But perhaps what constitutes constitutionally unacceptable "arbitrariness" depends on whether the capital sentencing decision is tilted towards death or errs in favor of life. Indeed, by requiring trial courts to admit mitigating evidence at capital sentencing, the Court may have recognized—but left unstated—the risk that some defendants would escape death for purely fortuitous reasons, yet nonetheless decided that arbitrariness favoring life raises no constitutional difficulties. However, if by mandating the admission of mitigating evidence the Court was tacitly conceding that mitigating evidence injects an element of randomness into the capital sentencing process, then *Lockett* and *Eddings* seem inconsistent with *Furman*'s holding that death sentences cannot be meted out arbitrarily.[68] *Furman* never said that arbitrariness that *favors* defendants raises no constitutional concerns; to the contrary, *Furman* condemned *all* arbitrariness in capital sentencing.[69] Under *Furman*, therefore, *Lockett* and *Eddings* must be viewed as rejecting the contention that mitigating evidence yields arbitrary results. At least for the purposes of an Eighth Amendment analysis, mitigating evidence cannot be considered arbitrary, and thus neither can its analog, victim-impact evidence.

Once stripped of its presupposition that evidence of personal and family characteristics yields arbitrary results when presented as victim-impact evidence but not when presented as mitigating evidence, this argument is revealed for what it really is: a veiled equal protection claim. Those who make the first arbitrariness argument do so more out of a (reasonable) concern that it is immoral to place differing values

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66. While some complain that victim-impact statements "reward" with the death penalty emotional displays by a victim's family members, *see* Phillips, *supra* note 3, at 112, they are silent with regard to the fact that defendants' family members are similarly rewarded with a life sentence for their tearful pleas for mercy. *Cf.* Maria Imperial, *A Contrasting View of Victims' Rights*, N.Y. L.J., Apr. 15, 1992, at 2 ("Should defendants be denied their rights based on the fear that some defendants are more eloquent than others or could afford higher priced defense attorneys?"); Christine D. Marton, Comment, *The Admissibility of Victim-Impact Evidence at the Sentencing Phase of a Capital Trial*, 31 DUQ. L. REV. 801, 806 n.41 (1993) ("The argument concerning the possibility that a victim's articulateness as well as a victim's financial position might result in unequal justice can be likewise applied to defendants.").

67. Importantly, the point is *not* that defendants' rights must be balanced with victims' rights, but rather that the Court cannot consider victim-impact evidence arbitrary if it does not consider mitigating evidence arbitrary. Either both mitigating and victim-impact evidence yield arbitrary results or neither does.

68. *Cf. Furman*, 408 U.S. at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

69. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("*Furman* held that [capital punishment] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

on different human lives than out of their concern that juries' evaluations of different humans' worth will result in "arbitrary and capricious" imposition of capital punishment (for if this were their true concern, then they would also oppose allowing analogous forms of mitigating evidence). Thus the first arbitrariness argument should be evaluated under Equal Protection Clause rather than Eighth Amendment principles.

B. The Equal Protection Claim

The controlling precedent regarding jurors' discrimination on the basis of a murder victim's personal characteristics is *McCleskey v. Kemp.*[70] In *McCleskey*, the Court held that a complex statistical analysis, the Baldus Study, which concluded that, in Georgia, capital defendants charged with murdering white victims were 4.3 times as likely to receive a death sentence as defendants charged with murdering blacks, did not demonstrate that Georgia's capital sentencing process violates the Fourteenth Amendment's Equal Protection Clause.[71] Justice Powell, writing for the Court, noted that "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination,'"[72] and that "the purposeful discrimination 'had a discriminatory effect' on him."[73] Hence to show an Equal Protection Clause violation, McCleskey had to "prove that the decisionmakers *in his case* acted with discriminatory purpose."[74] Because each jury "is unique in its composition" and considers "innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense," one cannot infer from a statistical analysis that a *particular* jury considered the victim's race as a factor in determining whether the defendant deserves the death penalty.[75]

Moreover, Justice Powell argued, "[b]ecause discretion is essential to the criminal justice process," the Court requires "exceptionally clear proof before we would infer that the discretion has been abused."[76] Justice Powell maintained that a statistical analysis which took into account 230 nonracial factors that might influence a capital

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70. 481 U.S. 279 (1987).

71. *Id.* at 291-99. *McCleskey* also said that the Baldus study did not prove that Georgia's capital punishment system violated the Eighth Amendment. *Id.* at 299-319.

72. *Id.* at 292 (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).

73. *Id.* (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

74. *Id.* (emphasis added).

75. *Id.* at 294. Justice Powell said that while the Court had held that statistics could prove discrimination in the context of selection of jury venires and employment decisions, the situation is different for juries' sentencing decisions. *See id.* at 294-95.

> The decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer. Therefore, an unexplained statistical discrepancy can be said to indicate a consistent policy of the decisionmaker. The Baldus study seeks to deduce a state 'policy' by studying the combined effects of the decisions of hundreds of juries that are unique in their composition.

Id. at 295 n.15; *see also id.* at 293-96.

76. *Id.* at 297.

sentencing juror did not constitute "exceptionally clear proof."[77] Thus *McCleskey* made it virtually impossible for a capital defendant to demonstrate that his victim's race was a factor in his death sentence: to prove an Equal Protection Clause violation, a capital defendant must demonstrate that the jury that sentenced him to death considered the defendant's race as a factor in its sentencing determination, and that racial bias was the "but-for" cause of the death sentence.[78] Under this standard, the only realistic way a defendant can prove his jury's decision was motivated by racial bias is if the jurors say so. Only in extremely rare cases will a juror come forward and admit that he or his fellow jurors sentenced a defendant to death because they dislike persons of his race. Therefore, *McCleskey*'s effect is to allow capital sentencing jurors to consider the victim's race in its sentencing determination so long as they do not talk about the discriminatory basis for their decision outside of the jury room.[79]

The dicta in *McCleskey* similarly dismissed the possibility of allowing defendants to demonstrate via statistical analyses the influence on sentencing of victims' characteristics other than race.[80] One can assume that the Court would not impose a more exacting standard on attempts to prove bias on characteristics other than race than the standard *McCleskey* imposed on attempts to prove racial bias. Moreover, while racial, religious, and ethnic distinctions are subject to "strict scrutiny," the ability to articulately and emotionally convey grief, level of education, and class are not "suspect" categories and thus are subject only to "rationality" review.[81] Although

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77. *Id.* at 325 (Brennan, J., dissenting).

78. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 337 (1997) (noting that "Powell and the Court majority resolutely shut the door to any statistics-driven, class-based challenge to the administration of punishment"); David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 370 (1994) ("The standard set by *McCleskey* for proving constitutional violations means that proof of racial discrimination in capital punishment cases is beyond the capacity of virtually all capital defendants.").

79. Though the Supreme Court prefers to ignore the problem by setting an impossibly high standard of proof, overwhelming evidence suggests that whether a capital defendant gets the death penalty depends largely on the race of his victim. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5-6 (1990) (analyzing the results of 28 studies from various jurisdictions, all of which found that the victim's race was a significant factor in the imposition of capital punishment); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 708-10 (1983) (providing extensive supporting data for, and statistical analysis of, the Baldus study's race-of-victim findings). For a list of additional studies finding a correlation between a murderer's likelihood of receiving a death sentence and his victim's race, see KENNEDY, *supra* note 78, at 450 n.51.

80. *McClesky*, 481 U.S. at 297, 315-19.

81. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). Levy argues that "whether a victim has an articulate and caring family is just as arbitrary a characteristic as the color of the victim's skin." Levy, *supra* note 3, at 1044-45 n.137. That may be true, but whether a victim has an articulate and caring family is not *constitutionally* arbitrary. While the Constitution bars distinctions along racial lines, it says nothing about distinctions on the basis of a person's family members' articulateness or capacity for empathy. These characteristics

considering these victim characteristics when imposing the death penalty is very controversial and probably bad policy, the Court would almost certainly refuse to find it unconstitutional because it is not *irrational*. Therefore, when victim-impact evidence is presented to a capital sentencing jury, a defendant given the death penalty can challenge his sentence on equal protection grounds only if he can demonstrate that the jurors *in his case* considered the victim's race, religion, or ethnicity in reaching their decision or if the statute authorizing the introduction of victim-impact evidence lists these constitutionally suspect classifications as relevant to the capital sentencing decision.

Additionally, it should be noted that "in other legal contexts, such as civil wrongful death actions, juries are invited to make different-sized damage awards based on the relative harm caused by the loss of the life in question or some similar valuation."[82] While measuring the value of different human lives seems morally repugnant to many, our law already permits such measurements in the civil context, and, under *McCleskey*, effectively in the criminal context as well,[83] so it is difficult to see how evidence that allows or even encourages these judgments violates the Constitution. For that matter, it appears that no constitutional impediment prevents a legislature from explicitly including a threshold valuation of the murder victim's worth to society as an aggravating factor in capital sentencing, unless the legislature includes a constitutionally suspect characteristic as a factor relevant to the jury's calculation of the victim's social value.

III. GUIDELINES, DISCRETION, AND THE ELIGIBILITY-SELECTION DICHOTOMY

In his *Payne* dissent, Justice Stevens alleged that admitting victim-impact evidence at capital sentencing is arbitrary in violation of the Eighth Amendment because "the quantity and quality of victim-impact evidence sufficient to turn a verdict of life in

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appear to lie outside the ambit of the Equal Protection Clause. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). Thus rationality review applies to allegations of discrimination on the basis of a nonsuspect characteristic of a victim. Even if a defendant satisfied *McCleskey*'s standard of proof, such discrimination is not clearly *irrational*. Indeed, some devotees of "law and economics" argue that considering victims' "value" in assessing punishments would more efficiently deter crime. *See* David D. Friedman, *Should the Characteristics of Victims and Criminals Count?:* Payne v. Tennessee *and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 747-56 (1993) (arguing that considering a murder victim's characteristics in the capital sentencing decision is efficient, at least in cases where the murderer knew the victim's characteristics ex ante).

82. Gewirtz, *supra* note 3, at 875-76 n.32.

83. While *McCleskey* did not *technically* "permit" assigning values to victims' lives, its standard of proof is virtually impossible to meet and apparently applies to claims of discrimination on the basis of nonsuspect victim characteristics. *See supra* text accompanying notes 76-79. Thus *McCleskey in practice*—although admittedly not *in theory*—allows prosecutors and jurors to discriminate on the basis of victims' characteristics.

prison into a verdict of death is not defined until after the crime has been committed and therefore cannot possibly be applied consistently in different cases."[84] But the same is true of mitigating evidence: jurors' discretion to consider and weigh mitigating factors is totally unconstrained.[85] Since the Court *requires* that capital sentencing jurors be permitted to *decrease* a death sentence to life inprisonment on the basis of *undefined* mitigating evidence and in the absence of *any* statutory guidelines for considering that evidence, logic dictates that it cannot be arbitrary to allow jurors to *increase* a life sentence to a death sentence on the basis of victim-impact evidence when the statute authorizing that evidence directs the jurors to consider certain broadly defined but limited categories of victim-impact evidence.

Furthermore, the Court has "distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase."[86] Because victim-impact evidence is not introduced to prove the existence of an aggravating factor, it, like mitigating evidence, is relevant only to the selection phase.[87] While the Court has underscored the need to channel and limit the jury's discretion during the *eligibility* phase in order to avoid the arbitrary or capricious imposition of death,[88] it has taken a quite different approach toward the *selection* phase. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."[89] As the Court said in *Buchanan v. Angelone*, "[I]n the selection phase, we have emphasized the need for

84. *Payne*, 501 U.S. at 861.

85. Moreover, current capital sentencing statutes' guidelines (or lack thereof) for jurors' consideration of mitigating evidence *are a direct result of* the Court's rulings *preventing* legislators from attempting to guide capital sentencing jurors' consideration of mitigating factors. *See supra* text accompanying note 63.

86. Buchanan v. Angelone, 522 U.S. 269, 273 (1998); *see also* Tuilaepa v. California, 512 U.S. 967, 971 (1994). In the eligibility phase, the jury decides whether the defendant is eligible for the death penalty, usually by determining whether the murder involved aggravating circumstances. In the selection phase, the jury decides whether a death-eligible defendant should be executed. *See Buchanan*, 522 U.S. at 273; *Tuilaepa*, 512 U.S. at 971-73.

87. *See* Windom v. State, 656 So. 2d 432, 438 (Fla. 1995) (Under Florida's capital sentencing system, "victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances. The evidence is not admitted as an aggravator . . . ."); Cargle v. State, 909 P.2d 806, 828 n.15 (Okla. Crim. App. 1995) (noting that victim-impact evidence does not help the jury determine whether the defendant is eligible for the death penalty because it cannot help prove the existence of an aggravating factor, and thus cannot support the imposition of a death sentence in the absence of an aggravating factor); Johnson, *supra* note 3, at 805-06 ("Aggravating circumstances are facts sufficient to elevate a crime to a death-eligible category, while victim impact evidence are [sic] facts relevant to a determination as to whether a death sentence should be imposed on a death-eligible defendant.").

88. *See Buchanan*, 522 U.S. at 275; *cf.* Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988) (striking down instruction allowing the jury to find an aggravating circumstance if the murder was "especially heinous, atrocious, or cruel"); Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (invalidating instruction permitting the jury to find an aggravating circumstance if the murder was "outrageously or wantonly vile, horrible and inhuman").

89. California v. Ramos, 463 U.S. 992, 1008 (1983).

a broad inquiry . . . . Complete jury discretion is constitutionally permissible."[90] Therefore, the jury's consideration of victim-impact evidence does not need to be guided nearly as specifically as does its consideration of evidence which supports the existence of an aggravating factor.[91] Finally, the Constitution does not require scientifically precise guidelines for what is necessarily a somewhat subjective calculation; rather, it requires general guidelines which cabin rather than eliminate the jury's discretion. After all, arbitrary means ungoverned by rule, not the absence of a rule that allows no discretion.[92]

A related but separate objection is that capital punishment statutes do not specifically mention victim-impact evidence, and hence admitting victim-impact evidence raises due process concerns: murderers cannot know that they will be held responsible for the "indirect" harm they inflict, because this harm is not specifically proscribed by statute.[93] As Professor Susan Bandes notes, "[i]t is an essential tenet of

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90. *Buchanan*, 522 U.S. at 275-76. *Buchanan*'s discussion of the Court's requiring "a broad inquiry" occurs in the context of deciding whether the Eighth Amendment requires that capital juries "be instructed on the concept of mitigating evidence generally, or on particular statutory mitigating factors." *Id.* at 270. However, the Court has not said that the jury's broad inquiry must be limited to mitigating evidence and has not stated a reason why this constitutional evidentiary standard for the selection phase would not apply to victim-impact evidence (and all other relevant evidence) as well as mitigating evidence. *Cf. Tuilaepa*, 512 U.S. at 971-73, 978-79 (noting that at the selection phase, the State can allow the jury unfettered discretion); Zant v. Stephens, 462 U.S. 862, 875, 878-79 (1983) (rejecting the argument that *Furman v. Georgia*, 408 U.S. 238 (1972), prohibits states from allowing a capital sentencing jury "to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is [death-eligible]" and noting that accepting this argument would require overruling *Gregg v. Georgia*, 428 U.S. 153 (1976), since the capital sentencing statute in that case "clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances").

91. *See Buchanan*, 522 U.S. at 275.

92. I thank Professor Marvin Cummins for this point. *Cf.* Harris v. Alabama, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer."); Franklin v. Lynaugh, 487 U.S. 164, 179 (1988) (rejecting the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"); *Zant*, 462 U.S. at 884 ("[T]here can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'") (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

93. Of course, this objection does not apply to capital sentencing schemes that specifically authorize the admission of victim-impact evidence at capital sentencing hearings. In *Payne*, the victim-impact evidence was not admitted pursuant to a statute authorizing the admission of such evidence. *Payne*, 501 U.S. at 821. In fact, when *Payne* was decided, no state specifically authorized the admission of victim-impact evidence at capital sentencing. *See* Johnson, *supra* note 3, at 800. Since *Payne*, 12 of the 38 states which employ capital punishment have revised their death penalty statutes to explicitly permit the introduction of victim-impact evidence at capital sentencing. *See id.* at 800 n.43. Of the remaining 26 death penalty states, 15 have statutes that include a "catch-all" phrase that authorizes the admission at sentencing of all relevant evidence, and 11 have statutes that do not provide for the admission of evidence not relevant to the statutorily enumerated aggravating factors. *See id.*

due process that if the defendant's conduct does not meet the criteria for a previously defined crime, he cannot be punished for that conduct."[94] But victim-impact evidence does not alter the *type* of offense for which the defendant has been convicted and charged; rather, it is "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."[95] Furthermore, in noncapital as well as capital sentencing decisions, judges and juries often consider factors not mentioned in the relevant statute, such as the defendant's future dangerousness or the extent to which he is remorseful, and the Court has found this practice consistent with due process.[96]

IV. EMOTION, REASON, AND DEATH

Opponents of victim-impact evidence contend that it prevents jurors from making a "rational" (that is, devoid of emotional influence) sentencing determination[97] and injects volatile and improper emotions into the capital sentencing decision.[98] But it is unrealistic to expect a capital sentencing jury's decision to be wholly devoid of emotion. Capital sentencing juries' decisions are *never* unaffected by emotion. No capital sentencing jury could possibly decide solely on the basis of "pure" reason.[99] Emotions cannot be neatly separated from reasoning; each includes aspects of the other.[100] Furthermore, the decision of whether a particular individual deserves the

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94. Bandes, *supra* note 3, at 396 n.177 (noting that due process, fair play, "and the settled rules of law" require that "the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties"). Bandes argues that in the absence of a specific statutory proscription, considering the harm inflicted upon a murder victim's survivors "conflicts with the legal principle of nulla poena sine lege (the requirement of prior notice that particular conduct is criminal). . . . [T]o the extent that courts take the magnitude of harm into consideration, they must do so within the boundaries previously authorized by legislative enactment." *Id.*

95. *Payne*, 501 U.S. at 825.

96. *See id.* at 820-21 ("[T]he sentencing authority has always been free to consider a wide range of relevant material."); United States v. Tucker, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."); *cf.* Williams v. New York, 337 U.S. 241 (1949) (holding that judge's imposition of death sentence based in part on presentencing report prepared by probation department, despite life imprisonment recommended by jury, did not violate Due Process Clause).

97. *See* Levy, *supra* note 3, at 1046.

98. *See, e.g.*, Bandes, *supra* note 3, at 392-93; Levy, *supra* note 3, at 1046; Talbert, *supra* note 38, at 209.

99. *See* Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989) (arguing that capital sentencing decisions always do and should have some emotional basis).

100. *See* Bandes, *supra* note 3, at 366 ("[T]here is broad agreement on one crucial point—that emotions have a cognitive aspect—and its corollary—that reasoning has an emotive aspect."); Gewirtz, *supra* note 3, at 877-78 ("[T]he glib distinction between 'reasoned' responses and 'emotional' responses is far too simplistic. . . . [S]cholars from fields as diverse as philosophy, psychology, and neurobiology have demonstrated that emotions have a

death penalty necessarily is partly subjective, depending in part on whether the defendant's mitigating testimony induced jurors to feel empathy towards him and on jurors' perceptions of the "heinousness" of the crime.[101] Moreover, arguing that evidence yielding an emotional reaction should be inadmissible "would prove (and would exclude) far too much, because a high proportion of now-admissible evidence produces some emotional reaction in jurors."[102] In sum, "the issue is boundedness, not whether emotion has a place."[103]

However, that some victim-impact evidence is highly inflammatory, and thus may be more prejudicial than probative, is clear. Still, "'the Court has never held 'that the excessively inflammatory character of concededly relevant evidence can form the basis for a constitutional attack.'"[104] Moreover, victims' statements are "'unlikely to be more emotional... than the widely accepted presentations by defendants and their families and friends at sentencing hearings.'"[105]

Furthermore, courts can decide according to their jurisdictions' evidentiary standards whether victim-impact evidence is admissible.[106] The fact that *some* victim-impact evidence may be more prejudicial than probative does not justify excluding *all* victim-impact evidence as inherently arbitrary under the Eighth Amendment any more than the fact that some proffered mitigating testimony is excessively emotional and lacks any probative value justifies excluding all mitigating evidence. However, because "even some legitimate victim impact evidence could inflame or unduly prejudice a jury if admitted in excess,"[107] courts should be wary of admitting repetitive victim-impact evidence. When the evidence introduced is highly emotional, judges should be vigilant and decisive in ending the presentation of victim-impact evidence before the cumulative emotional weight of the testimony outstrips its probative value and the delicate balance between probative and prejudicial evidence

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cognitive dimension... emotions can open up ways of knowing and seeing, and can therefore contribute to reasoning."); Harris, *supra* note 3, at 92 ("Emotions are not inimical to the reasoning process, particularly in a contextual decision-making situation. Rather, emotions, being partly cognitive, are partly intellectual and can serve as guides to reasoned decision making.").

101. *See* Gewirtz, *supra* note 3, at 878; Pillsbury, *supra* note 99, at 655-56, 699-703.

102. Gewirtz, *supra* note 3, at 877.

103. *Id.* at 879; *see also* Williams v. Chrans, 945 F.2d 926, 947 (7th Cir. 1991) ("We must recognize that the state should not be required to present victim impact evidence... devoid of all passion.").

104. William L. Menard et al., *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-1990: Capital Punishment*, 79 GEO. L.J. 1123, 1141 n.2394 (1991) (quoting Thompson v. Oklahoma, 487 U.S. 815, 878 (1988) (Scalia, J., dissenting)).

105. Talbert, *supra* note 38, at 203 n.23 (omission in original) (quoting U.S. DEP'T OF JUSTICE, VICTIMS OF CRIME: PROPOSED MODEL LEGISLATION, II-9 (1986)).

106. *See* Gewirtz, *supra* note 3, at 870-71 & n.18.

107. Livingston v. State, 444 S.E.2d 748, 751 (Ga. 1994); *see also* State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996) ("The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant."); Johnson, *supra* note 3, at 816 ("[W]ith each witness paraded before the jury, the chances increase that an appellate court will view such evidence as cumulative and prejudicial.").

tips in favor of the latter.[108] In particularly extreme cases where victim-impact evidence might have rendered a capital sentencing hearing fundamentally unfair, the defendant can seek relief under the Fourteenth Amendment's Due Process Clause.[109]

Related to the argument that victim-impact evidence induces visceral, emotional reactions in jurors which lead them to impose death sentences on irrational and hence arbitrary bases is the charge that victim-impact evidence distracts jurors from focusing on the defendant's culpability.[110] This allegation presupposes that victim-impact evidence is irrelevant to the defendant's culpability: if the evidence is relevant, then it is hardly a distraction. Thus, the claim that the emotional nature of victim-impact evidence diverts jurors' minds is really just another way of phrasing the argument (which I will address later) that victim-impact evidence is irrelevant to the defendant's culpability.

Finally, some commentators not opposed to emotional testimony in general object to victim-impact evidence because it arouses jurors' passions for revenge. However, "[t]he principal objection to revenge, that it lacks measure or discrimination because the victim of the wrong is the self-appointed judge, has no force when the issue is merely the admissibility of victim impact statements before a disinterested judge (or jury)."[111] Moreover, the Constitution says nothing about the penological relevance of

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108. While the *Federal Rules of Evidence* do not apply at sentencing proceedings, Rule 403 provides an example of adequate guidelines for judges deciding whether to admit victim-impact evidence at capital sentencing. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. "'Unfair prejudice' . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note.

109. The Court has left little room for defendants to argue that improper prosecutorial comments rendered their trial fundamentally unfair. For instance, in *Darden v. Wainwright*, 477 U.S. 168 (1986), the Court found no denial of due process even though the prosecutor referred to the defendant as an "animal" and several times said that someone should have "blown [the defendant's] head off." *Id.* at 180 n.12. Justice Powell, writing for the Court in *Darden*, said, "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 181 (quoting Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983), and Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

In the rare cases in which a prosecutor's comments may have rendered a criminal proceeding fundamentally unfair, courts should not allow the result of the tainted proceeding to stand simply because the trial judge instructed the jurors to disregard the inflammatory evidence.

> It is illogical to believe that jurors will be so inflamed as to render an unjust decision which violates Due Process but not so inflamed that they cannot obey the judge's instructions to iguore the evidence or prosecutorial argument that is the source of those emotions. The whole point is that the evidence or argument may have subverted the jurors' ability to follow the law.

Levy, *supra* note 3, at 1056.

110. *See, e.g.*, Bandes, *supra* note 3, at 401; Dugger, *supra* note 3, at 403-04.

111. Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 745 (1997) (reviewing LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds.,

revenge, and the Court has certified revenge (couched as "retribution") as an acceptable reason for imposing the death penalty.[112] Even if imposing the death penalty to exact vengeance is bad policy, it is not *unconstitutional*.[113]

V. CULPABILITY, CONSEQUENCES, AND WHAT "ARBITRARY" MEANS

The claim that victim-impact evidence is irrelevant to a capital defendant's culpability fails to demonstrate that such evidence yields *arbitrary* death sentences in violation of the Eighth Amendment. (However, as explained in Part VI, this criticism *does* highlight the major problem with allowing victim-impact evidence at capital sentencing hearings: it allows negligently caused harm to be "the defining line between life and death."[114]) Like the first three allegations that admitting victim-impact evidence makes the capital sentencing decision arbitrary, this criticism applies to many forms of mitigating evidence as well. For example, how is the grief—or lack thereof—of a capital defendant's family members relevant to his culpability? Is it relevant to his blameworthiness that the defendant met his girlfriend at church or that he "was an extremely polite prisoner"?[115] Such mitigating evidence is routinely admitted during capital sentencing hearings even though it is irrelevant to the defendant's blameworthiness. In addition, neither a prediction of a murderer's future dangerousness nor whether he has a significant criminal record is indicative of his culpability,[116] yet the Court has held that this information can constitute an *aggravating factor*.[117]

Furthermore, punishing two equally culpable defendants differently on the basis of the harm they caused is not *arbitrary*. One cannot say of a post-*Payne* capital punishment system that "[t]here is no principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not."[118] "There *is* a distinguishing principle: the harm the victims suffered."[119] To be "arbitrary" means to be ungoverned by any rule or principle. That the governing principle may be *unsound* does not render the results *capricious*.

1996)).

112. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976); *see also* Posner, *supra* note 111, at 745 ("Revenge is primitive, in the sense of instinctual, as also is love, of which compassion for a criminal is a dilute form; but I do not think that the primitiveness of an emotion should disqualify it from playing a role in sentencing.").

113. However, vengeance cannot be the *only* reason for imposing the death penalty. *See infra* note 151.

114. Sullivan, *supra* note 57, at 630.

115. Payne v. Tennessee, 501 U.S. 808, 826 (1991).

116. However, such evidence is relevant to the larger question of whether the defendant should live or die. *See* Jurek v. Texas, 428 U.S. 262, 275-76 (1976).

117. *See id.* at 269, 274-76.

118. Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (opinion of Stewart, J.).

119. 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, 1316 (1988) (emphasis in original).

VI. RETRIBUTION, UNFORESEEN HARM, AND DESERT

As indicated in the preceding Part, the strongest objection to allowing victim-impact evidence at capital sentencing hearings is that it sheds no light on whether the defendant deserves the death penalty.[120] Murderers often are not aware of their victims' personal characteristics or interpersonal relationships when they kill them. Nor can one assume that those who kill consider the possibility that their crime will harm third parties; many murderers may never consciously consider this risk. If two murderers have equally culpable mental states when they killed, why should the state execute only one merely because he inflicted more unforeseen harm? Neither murderer killed in order to harm his victim's survivors—and likely never considered the risk of causing harm to third parties—so why should the fortuity that one murderer's victim left behind a loving family and many friends, while the other murderer's victim was a loner with no significant social ties, affect their respective sentences?

In order to evaluate this criticism of *Payne*, it is necessary to understand a little bit about culpability, the penological theory of retribution, and the Court's statements about retribution with regard to capital punishment.

A. Retribution's Four Variants and the Court's Capital Punishment Jurisprudence

A sentencing scheme based on the theory of retribution can assess punishments in four distinct ways: purely according to the criminal's mental state ("pure culpability-based retribution"), purely according to the harm the criminal's crime caused society ("pure harm-based retribution"), or according to one of two formulations which take into account both the criminal's culpability and the harm he caused ("impure culpability-based retribution" and "impure harm-based retribution").[121] Pure culpability-based retribution examines what the defendant intended to do or to risk doing and punishes the defendant solely according to his mental state.[122] Thus, under

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120. This Part employs the *Model Penal Code*'s five-level hierarchy of mental states. In order of increasing culpability, the five mental states are strict liability, negligence (the defendant should have known his conduct risked causing harm, or a "reasonable" person would have been aware or foreseen that his conduct created a risk of harm), recklessness (the defendant was consciously aware that his conduct created a substantial risk of harm), knowledge (the defendant was consciously aware that his conduct was virtually certain to cause harm), and purpose (the defendant's conscious object was to cause harm). *See* MODEL PENAL CODE § 2.02(2) (1962).

Despite its logical and philosophical merits, the Court has never incorporated into its Eighth Amendment jurisprudence the *Model Penal Code*'s principle that punishment should be based solely on culpability. Note that if the Eighth Amendment prohibited factoring the harm caused into *noncapital* sentencing decisions, differentiating between the sentences for attempts and completed crimes would be unconstitutional.

121. *See* Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 237-38 (1994).

122. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE

a theory of culpability-based retribution, attempted and successful crimes should be punished equally, since consequences are irrelevant to culpability.[123] Pure harm-based retribution, in contrast, measures the harm the defendant caused and imposes punishment without regard to the defendant's culpability. The offender's intent and expectations are irrelevant to pure harm-based retribution; consequences alone determine the appropriate punishment.

In addition to its pure culpability and pure harm-based forms, retribution can in two ways encompass *both* the offender's culpability and the harm he causes.[124] Under "impure culpability-based retribution," an offender's level of culpability determines the outer boundary of the range of permissible punishments, but within this range, the harm his crime causes affects his punishment.[125] As Professor Michael S. Moore says, "Culpability sets the outer limits of desert and thus, of proportionate punishment. (Proximately) causing the harm intended or risked brings one's deserts up to those limits but causing more harm than intended or risked does not increase one's deserts beyond those limits."[126] Impure culpability-based retribution pervades our criminal law.[127] For example, impure culpability-based retribution explains why completed crimes are punished more severely than attempts: a murderer and an attempted murderer may be equally culpable, but the different levels of harm they cause greatly affect their criminal liability.[128]

PHILOSOPHY OF LAW 131 (1968).

123. *See id.* ("Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?").

124. *See* Moore, *supra* note 121, at 237-38.

125. "[W]hen culpability is present, wrongdoing independently influences how much punishment is deserved." *Id.* at 238.

126. *Id.* at 281.

127. Chief Judge Richard Posner of the Seventh Circuit Court of Appeals has said, "'moral luck,' as philosophers refer to distinctions in culpability that are based on consequences rather than intentions, is, rightly or wrongly, a pervasive characteristic of moral thought in our society, at least the moral thought that informs the criminal law." United States v. Martinez, 16 F.3d 202, 206 (7th Cir. 1994); *see also* United States v. Tham, 118 F.3d 1501, 1507 (11th Cir. 1997) ("Distinctions based on the consequences of a criminal act, as opposed to the intentions of the actor, represent an enduring and pervasive characteristic of the moral thought that informs our system of criminal law.").

On the relevance of moral luck to criminal responsibility, see, for example, THOMAS NAGEL, *Moral Luck*, *in* MORTAL QUESTIONS 24, 24-38 (Thomas Nagel ed., 1979); BERNARD WILLIAMS, *Moral Luck*, *in* MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980, at 20, 20-39 (Bernard Williams ed., 1981); R.A. Duff, *Auctions, Lotteries, and the Punishment of Attempts*, 9 LAW & PHIL. 1, 30-37 (1990); Moore, *supra* note 121, at 253-58. For arguments that moral luck is irrelevant to criminal responsibility, see, for example, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS *passim* (H.J. Paton trans., 1964) (1785); Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1 (1994); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1601-03 (1974).

128. *See* Moore, *supra* note 121, *passim*.

The other way in which retribution can take both culpability and harm into account is "impure harm-based retribution." Under this fourth theory of retribution, only offenders who have a threshold level of culpability receive punishment, but they are held strictly liable for the full extent of the harm they cause even if their culpability does not extend to the full range of the harm they cause. A criminal is punished for *all* of the harm he caused if he only intended to cause or recklessly risked causing a portion of the harm he caused. The common law doctrines of felony-murder and "intent to inflict grievous bodily harm murder" are examples of this fourth form of retribution.[129]

The Court has come to acknowledge that "retribution" is the main penological interest justifying capital punishment[130]—and the overriding consideration for whether a particular type of evidence is admissible at capital sentencing, where the focus is on whether the defendant *deserves* death.[131] But the Justices have never clearly explained what they mean by "retribution." Nonetheless, since the Justices purport to rely on retribution to guide their analyses of capital punishment issues, I will examine *Payne* under the four theories of retribution and the Court's death penalty precedents to determine whether it can fit simultaneously within one of the four theories of retribution and the Court's death penalty jurisprudence.

B. Victim-Impact Evidence and Culpability

Payne's main flaw is that it permits *negligently* caused harm to be the decisive factor in whether a capital defendant lives or dies. Under *Payne*, if two *equally*

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129. *See id.* at 280; *cf.* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 999 (1985) ("Often the substantive law defines the criminal offense and the sanction to be imposed by the actual harm that has resulted. The definition of an offense frequently depends on the result of the conduct—simple battery, aggravated assault, and murder all encompass particular results within their definitions."). Similarly, the current United States Sentencing Guidelines allow departures from the recommended sentences for consequences of criminal conduct. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.1 (death), 5K2.2 (physical injury), 5K2.3 (extreme psychological injury), 5K2.5 (property damage or loss) (1996).

130. The lead opinion in *Gregg v. Georgia* said that the Eighth Amendment permits a state to impose the death penalty in order to advance two penological objectives: retribution and deterrence. 428 U.S. 153, 183 (1976). Since *Gregg*, the Court has come to rely more on retribution than deterrence. *See* Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting) ("[T]he interest that [the Court has] identified as the principal justification for the death penalty is retribution . . . ."). Apparently, many of the Justices have ceased believing that the death penalty deters crimes—and a number of studies support the Justices' shift away from relying on deterrence to justify capital punishment. *See, e.g.*, Death Penalty Information Center, *Facts About Deterrence and the Death Penalty* (visited Sept. 15, 1999) <http://www.essential.org/dpic/deter.html> (citing statistics indicating that the death penalty fails to deter murders).

131. When evaluating Eighth Amendment challenges to capital sentencing proceedings, the Court has consistently noted that the death penalty should be a "'reasoned moral response.'" Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Unlike retribution, deterrence is a utilitarian penological theory that focuses on results rather than moral desert.

culpable murderers commit essentially the *same crime*, one may be executed while the other lives *solely* because the former's victims suffered more (or *appeared* to suffer more) than the latter's.[132] By maintaining that the harm to a murder victim's family members is relevant to the defendant's blameworthiness, the *Payne* majority tacitly (unwittingly?) accepted the theory of impure harm-based retribution.

Victim-impact evidence informs the jury of harm with respect to which the defendant was merely negligent. If a murderer knew his victim's family and community would be harmed by the victim's death, or was aware that there was a substantial risk of this, then this harm may plausibly be deemed relevant to whether he deserves death, since he inflicted it knowingly or recklessly.[133] But if a murderer never considered the fact that by killing he might harm people other than his immediate victim, even though a "reasonable" person would have thought of this, he is merely negligent with respect to the harm he causes his victim's family and community. Even if one made a distinction between murderers who know their victims and murderers who do not know their victims, one cannot assume that the former consciously consider the possibility that they could harm their victims' families and communities.

In one passage of his opinion, Justice Souter indicated that he believed that all murderers are *reckless* with respect to the possibility that their murder will harm their victims' survivors. "Every defendant knows, if endowed with the mental competence for criminal responsibility . . . that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death."[134] If, as Justice Souter suggests, every murderer knew that by killing his victim he creates a substantial and unjustifiable risk that he will inflict harm upon his victim's survivors, there would be a far stronger argument for the relevance of victim-impact evidence to a capital defendant's culpability. But a murderer might never consider, before (or even after) killing his victim that by doing so he might severely harm other people's lives as well. Certainly a "reasonable" murderer would take this into account. Perhaps many murderers do take this into account (although it seems doubtful that death-eligible murderers are so reflective before committing a heinous crime). Even if most murderers took this into account, however, this would not justify an automatic presumption that any particular murderer was reckless with respect to causing harm to third parties.

That a capital murderer is necessarily (at least) negligent with respect to the probability that he will harm the murder victim's survivors offers terribly weak

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132. Chief Justice Rehnquist's opinion for the Court includes the statement that victim-impact evidence is necessary "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness." Payne v. Tennessee, 501 U.S. 808, 825 (1991). However, this is the only statement in either Rehnquist's opinion or the concurrences of Justices O'Connor and Scalia that claims victim-impact evidence sheds light on the capital defendant's moral guilt. Since most of Rehnquist's opinion rests on the harm-based theory of retribution, criticism of the Court's culpability analysis should be directed primarily at Justice Souter, whose concurrence repeatedly emphasizes the ostensible significance of negligently caused harm for determining a capital defendant's blameworthiness. *See id.* at 837-39 (Souter, J., concurring).

133. *See* MODEL PENAL CODE § 2.02(2) (1962).

134. *Payne*, 501 U.S. at 838 (Souter, J., concurring).

support for allowing this harm, when it occurs, to determine whether a defendant lives or dies. The murderer who kills a victim with no social ties is no less negligent than one whose victim has a family and whose death causes her community great harm. Both "should have known" that their victim might have social ties. As with the argument for punishing negligence in other contexts, therefore, this argument fails to explain why two equally negligent persons should be punished differently on the basis of the harm they caused.[135] While allowing moral luck to determine the appropriate punishment arguably makes sense when the defendant possesses the culpable mental state of purpose or recklessness, punishing negligently caused harm is dubious, particularly when a human life is on the line.[136] Thus the claim that the "foreseeability of the killing's consequences imbues them with direct moral relevance"[137] either misunderstands the level of culpability involved or rests on the premise that under a culpability-based theory of retribution, the Eighth Amendment permits negligently caused harm to determine a capital defendant's fate.

The *impure* culpability-based theory of retribution also fails to explain the relevance of victim-impact evidence. To see why, consider the flaw in Justice Scalia's analogy to the difference in the punishments imposed upon a murderer whose gun worked correctly and a would-be murderer whose gun misfires.[138] A person who pulls the trigger of a gun with the conscious object of killing another human being thereby sets the outer boundary of his culpability at intentional murder. However, if the gun misfires, he is guilty only of attempted murder. Thus in Justice Scalia's example the level of culpability (intentional murder) encompasses the results of *both* the completed and attempted crimes. The victim-impact evidence question is distinct from the murder-attempted murder dichotomy. Murderers (generally) lack the mental state of either intent or recklessness with respect to the harm they will cause their victim's family. Therefore—unless they *consciously* consider the risks of harm to third parties—purposeful murderers' culpability *does not* include the harm they inflict upon the victim's family. Because this harm to third parties extends beyond the harm with respect to which they possessed the mental state of purpose or recklessness, it ought not affect their punishment under a theory of impure culpability-based

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135. *See* PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS AND TEXT 204-05 (5th ed. 1995).

136. *But see* Gewirtz, *supra* note 3, at 872 ("[T]o the extent that predictable and foreseeable consequences of murder actually occur in a specific case, that particular evidence seems to provide a highly relevant reason for punishing a particular defendant more severely."). Assuming that Gewirtz does not view negligence, standing alone, as a sufficiently culpable mental state to make the difference between life and death, he evidently adheres to the impure harm-based theory of retribution—a theory which the Court had never endorsed in the capital punishment context until *Payne*. *See infra* text accompanying note 151-54.

137. *Payne*, 501 U.S. at 838 (Souter, J., concurring).

138. *See* Booth v. Maryland, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting) ("If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater."); Murphy, *supra* note 119, at 1325-26 ("[E]*ligibility* for the death penalty *always* depends upon the harm that results . . . . Fortuitous factors, irrelevant to the offender's culpability, can always intervene to save the victim's and consequently the defendant's life.") (emphases in original).

retribution.[139]

The analogy to reckless driving and vehicular manslaughter (or reckless homicide) proffered by Justices White and Scalia[140] is similarly unconvincing, although for more subtle reasons.[141] The act of murder has less to do with how much harm it will inflict on the victim's associates than the act of driving recklessly has to do with whether someone dies and the act of driving recklessly becomes manslaughter. The more dangerously one drives, the more likely it is that his conduct will cause a death. The same cannot be said of murder: the extent to which a murder is particularly heinous and cruel does not necessarily correlate with the resulting level of harm to third parties. While a particularly heinous murder might inflict more harm upon the victim's family and community, the harm to the victim's family members and community results primarily from the fact that the victim is dead.

On the other hand, reckless drivers do not *intend* to commit *any* crime; most death-eligible murderers purposely take human life. Moreover, murder's potential to harm persons other than the immediate victim is a risk far more likely to become a reality than the risk for a reckless driver. Furthermore, reckless drivers are often not really "reckless." One can drive in a manner which is objectively reckless without being consciously aware—although a reasonable person would have been—that his driving presents a substantial risk of harm to others. Hence one may be convicted of reckless driving—and thus of manslaughter, if a pedestrian crosses the street at an inopportune moment—for being merely negligent. Thus punishing a "reckless" driver for vehicular manslaughter may impose criminal responsibility beyond the bounds set by the offender's culpable mental state alone. A subjectively negligent driver who hits and kills a pedestrian while driving in an objectively reckless manner is punished for causing harm with respect to which he was merely negligent.

Thus the real difference between the reckless driving-manslaughter dichotomy and whether victim-impact evidence is relevant to capital sentencing is simply that the former involves a noncapital crime while the latter entails the prospect of a death

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139. Perhaps Justice Scalia meant to suggest that although the harm causcd is normally not relevant to an offender's criminal responsibility when it is outside the range of culpability (with recklessness being the minimal relevant level of culpability), when one commits capital murder and the prosecution has established beyond a reasonable doubt the presence of at least one aggravated factor, at that point the harm causcd by the crime may be considered in deciding whether the defendant lives or dies. *Cf.* Gewirtz, *supra* note 3, at 871 ("[E]ven assuming that blameworthiness is the only measure of relevance in deciding whether to impose the death penalty, why isn't the defendant to blame for the suffering endured by the survivors of someone he or she has intentionally murdered?"). If so, this would fall under impure harm-based retribution, which the Court had never sanctioned prior to *Payne*. *See infra* text accompanying notes 151-54.

140. *See Booth*, 482 U.S. at 516 (White, J., dissenting); *id.* at 519 (Scalia, J., dissenting); *cf.* Talbert, *supra* note 38, at 208-09 (arguing that while the harm caused may justify distinguishing between two different offenses, as in White and Scalia's examples, two defendants convicted of *the same offense* should not receive different sentences because their respective victims' families suffered different levels of harm). If the state may legitimately distinguish offenses on the basis of the harm eaused, however, why may it not distinguish among perpetrators of the same crime on the basis of the harm they inflict?

141. Professor George Fisher was instrumental in helping me sort through the problems with White and Scalia's reckless driving-manslaughter analogy to victim-impact evidence.

sentence. The Court has said on numerous occasions that "death is different."[142] Principles that apply to noncapital crimes are often inapposite in the capital context. Imposing a lengthy prison sentence for negligently driving into a pedestrian is therefore not really analogous to allowing victim-impact evidence to transform what would otherwise be a life sentence into the ultimate punishment.

Nor do the Court's felony-murder precedents support the proposition that the Eighth Amendment permits a State to make a defendant's negligence the difference between life or death. Prior to *Booth* and *Gathers*, the Court held in *Enmund v. Florida* that the Eighth Amendment prohibits a State from executing a person for being the "getaway car" driver for an armed robbery during which his co-felons killed.[143] The Court emphasized that Enmund did not intend or anticipate that life would be lost during the robbery.[144] *Enmund* thus suggests that a defendant's negligence with respect to the possibility that someone might die cannot sustain a death sentence. *Tison v. Arizona*[145] similarly indicates that the Eighth Amendment imposes a culpability requirement for the capital sentencing decision. *Tison* held that the Eighth Amendment does not prevent a State from executing a defendant who initiated a prison escape and, although not a participant in the killing, watched as one of the escapees committed murder following the escape.[146] Although neither Tison brother "took any act which he desired to, or was substantially certain would, cause death," their "reckless indifference to human life" rendered them responsible for the harm which resulted from the escape.[147]

Admittedly, *Tison* is somewhat ambiguous because portions of Justice O'Connor's majority opinion oscillated between relying on negligence and extreme recklessness. For example, Justice O'Counor wrote:

> [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities *known* to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.[148]

Earlier in her opinion, Justice O'Connor noted that one of the Tison brothers "*could have foreseen* that lethal force might be used."[149] These statements suggest that the proper inquiry is whether a reasonable person would have recoguized the grave risk of death because the words "known" and "could have foreseen" do not require that the defendants *themselves* were aware of this risk. However, Justice O'Connor later

142. *See, e.g.*, *Booth*, 482 U.S. at 509 n.12; Harris v. Alabama, 513 U.S. 504, 516 (1995); Lankford v. Idaho, 500 U.S. 110, 125 (1991); Clemons v. Mississippi, 494 U.S. 738, 750 n.4 (1990); Solem v. Helm, 463 U.S. 277, 289, 294 (1983); Enmund v. Florida, 458 U.S. 782, 797 (1982), Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion).

143. *See Enmund*, 458 U.S. at 782, 788, 797-801.

144. *See id.* at 801.

145. 481 U.S. 137 (1987).

146. *See id.* at 139-41, 157-58.

147. *Id.* at 150-51, 158.

148. *Id.* at 157-58 (emphasis added).

149. *Id.* at 152 (emphasis added).

stated, "we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[150] In view of the Court's holding in *Enmund* and Justice O'Connor's repeated use of the word "reckless," *Tison* should be viewed as standing for the proposition that reckless indifference to human life is the minimal level of culpability (with respect to the possibility that death will result from one's conduct) for which one may be executed consistently with the Eighth Amendment.

However, one might argue that *Enmund* and *Tison* involved the level of culpability with respect to the possibility that someone could die, not with respect to the "indirect" *effects* of a defendant's actions *on the immediate victim's survivors*. If Tison could be executed for a killing he didn't even intend to commit, why can't Payne be executed in part based on victim-impact evidence for a murder which he purposefully carried out? The answer is straightforward: under a pure culpability-based or impure culpability-based theory of retribution, negligently caused harm is not relevant to the capital sentencing decision. However, under the impure harm-based form of retribution, harm with respect to which the offender is not culpable is relevant.[151] Thus we must examine whether the Court's rulings permit death to be imposed under an impure harm-based theory of retribution.

The Court's pre-*Payne* death penalty rulings preclude the conclusion that impure harm-based retribution can justify a death sentence. The Court has consistently held that a defendant cannot be executed unless he killed intentionally or with reckless indifference to human life. *Gregg* held that vengeance helps justify capital punishment, but noted that the Court was "concerned here only with the imposition of capital punishment for the crime of murder . . . when a life has been taken *deliberately* by the offender."[152] *Enmund* said that whether retribution can justify the death penalty "depends on the degree of [the defendant]'s culpability," and specifically on whether the defendant *intended* to kill.[153] And in *Tison*, while the harm the defendants caused was crucial to their eligibility for the death penalty, their "culpable mental state of reckless indifference to human life" was necessary as well.[154] Until *Payne*, what the Court probably meant but was either unable or unwilling to say is that death may be imposed only under a theory of pure culpability-based or impure culpability-based retribution.

Payne is the first decision by the Court that permits the life-or-death decision to turn on harm with respect to which the defendant was not at least extremely reckless. Even putting the weight of precedent aside, the Court was right before *Payne* not to allow a death sentence to be predicated upon impure harm-based retribution. "Death is different,"[155] and allowing negligently caused harm to determine whether a

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150. *Id.* at 158.

151. The pure harm-based theory of retribution cannot support the outcome in *Payne*. No Justice has said that blind vengeance alone can support a death sentence—*some* culpable mental state is a prerequisite for a constitutionally acceptable execution. Otherwise, the Eighth Amendment would permit a State to execute one who is merely negligent—or even strictly liable—with respect to a death occurring. Clearly, *Enmund* precludes this outcome.

152. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (emphasis added).

153. Enmund v. Florida, 458 U.S. 782, 800 (1982).

154. *Tison*, 481 U.S. at 151, 158.

155. *See supra* note 142.

defendant lives or dies—the biggest sentencing differential imaginable—is unfair.

VII. THE "BALANCING" JUSTIFICATION FOR VICTIM-IMPACT EVIDENCE

As described in Part I, in addition to its misguided retribution arguments, the *Payne* majority relied heavily on the argument that victim-impact evidence is relevant to the capital sentencing decision because it "balances" the impact of the mitigating evidence presented by capital defendants and thereby helps to correct an imbalance in the way the criminal law treats victims and defendants. This argument presupposes that the criminal justice system neglects crime victims while privileging defendants, and that fairness demands that capital sentencing decisions take victims' interests into account.[156] Introducing victim-impact evidence at sentencing, it is said, ensures adequate respect for victims and blunts the impact of defendants' mitigating evidence.[157] As the Supreme Court of Tennessee put it:

> It is an affront to the eivilized members of the human race to say that at senteneing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant... without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.[158]

Although this is a powerful *political* argument which possesses great emotional appeal, it is improper in the context of capital sentencing. Like the overtly political arguments for victim-impact evidence offered by many victims' rights advocates,[159]

156. *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (1982) ("The victim, no less than the defendant, comes to court seeking justice."). Of course, this part of the balancing argument assumes that murder victims' survivors want the defendant to die for his crime. This assumption, however, is not always valid; a victim's survivors may be philosophically opposed to capital punishment.

157. Or as Chief Judge Posner of the U.S. Court of Appeals for the Seventh Circuit puts it, when it comes to emotion-evoking testimony at capital sentencing, "what is sauce for the goose should be sauce for the gander." Posner, *supra* note 111, at 745; *see also* Livingston v. State, 444 S.E.2d 748, 755 (Ga. 1994) (Carley, J., concurring specially) ("[T]he very purpose of victim impact evidence is to counteract that very broad range of mitigating evidence which the defendant is authorized to introduce....").

158. State v. Payne, 791 S.W.2d 10, 19 (1990), *quoted in* Payne v. Tennessee, 501 U.S. 808, 826 (1991); *see also* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 156, at 77 ("When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's erime be allowed to speak.").

159. Many victims' rights advocates argue that increasing the extent to which victims are involved in the prosecution of the person who harmed them assists victims' efforts to cope with the psychological impact of the crime by helping victims regain a sense of control and allowing them to "vent" their anger at the defendant. *See, e.g.*, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 156, at 76. However, the purpose of a capital sentencing hearing is to determine whether a convicted defendant should receive the death penalty, not to ease surviving victims' psychological pain. That including a victim-impact statement may help victims recover from the loss of a loved one is irrelevant to whether the defendant deserves the

the "balancing" argument considers factors properly extrinsic to the capital sentencing decision as justifications for admitting it. While the former argument holds that participating in the sentencing process helps victims' psyches, the latter maintains that including victim-impact evidence at sentencing helps remedy our criminal justice system's neglect for victims. Furthermore, it is not even clear whether admitting victim-impact evidence really helps victims.[160] But this is beside the point: trying to correct a perceived imbalance between the rights of victims and defendants is a goal irrelevant to a capital sentencing hearing, as it bears no relevance to whether the defendant deserves death.[161]

An Eighth Amendment analysis should focus on whether the defendant's rights are violated, not on what assists persons suffering from the defendant's crime. Rather than being subordinate to politicians' crime-fighting and reelection efforts, "the Bill of Rights is designed to level the playing field between the defendant and the *state*; its provisions afford extra protections to the former to counteract the awesome power of the latter."[162] Balancing a government interest against a defendant's constitutional rights is precarious in any situation; balancing an interest extrinsic to the capital sentencing process against a capital defendant's constitutional rights is simply inappropriate.[163]

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death penalty.

160. *See* Bandes, *supra* note 3, at 406 ("[T]he victim impact statement benefits the conservative crime control agenda more consistently than it benefits the victim."); Henderson, *supra* note 129, at 1001-03 (arguing that proponents of victim-impact evidence are more interested in fighting crime than in genuinely helping victims).

161. The Supreme Court of Georgia said:

> As it is the defendant who is on trial in a capital murder case and who is, therefore, subject to the imposition of the death penalty, we cannot agree that Georgia courts are required to maintain some sort of "balance" between the victim and the defendant in a death penalty prosecution . . . . [L]ong-standing Georgia law . . . has never embraced a "tit-for-tat" doctrine with respect to defendants' and victims' rights.

Livingston, 444 S.E.2d at 750 n.3.

162. Bandes, *supra* note 3, at 402 (emphasis in original); *see also Payne*, 501 U.S. at 860 (Stevens, J., dissenting) ("The premise that a criminal prosecution requires an even-handed balance between the State and the defendant is . . . incorrect. The Constitution grants certain rights to the criminal defendant and imposes special limitations on the State designed to protect the individual from overreaching by the disproportionately powerful State.").

163. Another, less common argument is that including victim-impact evidence (or otherwise increasing the participation of victims in the criminal justice system) encourages victims to cooperate with prosecutors and thus helps the criminal justice system to run more efficiently. *See* Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 505-06 (1986). This fourth argument suffers from the same major defect as the "to help the victims" and "balancing" justifications: it cites a goal wholly unrelated to the purpose of a capital sentencing hearing as a reason for admitting victim-impact evidence. Moreover, its presupposition that admitting victim-impact evidence will increase the criminal justice system's efficiency is as speculative as the "to help the victims" argument's presupposition that including victim-impact evidence at capital sentencing hearings will assist a murder victim's family members' efforts to cope with and recover from the crime. Controversial, unsubstantiated hypotheses such as these do not rise to the level of a persuasive consideration

VIII. CONCLUSION: *PAYNE*, FEDERALISM, AND PUBLIC OPINION

Since neither a culpability analysis nor a desire to advance crime victims' ostensible interests can support the Court's conclusion in *Payne*, the decision is left to stand on two rather tenuous underpinnings: public opinion and federalism.[164] These crutches for *Payne*'s theoretical infirmities fail to remedy its ills. *Payne* thus continues the Court's gradual reversion, largely in the name of respecting the States' sovereignty and deferring to the people's will, towards the pre-*Furman* "laissez-faire" imposition of capital punishment.[165]

The federal government and all fifty states allow victim-impact evidence at sentencing.[166] The federal government and at least thirty-two of the thirty-eight death penalty states permit victim-impact evidence at capital sentencing.[167] When a majority of the population (as well as the Court) thinks that retribution is the primary basis for executing murderers[168] and there is an overwhelming consensus that the harm a murderer causes to his victim's associates is relevant to his desert, an Eighth Amendment analysis must take this into account.[169] In addition, the Constitution grants the States considerable latitude to decide what factors affect criminal

in the volatile context of capital sentencing hearings.

164. I will examine these two defenses for *Payne* together because the relevant considerations are largely identical.

165. *Cf.* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305 (arguing—presciently, since William H. Rehnquist had not yet been promoted to Chief Justice—that in a quartet of death cases decided in 1983 the Court essentially announced that the States could implement capital punishment as they please).

166. *See* National Center for Victims of Crime, *Infolink: Victim Impact Statements* (visited Sept. 15, 1999) <http://www.ncvc.org/Infolink/Info72.htm>.

167. *See* Logan, *supra* note 7, at 150.

168. Some polls find that a majority of death penalty supporters say that retribution is the main reason for their position. A 1985 Gallup poll—the last detailed poll on the reasons for support of capital punishment—found that a plurality (48%) of death penalty proponents based their view on retribution (30% on "revenge" and 18% on "desert"). GALLUP ORG., GALLUP REPORT: THE DEATH PENALTY 3 (1985). Fifty-one percent of respondents said they would continue to favor capital punishment even if it was conclusively proven that it failed to deter criminals. *See id.* "[A] factor variously called retribution, revenge, or a desire to see criminals receive their just deserts seems to have become the dominant motive for supporters of the death penalty." James O. Finckenauer, *Public Support for the Death Penalty: Retribution as Just Deserts or Retribution as Revenge?*, 5 JUST. Q. 81, 90 (1988). Although a more recent poll found that 60% of respondents did not think that "a loved one's feeling of vengeance" is a legitimate reason for capital punishment, the result likely would have been quite different had the pollsters asked about *society's* interest in vengeance or retribution rather than the victim's "loved one"; the same poll found that 52% of respondents think the death penalty does not deter people from committing crimes. *See* Eric Pooley, *Death or Life?*, TIME, June 16, 1997, at 33.

169. The meaning of the Eighth Amendment is informed partly by public opinion. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

responsibility.[170] The Court has often noted that "the discretion to define criminal offenses and prescribe punishments . . . resides wholly with the state legislatures."[171]

But while it goes without saying that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government,"[172] the quasi-autonomous States and the citizens who reside therein remain bound by the Fourteenth, and thus by the Eighth, Amendment.[173] Therefore, even though "legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime,"[174] the Eighth Amendment limits this freedom. Thus the Court has recognized that "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society."[175]

Because "death is different," federalism and public opinion alone cannot support admitting evidence of negligently caused harm which could lead a jury to sentence to death a person who would otherwise receive a life sentence.[176] Until *Payne*, the Court had never held that negligently caused harm could, consistently with the Eighth Amendment, make the difference between life and death. Even in our era of up-to-the-minute polls and devolution of power from the federal government to the States, the Bill of Rights remains to check the majority's excesses. Clearly the Court will not revisit the relevance of victim-impact evidence to capital sentencing hearings for the foreseeable future. Thus *Payne* stands as yet another monument to the Court's confused conception of culpability[177] and its evident desire to take any means necessary to exit the business of monitoring the States' implementation of capital punishment.

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170. *See* Martin v. Ohio, 480 U.S. 228, 232 (1987) (noting the Court's "reluctance . . . to disturb a State's decision with respect to the definition of criminal conduct").

171. Schall v. Martin, 467 U.S. 253, 269 n.18 (1984); *see also* Abbate v. United States, 359 U.S. 187, 195 (1959) ("[T]he States under our federal system have the principal responsibility for defining and prosecuting crimes.").

172. Patterson v. New York, 432 U.S. 197, 201 (1977), *quoted in* Montana v. Egelhoff, 518 U.S. 37, 43 (1996).

173. *See, e.g.*, Robinson v. California, 370 U.S. 660, 666-67 (1962).

174. Powell v. Texas, 392 U.S. 514, 545 (1968) (Black, J., concurring).

175. *Gregg*, 428 U.S. at 182. Although the public's view that victim-impact evidence is relevant to sentencing is not an opinion about a *punishment*, that it is an opinion about whether a particular type of evidence is relevant to a punishment does not exempt it from the Eighth Amendment principle that public opinion alone is not dispositive.

176. *See* Enmund v. Florida, 458 U.S. 782, 797 ("Although the judgments of legislatures . . . weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty . . . .").

177. *Cf.* Miguel Angel Méndez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407 (1995) (discussing the flaws in California and U.S. Supreme Court rulings involving issues of culpability).