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Payne, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency

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PAYNE, VICTIM IMPACT STATEMENTS, AND NEARLY TWO DECADES OF DEVOLVING STANDARDS OF DECENCY

*Joe Frankel**

"[A]s a matter of international law, there's sort of a correspondence to our evolving standards of decency that have generally governed our Eighth Amendment jurisprudence. It's kind of a one-way ratchet, we look at trends in one direction but we don't look to see if you can suddenly change gears and go in the other direction."

–Justice John Paul Stevens[1]

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INTRODUCTION

Pervis Payne is a polite, somewhat naïve, mentally handi-

* Joseph Frankel, J.D. 2008, City University of New York (CUNY) School of Law. Thank you to Sandra Dos Santos, Gregory Foley, Edward Frankel, Sarah Mugford, and Professors Jeffrey Kirchmeier and Steve Zeidman.

1 Transcript of Oral Argument at 42, Kennedy v. Louisiana, 129 S.Ct. 1 (2008) (No. 07-343).

capped[2] man from Millington, Tennessee.[3] As of this writing, he remains in the cell on Tennessee's death row[4] that he has occupied for nearly twenty years[5] after his conviction for stabbing a mother and daughter to death in their home.

Mr. Payne's death sentence largely rests on two pieces of evidence introduced at his sentencing hearing. First, testimony of the victims' mother and grandmother regarding the emotional effect of the crime on the victims' family members was admitted. Second, the prosecutor focused on the character of the victims in closing arguments.[6] The admission of this victim impact evidence was a clear violation of then-existing law.

Booth v. Maryland, mandatory precedent at the time of Payne's trial, established a per se bar to victim impact statements during the sentencing phase of capital trials.[7] By the time of his appeal to the Supreme Court of Tennessee, another case, *South Carolina v. Gathers*, had extended the *Booth* rule to bar victim impact statements read into evidence by a prosecutor.[8] However, in Payne's case, the prosecutor violated the Tennessee Supreme Court precedent by introducing testimony from the victims' family members, and the judge acquiesced. On appeal, the high court found no error,[9] and eventually the U.S. Supreme Court affirmed that deci-

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2 Dr. John T. Hutson's clinical evaluation described Mr. Payne's personality as "polite" and "somewhat naïve." State v. Payne, 791 S.W.2d 10, 17 (Tenn. 1990), *aff'd*, Payne v. Tennessee, 501 U.S. 808 (1991). An IQ test of Pervis Payne showed a Verbal IQ score of 78 and Performance IQ of 82. *Id.* Dr. Hutson testified that the clinical norm was 100, with actual tests showing the norm closer to 110, and that 75 was typically classified as "retarded," or more favorably, "mentally handicapped." *Id.*

3 *Id.* at 14.

4 Tennessee Department of Correction Death Row List, http://www.tennessee.gov/correction/deathrowlist.htm (last visited Mar. 22, 2008).

5 Pervis Payne's original execution date was July 18, 1990. *State v. Payne*, 791 S.W.2d at 21.

6 *Id.* at 18–19. Also introduced, over objection, was a videotape of the crime scene, played during the sentencing hearing. *State v. Payne*, 791 S.W.2d at 17.

7 Booth v. Maryland, 482 U.S. 496, 509 (1987) ("We conclude that the introduction of a [victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment, and therefore the Maryland statute is invalid to the extent it requires consideration of this information.").

8 Justice Brennan, in writing the plurality decision, noted that "[w]hile in this case it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the statement is indistinguishable in any relevant aspect from that in *Booth*." South Carolina v. Gathers, 490 U.S. 805, 811 (1989).

9 The Supreme Court of Tennessee held that there was no violation of Payne's rights under *Booth* and *Gathers*, and even if there was, it "was harmless beyond a reasonable doubt." *State v. Payne*, 791 S.W.2d at 18–19. In its effort to confront the *Booth/Gathers* rule on its face, the Tennessee Court went as far as to recognize that *Gathers* applies retroactively. *Id.* at 19.

sion. In *Payne v. Tennessee*, the Court held that the Eighth Amendment does not pose a per se bar to victim impact statements in capital cases[10]—a decision that stands in direct opposition to the legal principles that existed at the beginning of Pervis Payne's case.[11]

Certainty is essential in the law. Nowhere is this maxim more important than in a capital sentencing decision because "death is different."[12] In a common law system, certainty is achieved through stare decisis.[13] As Justice Stewart wrote in *Woodson v. North Carolina*:

> The penalty of death is different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[14]

Because "death is different,"[15] a capital jury's sentencing discretion must be tempered by "clear and objective standards as to produce a non-discriminatory application."[16] Further, a capital sentencing statute must provide a "meaningful basis for distinguishing the few cases in which the [death penalty is imposed] from the many cases [in] which it is not."[17] To fulfill the "*Gregg* mandate,"[18] most states have adopted statutes which enumerate certain aggravating factors that the prosecutor must prove before

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10 *Payne v. Tennesse*, 501 U.S. 808, 827 (1991).

11 *Id.* at 830.

12 Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (invalidating a mandatory death penalty scheme because it both failed to address the concern of unbridled jury discretion raised in *Furman v. Georgia*, 408 U.S. 238 (1972), and did not allow for individualized sentencing determinations).

13 Respect for precedent promotes certainty, allowing individuals to "arrange their affairs with confidence," assured that the law applied to them in the future will be the same as currently applied. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

14 *Woodson*, 428 U.S. at 305.

15 *Id.*

16 *Compare* Gregg v. Georgia, 428 U.S. 153, 198 (1976) (upholding a capital sentencing scheme which guides the jury's discretion through the use of statutorily prescribed aggravating factors) *with* Furman v. Georgia, 408 U.S. 238, 239 (1972) (striking a capital sentencing scheme allowing for complete jury discretion).

17 Godfrey v. Georgia, 446 U.S. 420, 427–429 (1980) (holding the use of "outrageously or wantonly vile, horrible, and inhuman," before the term "offense," is an aggravating factor that is unconstitutional because all murders could be described as such and therefore no meaningful narrowing function is served).

18 *See* Tim Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483, 518 (1983).

the accused can be considered among the "worst of the worst"[19] and therefore deserving of death.[20]

In addition to the requirement that a capital sentencing scheme provide objective guidelines that meaningfully narrow the class of death-eligible defendants, there is a seemingly contradictory individualized sentencing requirement. To withstand constitutional muster a sentencing scheme must allow for "particularized considerations of relevant aspects of the character and record of each convicted defendant."[21] This mandate has been interpreted as a requirement that a sentencer must consider, as a mitigating factor, "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."[22]

Since *Woodson*, the guiding principle that "death is different" has been a cornerstone of Eighth Amendment jurisprudence. The Court has consistently held that the Eighth Amendment provides additional procedural protections for defendants when the possible punishment is death.[23] This principle has given rise to two procedural mandates, out of which an unworkable tension arises. One mandate requires that a capital scheme provide objective guidelines that narrow the class of persons eligible for the death penalty; the other requires a subjective, open-ended consideration of any mitigating characteristic of the defendant or circumstance of the crime.[24] Juries are left to conduct an impossible undertaking when they are asked to balance a subjective mitigating factor, such as the severe childhood abuse suffered by the defendant, against objective aggravating factors, such as the number of victims killed. This tension has led at least one former Supreme Court Justice, Harry

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19 Justice Souter used the phrase "worst of the worst" to describe the *Gregg* mandate in his dissent in Kansas v. Marsh, 548 U.S. 163, 206 (2006) (citing Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them "the most deserving of execution.'" (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002))).

20 Other states, such as Texas, fulfill the narrowing mandate by directing special questions to the sentencing jury. *See* TEX. PENAL CODE ANN. § 19.03 (Vernon 2005).

21 *Woodson*, 428 U.S. at 303.

22 Lockett v. Ohio, 438 U.S. 586, 604 (1978) (invalidating the Ohio death penalty statute because it limited mitigating factors to those enumerated in the statute).

23 *See, e.g.*, Ford v. Wainwright, 477 U.S. 399 (1986); *see also* Murray v. Carrier, 477 U.S. 478 (1986). In fact, an electronic Westlaw search for the language "death is different" returns twenty-three U.S. Supreme Court cases, starting with *Woodson*.

24 For an excellent analysis of how these two mandates contradict each other in areas beyond the admission of victim impact evidence, see Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL OF RTS. J. 345 (1998).

Blackmun, to conclude that the death penalty can never be imposed fairly and he would therefore "no longer tinker with the machinery of death."[25]

The focus of this Comment is whether victim impact statements—which are non-objective by nature—should be admissible in capital sentencing procedures. This Comment hopes to show that victim impact statements have no place in the determination of whether the capitally accused should live or die.[26] Such evidence, which does not address the defendant's blameworthiness,[27] serves neither of the two contradictory guiding principles of Eighth Amendment law. The seventeen years since *Payne* have shown us that, in effect, victim impact statements are an arbitrary, non-objective, sentencing factor that is irrelevant to the culpability of the individual defendant.

This Comment first introduces the historical political landscape from which victim impact legislation originates. Part Two examines the limited body of Supreme Court case law regarding victim impact statements. Part Three surveys how the states and federal systems integrated *Payne* into their legislation and court rulings. After *Payne*, the state laboratories have shown the decision's deficiencies. Using the states' treatment as a guide, the final part of this paper will dissect the logic of *Payne* and offer suggestions for living with *Payne*.

I. Historical Context

Since President Reagan first proclaimed observance of a National Crime Victims' Rights Week in 1981,[28] the Victims' Rights Movement has gained momentum.[29] The Victims' Rights Move-

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25 Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). Justice Blackmun dissented in *Furman* and voted to uphold the death penalty in *Gregg*, but by the end of his career concluded that the death penalty could never be fairly imposed. Following *Callins*, Justice Blackmun dissented in every case upholding a death sentence.

Notably, Justice Powell had a similar revelation to that of Justice Blackmun. After his retirement Powell stated he regretted his vote upholding the death penalty in *Gregg*. *See* Kirchmeier, *supra* note 24, at 347; John C. Jeffries, Jr., Justice Lewis F. Powell, Jr.: A Biography 451 (1994); John C. Jeffries, Jr., *A Change of Mind that Came Too Late*, N.Y. Times, June 23, 1994, at A23.

26 *Booth*, 482 U.S. at 504.

27 *Id.*

28 Office for Victims of Crime, National Crime Victims' Rights Week, http://www.ojp.usdoj.gov/ovc/ncvrw/2005.html (last accessed Mar. 22, 2008).

29 *See, e.g.*, Elizabeth Beck, et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 Cornell L. Rev. 382, 388–389 (2003) (noting that Reagan's proclamation was crucial for the Victims' Rights Movement because it was the first

ment is a loose populist coalition[30] that advocates for increased victim participation in the criminal justice system. In advancing its goals, the movement lobbies for draconian treatment of the accused[31] and evidentiary rules that result in unreliable decisions.[32]

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time the word "right" was associated with a national crime victims movement). The word "right" is a powerful rhetorical device in American history and culture and is being used here for a conservative political agenda concerned with a crime control—rather than a restorative—model of justice. Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 952 (1985).

30 Identifiable elements of the Victims' Rights Movement are the Law and Order Lobby, Women's Movement and General Victim Law Lobby. John Gillis & Douglas Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 690 (2002).

31 *See, e.g.*, Henderson, *supra* note 29, at 950 (stating that many states have adopted "preventive detention" statutes at the behest of victims' rights advocates).

32 Two examples of new evidentiary rules lobbied for by the Victims' Rights Movement are: rape shield laws and the use of "virtual" cross-examination. Rape shield legislation has been criticized for

> its failure to distinguish between benign and invidious uses of sexual conduct evidence. This failure stems from a misperception by the drafters of the precise wrong to be redressed by reform legislation. The result is not merely bad evidence law; in many instances, the result is constitutional problems that stem from unnecessarily broad enactments.

Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 812 (1986). For a thorough discussion on the history of rape shield laws, and a different thesis from that asserted by Professor Galvin, see Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002).

Regarding the use of television in lieu of cross examination, see Maryland v. Craig, 497 U.S. 836, 850–51 (1990) (holding that the Sixth Amendment's Confrontation Clause does not prohibit the use of closed circuit television to avoid face-to-face confrontation with the accused during the cross examination of an allegedly abused child). In his dissent, Justice Scalia wrote:

> The "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.

Id. at 868 (Scalia, J., dissenting). He points to three works, which speak to the vulnerability of children to suggestion. *See* D.S. LINDSAY & M.K. JOHNSON, REALITY MONITORING AND SUGGESTIBILITY: CHILDREN'S ABILITY TO DISCRIMINATE AMONG MEMORIES FROM DIFFERENT SOURCES, IN CHILDREN'S EYEWITNESS MEMORY 92 (S. Ceci, M. Toglia, & D. Ross eds. 1987); Thomas L. Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 230–233 (1987); John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 708–11 (1987).

Scalia begins his dissent with, "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." *Craig*, 497 U.S. at 860 (Scalia, J., dissenting). This is notably inconsistent with his position on victim impact statements—where he invokes popular opinion to justify his decisions. *See infra* note 245.

Behind the movement lies the belief that the Warren Court went too far in ensuring constitutional protections for the accused.[33] The need for retributive justice and a goal of providing a meaningful role for the victim in the criminal justice process also motivates Victims' Rights advocates.[34]

What is right is not always popular and what is popular is not always right—this holds true in the area of victim participation in capital sentencing. The use of victim impact statements has garnered popular support; but this alone does not make their use just. In 2002, President Bush announced his support for the proposed Federal Crime Victims' Rights Amendment.[35] Currently, every state has a victim's bill of rights.[36] Many states have adopted general legislation allowing prosecutors to use victim impact statements in ordinary criminal matters.[37] Following *Payne*, some states incorporated the consideration of victim impact statements into their capital sentencing proceedings through amendments to their capital statutes.[38] Other states allow such evidence through their

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[33] Professor Henderson notes that the victim's movement is largely conservative and focused on a "crime control model." Lynne Henderson, 37 STAN. L. REV. 937, 945–47 (1985). She writes, "Conservatives have never truly accepted the Warren Court's concern for the rights of the accused: The exclusionary rule and *Miranda* particularly irritated them . . . . In their view, the courts were letting desperate criminals loose . . . and preventing the police from protecting the innocent public . . . ." *Id.* at 948. Professor Henderson goes onto note that "victims" became an important political symbol for the conservative lobby, which was focused on undoing the Warren Court's work. *Id.* at 949.

[34] Andrew Karmen, *Who's Against Victims' Rights? The Nature of Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT 157, 161 (1992).

[35] President Calls for Crime Victims' Rights Amendment, http://www.whitehouse.gov/news/releases/2002/04/20020416-1.html (last accessed Mar. 22, 2008).

[36] The National Center for Victims of Crime, Victims' Bill of Rights, http://ncvc.microportals.net/ncvc/main.aspx?dbName=documentViewer&DocumentID=32697 (last accessed Mar. 22, 2008).

[37] *See* The National Center for Victims of Crime, Statistics: State Legislative Summary, http://www.ncvc.org/ncvc/main.aspx?dbName=documentViewer&DocumentID=38725 (last visited January 29, 2009).

[38] *See, e.g.*, 17 ARIZ. REV. STAT. ANN. § 19.1 (d)(3) (2008):

> Penalty Hearing in a Capital Case
>
> . . . .
>
> If a jury finds one or more aggravating circumstances, the penalty proceedings shall proceed as follows: (3) The victim's survivors may make a statement relating to the characteristics of the victim and the impact of the crime on the victim's family, but may not offer any opinion regarding the appropriate sentence to be imposed.

See also 42 PA. CONS. STAT. § 9711 (c)(2) (2008):

> Sentencing procedure for murder of the first degree
>
> . . . .
>
> The court shall instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it shall consider,

general victim impact statutes[39] or through regular evidence admissions absent an authorizing statute.[40]

With the appointments of Justices Kennedy and Souter to replace Justice Powell, author of *Booth*, and Justice Brennan, veteran of the Warren Court, the Supreme Court began to reflect the values of the populist conservative movements of the time,[41] including the Victims' Rights Movement. This shift in Supreme Court personnel resulted in the *Payne* decision, which was largely based on a new reading of the "individualized sentencing" mandate to include "all relevant" evidence—not just all relevant *mitigating* evidence as envisioned in *Lockett*.[42] This new understanding of the Eighth Amendment was based less on law and more on politics.

The Court cannot have its cake and eat it too. If indeed "all relevant" evidence is admissible, that evidence still must provide "clear and objective standards as to produce a non-discriminatory application."[43] Simply put, victim impact statements are personal and subjective. Victim impact statements, used as an aggravating factor, are far from the "clear and objective standards" envisioned in *Gregg*.

II. Victim Impact Statements and the United States Supreme Court

A. Booth v. Maryland

The Victims' Rights Movement emerged in part out of crime victims' perceived marginalization by the criminal justice system, and a conservative backlash to the Warren Court.[44] This loosely defined movement has led to a sweep of legislative reforms ranging

> in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim's family.

39 *See, e.g.*, 22 Okla. Stat. tit. § 984.1 (2003) (This section is titled "Presentation and use of victim impact statement at sentencing and parole proceedings.").

40 *See, e.g.*, State v. Rhines, 548 N.W.2d 415, 446 (S.D. 1996) (South Dakota Supreme Court noted that *Payne* does not require victim impact evidence be treated differently than any other relevant evidence and that therefore no statute explicitly authorizing its admission was necessary).

41 *See generally* Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court (2007) (arguing that the Court's decisions are political and that justices are selected based in part by lobbying of groups like the Federalist Society).

42 It has been noted that *Booth* was correctly decided under a defendant-preferred analysis developed in *Lockett* and *Woodson*. Steven Paul Smith, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 93 Col. L. Rev. 1249, 1256 (1993).

43 *Gregg*, 428 U.S. at 198.

44 *See* Henderson, *supra* note 29.

from rape shield laws to Megan's law.[45] A significant part of this movement was the passage of victim impact legislation such as the statute at issue in *Booth*.[46] This type of legislation provided a vehicle for the entry of victim impact statements into capital sentencing hearings.[47]

In 1987, victim impact legislation was a new creation. It faced its first constitutional challenge in *Booth v. Maryland*, when the Court considered whether the Constitution prohibits a jury from considering a victim impact statement during the sentencing phase of a capital murder trial.[48] The Court concluded simply that presenting victim impact statements in capital sentencing hearings violates the Eighth Amendment.[49]

John Booth was found guilty of the murder of his neighbors Irvin and Rose Bronstein.[50] At Booth's sentencing hearing a victim impact statement was provided pursuant to a Maryland statute *requiring* that a victim impact statement describing the effect of the crime on the victim and his or her family be prepared in *all* felonies.[51] The victim impact statement included statements from the Bronsteins' granddaughter, son-in-law, daughter, and the son who found the victims' bodies two days after the murder.[52] The son testified that, as a result of the murders, he suffered from lack of sleep and depression, and the granddaughter testified that she had attended therapy but stopped because "no one could help her."[53]

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45 Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements, Implications for Capital Sentencing Policy*, 10 PSYCH. PUB. POL., & LAW 492 (2004). Megan's law is a general term used to describe sex offender registries.

46 *Id.*; *Booth*, 482 U.S. at 498; MD. CODE ANN. art. 41, § 4-609(c) (1986).

47 A typical victim impact statement: (a) identifies the offender; (b) indicates financial losses suffered by the victim; (c) lists physical injuries suffered by the victim including seriousness and permanence; (d) describes changes to the victim's personal welfare or familial relationships; (e) identifies requests for psychological services initiated by the victim or the victim's surviving family; and (f) contains other information relating to the impact of the offense on the victim or the victim's family. Myers & Greene, *supra* note 45; *Booth*, 482 U.S. at 498-99.

48 *Booth*, 482 U.S at 497.

49 *Id.* at 502.

50 *Id.* at 497–98.

51 *Id.* at 498. MD. CODE ANN., art. 41 § 4-609(c) (1986). When enacted it was unclear whether the Maryland victim impact statute applied to capital sentencing. Originally the law required, victim impact statement "if victim suffered injury." MD. CODE ANN., art. 41 § 4-609(c)(2)(i) (1986). By the time *Booth* was decided it was amended to clearly include capital prosecutions. In 1983, the statute was amended to read, "In any case in which the death penalty is requested . . . a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation . . . " MD. CODE ANN., art. 41 § 4-609(d) (1986).

52 *Booth*, 482 U.S. at 510.

53 *Id.* at 499–500.

The son further testified that his parents were "butchered like animals," and the daughter concluded such a person could "never be rehabilitated."[54] Upon consideration of this evidence, the jury sentenced Booth to death on one murder count and life in prison on the other.

In *Booth*, the victim impact statement presented to the jury contained two types of information. First, it described personal characteristics of the victims[55] and the emotional impact the crime had on the family.[56] Second, it gave the family's opinions and characterizations of the crimes and the defendant.[57] The Court addressed these two distinct types of evidence separately in its opinion.

Maryland made several arguments defending the admission and consideration of victim impact statements. First, the state argued that evidence of personal characteristics of the victim and the emotional impact the crime had on the family should be admissible as a "circumstance of the crime."[58] The state argued this evidence fully illustrates the harm of the defendant's actions, and, although not an enumerated aggravating factor in the capital sentencing statute, such evidence allows the jury to better assess the "gravity or aggravating quality" of the offense.[59] The state also advanced the idea that victim impact statements are not arbitrary because there is a foreseeable nexus between the murder and the harm caused to the family.[60]

Writing for the majority, Justice Powell rejected this argument and invoked the doctrine that "death is different" by stating

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[54] *Id.* at 500.

[55] For example, the victim impact statement given at Booth's trial read:

> [T]he victims' son reports that his parents had been married for fifty-three years and enjoyed a very close relationship, spending each day together. He states that his father had worked hard all his life and had been retired for eight years. He describes his mother as a woman who was young at heart and never seemed like an old lady. She taught herself to play bridge when she was in her seventies. The victims' son relates that his parents were amazing people who attended the senior citizens' center and made many devout friends. As described by their family members, the Bronsteins were loving parents and grandparents whose family was most important to them. Their funeral was the largest in the history of the Levinson Funeral Home and the family received over one thousand sympathy cards, some from total strangers.

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

[56] *Id.*

[57] *Id.*

[58] *Id.* at 502.

[59] *Booth*, 482 U.S. at 503–04.

[60] *Id.* at 503.

"[w]hile the full range of foreseeable consequences of a defendant's actions may be relevant in other . . . contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing."[61] To support this assertion, Powell pointed out that some victims might be capable of making impassioned statements articulating their grief. On the other hand, some victims might not leave family members to testify on their behalf, or they might be "less articulate in describing their feelings even though their sense of loss is equally severe."[62] Powell further reasoned that it would be as inappropriate for a jury's decision to impose the death penalty to turn on this distinction, as it would be to permit evidence of the victim's character. Such a consideration is not a "principled way to distinguish [cases] in which the death penalty was imposed from the many cases in which it was not."[63]

Further, the Court noted that if a victim impact statement is allowed in a capital sentencing hearing it is difficult—"if not impossible"—to rebut.[64] The problem of rebuttal is two-fold. First, there is a strategic problem for the defendant, since on cross-examination a defendant cannot easily show that "family members exaggerated their sleeplessness, depression or emotional trauma suffered."[65] Second, if victim impact statements are admitted, then it is presumed the defendant can cross-examine the declarant.[66] However, this presentation and rebuttal of evidence creates a "mini-trial" on the victim's character.[67] Besides being unappealing,[68] this mini-trial detracts from the jury's charge to consider the character of the defendant and circumstances of the offense.[69]

The Court also addressed a foreseeability issue. The state advanced the argument that a defendant takes the victim as he finds him and that generally defendants are liable for unforeseen consequences of their actions. While case law shows that most defendants do not choose their victims based on the effect that the murder will have on anyone other than victim, Powell did concede

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61 *Id.* at 504.

62 *Id.* at 505.

63 *Id.* at 506 (citing Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 507.

68 Vivian Berger has said that rebutting the statement by impugning the victim's character would only be appealing to "Charles Bronson or Clint Eastwood." Vivian Berger, *Payne and Suffering-A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 51 (1992).

69 *Booth*, 482 U.S. at 507.

that in some cases the defendant could have known some of the information contained in a victim impact statement before commission of the offense.[70] Still, because of the prejudicial nature of the information contained in the victim impact statement, the Court held that there is an impermissible risk that the capital sentencing decision will be made in an arbitrary manner.[71]

Booth was a five–four decision with Justices Brennan, Marshall, Blackmun, and Stevens joining Powell's majority. However, both Justices White and Scalia filed dissenting opinions, each joined by the other. Chief Justice Rehnquist and Justice O'Connor joined both dissents. These dissents illustrated the controversial nature of the issue and paved the way for the *Payne* decision.

White's dissent presented two arguments in favor of upholding the Maryland statute. The first argument is one of straightforward deference to the legislature.[72] White's second argument was that culpability and punishment is determined in large part by the extent of harm caused.[73] White essentially argued that some lives are more valuable than others.[74] Additionally, White addressed the majority's concern about a jury's potential arbitrary decision making. He retorted with a two-wrongs-make-a-right argument and listed the ways that a criminal prosecution is already arbitrary.[75]

Justice Antonin Scalia used a different framework to address many of the same points as White. Scalia drew a distinction between "moral blameworthiness" and "personal responsibility."[76]

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70 *Id.* at 504 (citing to People v. Levitt, 156 Cal.App.3d 500, 516–17 (Cal. 1984)).

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

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

73 In this argument White analogizes to a reckless driving case by saying that a person who runs a red light should be punished more lightly than a person who runs a red light and kills a pedestrian. *Id.* at 516–17 (White, J., dissenting).

74 White does this by pointing to the constitutionality of death penalty statutes qualifying defendants who are accused of police killings (MD. ANN.CODE art. 27 § 413(d)(1) (1982)) or assassination of the President or Vice President (18 U.S.C. § 1751(a) (1982)). *Booth*, 482 U.S. at 517 (White, J., dissenting).

75 White writes, "No two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator." *Id.* at 517–18.

76 Scalia used three examples to illustrate these two categories. First, a reckless driving case where nobody is injured versus one where a person is killed. Second, a bank-robber who fires and kills his target versus a bank-robber whose gun misfires. Third, the then recently decided *Tison v. Arizona*, 481 U.S. 137 (1987), where the Court upheld the death sentence for two non-triggermen involved in a murder. Scalia argues that in each case the blameworthiness of the defendant is the same, but because the result is different the personal responsibility of each is different and therefore each defendant is deserving of a different sentence. *Booth*, 482 U.S. at 519–20 (Scalia, J., dissenting).

Citing examples,[77] Scalia concluded that although the "moral blameworthiness" of a defendant may be the same regardless of the unintended result of his or her actions, "personal responsibility" is measured by the result. He argued that the majority improperly determined the sentence based on blameworthiness alone and that responsibility should be considered as well. Although artfully written, Scalia's point is quite similar to White's: both argued that society should value some lives more than others and that a defendant's sentence should be determined by the availability and articulateness of the victim's family.

Scalia couched his argument in textualist terms stating, "[i]n sum, the principle upon which the Court's opinion rests—that the imposition of capital punishment is to be determined solely on the basis of moral guilt—does not exist, neither in the text of the Constitution, nor even the opinions of this Court." Unlike White, Scalia did not address the arbitrariness concern on which the Court's opinion truly rests.[78]

B. South Carolina v. Gathers

The *Booth* rule prohibited family members of a murder victim from giving a victim impact statement at a capital sentencing hearing. This rule left unaddressed the question of whether a prosecutor could read a statement about the victim into evidence—that is until Demetrius Gathers was convicted of murder and sentenced to death for a park-bench assault on Richard Haynes.[79] Mr. Haynes

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77 *See Booth*, 482 U.S. at 516–17 (White, J., dissenting).

78 *Id.* at 520 (Scalia, J., dissenting).

Justice Scalia does not recognize that the Court's Eighth Amendment jurisprudence provides protections against arbitrary decision making in capital sentencing. He has written:

> Today a petitioner before this Court says that a state sentencing court (1) had unconstitutionally *broad* discretion to sentence him to death instead of imprisonment, *and* (2) had unconstitutionally *narrow* discretion to sentence him to imprisonment instead of death. An observer unacquainted with our death penalty jurisprudence (and in the habit of thinking logically) would probably say these positions cannot both be right . . . . In my view, it is time for us to reexamine our efforts in this area and to measure them against the text of the constitutional provision on which they are purportedly based . . . . Our decision in *Furman,* 408 U.S. at 238, was arguably supported by this text.

Walton v. Arizona, 497 U.S. 639, 656–670 (1990) (Scalia, J., concurring). In *Payne*, Justice Scalia cites to his *Walton* line and elaborates, "I have previously expressed my belief that the latter requirement is both wrong, and when combined with the remainder of our capital sentencing jurisprudence, unworkable. *Payne*, 501 U.S. at 833 (Scalia, J., concurring).

79 South Carolina v. Gathers, 490 U.S. 805, 806 (1989).

was 31 years old, mentally ill, unemployed, and transient.[80] At the time of his death, Mr. Haynes was carrying several bags containing articles of religious significance, including a copy of the "Game Guy's Prayer," which was read into evidence by the prosecution. These articles were found strewn around the murder scene.[81]

At the sentencing phase of Mr. Gathers's trial, the prosecution readmitted all evidence from the guilt phase including the religious items possessed by Mr. Haynes[82]; no additional evidence was admitted.[83] However, the prosecutor did offer a closing argument that focused extensively on Mr. Haynes's personal traits. The admissibility of this testimony was the issue addressed in *Gathers*.[84]

The Supreme Court of South Carolina concluded that the prosecution's closing argument suggested to the jury that "the appellant deserved a death sentence because the victim was a religious man and registered voter" but that these characteristics "were unnecessary to an understanding of the circumstances of the crime."[85] The state court reversed Gathers's death sentence and remanded for a new sentencing proceeding.[86]

In a decision written by Justice Brennan, the U.S. Supreme Court affirmed this ruling[87] and noted, "[o]ur capital cases have consistently recognized that '[f]or purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt' "[88] and "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[89] At the heart of the plurality's reasoning was a reaffirmation of the then recent *Booth* decision. Citing *Booth*, the plurality found the prosecutor's statement in *Gathers* "wholly unrelated to the blameworthiness of a particular defendant."[90]

In *Gathers*, Justice Brennan noted that *Booth* left open the possibility that victim impact statements may be admissible if "re-

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80 *Id.* at 807.

81 *Id.*

82 *Id.* at 808.

83 The religious objects were admitted into evidence through the testimony of a Charleston police officer. *Id.* at 807.

84 *Id.* at 808–09.

85 State v. Gathers, 295 S.C. 476, 484 (S.C. 1988), *aff'd.*

86 *Gathers*, 490 U.S. at 810; *Gathers*, 295 S.C. at 478.

87 *Gathers* at 812.

88 *Id.* at 810 (citing Enmund v. Florida, 458 U.S. 782, 801 (1982)).

89 *Id.* at 810 (quoting *Tison*, 481 U.S. at 149)(internal quotations omitted).

90 *Id.* at 810 (quoting *Booth*, 482 U.S. at 504).

late[d] directly to the circumstances of the crime."[91] South Carolina raised this issue in their argument, stating that various personal items found at the crime scene, "maliciously strewn around [the victim's] body during the event," were "relevant to the circumstances of the crime."[92] The *Gathers* Court rejected this argument, closing this possible method for admission of victim impact statements.

In holding that the evidence was not relevant to "circumstances of the crime," the majority, as the Court had done in *Booth*, addressed the issue of foreseeability. Brennan reasoned that the fact Gathers rifled through Haynes's personal belongings for something to steal was indeed relevant as a "circumstance of the crime."[93] However, the *content* of the belongings, as it may have related to the victim's character, was inadmissible because there was "no evidence whatever that showed that the defendant read anything that was printed."[94]

Justice White, a dissenter in *Booth*, filed a brief concurrence. He acquiesced in the decision as respect for precedent.[95] This concurrence is curious in light of White's choice to join the majority in *Payne*, which determined that the Eighth Amendment does not per se prohibit a capital sentencing jury from considering victim impact evidence.[96]

Justice O'Connor's dissent, joined by Chief Justice Rehnquist and Justice Kennedy, alluded to the fact she thought *Booth* was wrongly decided and should be overruled. Her dissent rested on the idea that the case at bar was easy to distinguish from *Booth*.[97] In *Booth* the central holding proscribed statements about harm to the victim's family; in *Gathers*, O'Connor wrote, "[a]t issue here are solely prosecutorial comments about the victim himself."[98] O'Connor is misplaced in resting her dissent on this distinction,

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91 *Id.* at 811 (citing *Booth*, 482 U.S. at 507).

92 Brief for Petitioner at 28, South Carolina v. Gathers, 490 U.S. 805, 805 (1989) (No. 88-305).

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

94 *Id.* The prosecutor referred to the victim's prayer card and voter registration card during closing arguments. Both items were found among the victim's belongings scattered around his body, and were admitted into evidence. The prosecutor "conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter." *Gathers*, 490 U.S at 810 (quoting *Gathers*, 295 S.C. at 484).

95 *Id.* at 812 (White, J., concurring) (writing that "[u]nless *Booth v. Maryland* . . . is to be overruled, the judgment below must be affirmed.").

96 Payne v. Tennessee, 501 U.S. 808 (1991); *see infra* Part II.C.

97 *Id.* at 813–14 (O'Connor, J., dissenting).

98 *Id.* at 814 (O'Connor, J., dissenting).

because, in fact, *Booth* deals quite directly with evidence of the victims themselves.[99]

O'Connor first restated the facts of the case in a gruesome manner[100] and went on to ground the remainder of her dissent on two intertwined concepts. First, sentencing should be based on moral blameworthiness.[101] Second, capital sentencing should not be one-sided. O'Connor argued that the *Lockett* and *Eddings* line of cases, which establish a requirement for individualized sentencing based on the defendant's character and circumstances of the offense, should be balanced by victim impact evidence.[102] These arguments laid out some of the underlying rationale for the *Payne* decision.[103]

Justice Scalia filed a separate, solo dissent in which he minced no words and made no attempt to distinguish this case from *Booth*. Instead, he argued *Booth* was wrongly decided and should be overturned.[104]

Despite the "spirited" dissents, in practical terms, the *Gathers* rule simply extended the *Booth* ban on victim impact statements made by family members of the victim to also include statements made by a prosecutor. This is particularly helpful in the analysis of *Payne* because there the Supreme Court deemed the prosecutor's statements about the victims constitutionally permissible.

C. Payne v. Tennessee

Pervis Payne was convicted by a Tennessee jury of the first-degree murders of Charisse Christopher and her daughter Lacie, and of the assault of Charisse's son Nicholas. Mr. Payne was sentenced to death for the two murders and to thirty years in prison for the assault.[105]

Payne's death sentence rested largely on the penalty phase testimony of Charisse's mother and the prosecutor's inflammatory and illegal closing argument. Nicholas's grandmother testified

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99 *Id.*; *Booth*, 482 U.S. at 499–500.

100 *Gathers*, 490 U.S. at 814–16 (O'Connor, J., dissenting).

101 *Id.* at 818.

102 *Id.* at 817 (O'Connor, J., dissenting) (citing Eddings v. Oklahoma, 455 U.S. 104 (1982); *Lockett*, 438 U.S. at 604).

103 O'Connor relies on the recent dissents written by herself or her fellow dissenters. *See* Mills v. Maryland, 486 U.S. 367, 398 (1988) (Rehnquist, C.J., dissenting); Enmund v. Florida, 458 U.S. 782, 823 (1982) (O'Connor, J., dissenting). The personnel of the Court had changed by the time the issue is revisited in *Payne* and these dissents become the basis of the majority opinion. *Payne v. Tennesse*, 501 U.S. 808 (1991).

104 *Gathers*, 490 U.S. at 823 (Scalia, J., dissenting).

105 *Payne*, 501 U.S. at 811.

that "[h]e cries for his mom . . . [and] [h]e doesn't seem to understand why she doesn't come home."[106] The prosecutor's closing argument focused largely on the impact on Nicholas and his family.[107] The Supreme Court of Tennessee affirmed the conviction and sentence, and rejected Payne's argument that the admission of the grandmother's testimony and the prosecutor's closing argument violated the Eighth Amendment as applied in *Booth* and *Gathers*.[108] That court reasoned that although the testimony of the grandmother was "technically irrelevant" it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty . . . ."[109] The United States Supreme Court granted certiorari "to reconsider our holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family."[110]

In writing *Payne*'s six-member majority opinion, Rehnquist began the analysis by laying a favorable foundation from which to work. Arguably, he over-simplified the *Booth/Gathers* rule by framing it using two premises: first, evidence relating to a particular victim or harm caused to the victim's family does not reflect on the defendant's blameworthiness, and second, only evidence relevant to a defendant's "blameworthiness" is relevant to capital sentencing.[111] The next portion of his opinion gives historical context for "the principles which have guided criminal sentencing—as opposed to criminal liability . . . ."[112] In this section, Rehnquist built the retributive framework on which the rest of the opinion hangs.

Just as O'Connor reasoned in her *Gathers* dissent,[113] Rehnquist concluded that victim impact evidence provides the State with a logical answer to mitigation.[114] He argued that the precedent on

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106 *Id.* at 814.

107 *Id.* at 814–15.

108 State v. Payne, 791 S.W.2d 10, 17 (Tenn. 1990).

109 *Id.* at 18.

110 *Payne*, 501 U.S. at 817.

111 *Id.* at 819.

112 *Id.*

In this portion of the argument Chief Justice Rehnquist cites to the book of Exodus, "An eye for an eye, a tooth for a tooth." Notably missing is a citation to *Matthew* that states "[a]n eye for an eye, a tooth for a tooth. But I say unto you, That ye resist not evil; but whosoever shall smite thee on thy right cheek, turn to him the other also." 5 *Matthew* 38:39 (King James).

113 *Gathers*, 490 U.S. at 817 (O'Connor, J., dissenting).

114 *Payne*, 501 U.S. at 839.

which *Booth* partially relies[115] was misread as only describing a class of evidence that could be introduced in favor of a defendant.[116] Rehnquist wrote that the allegedly misread precedent "unfairly weighted the scales in a capital trial; while virtually no limits are placed on mitigating evidence, . . . the State is barred from either offering 'a quick glimpse into the life' [of the victim], or demonstrating the loss to the victim's family."[117] Rehnquist borrowed the language for this reasoning from his dissent in *Mills*; the same dissent O'Connor cited to in her *Booth* dissent.

Rehnquist went on to address the *Booth* reasoning that victim impact evidence must be excluded because it creates a "mini-trial on the victim's character"[118] and is impossible to rebut.[119] Rehnquist was not concerned with either the defendant's Hobbesian choice on how to rebut a victim impact statement or the specific relevancy requirements of capital sentencing.[120] Rather, he glossed over these concerns, instead giving voice to the concept that "relevant, unprivileged evidence should be admitted and its weight left to the fact finder."[121]

Because *Booth* was so recently decided, and even more recently extended by *Gathers*, the rumblings of stare decisis were obvious. Rehnquist tried to address the concern by giving an extensive list of cases where the Court has overturned precedent.[122] Cases where stare decisis is most important, Rehnquist argued, arise in the contract law context where reliance is at issue.[123]

Federalist themes echo throughout the opinion. Rehnquist wrote, "[u]nder our constitutional system, the primary responsibil-

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115 *Eddings*, 455 U.S. at 104; Skipper v. South Carolina, 476 U.S. 1 (1986). O'Connor specifically addresses the *Woodson* language that the capital defendant must be treated as a "uniquely individual human being." *Woodson*, 428 U.S. at 304.

116 *See* Steven Paul Smith, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 93 COL. L. REV. 1249, 1256 (1993) (noting the Court is moving away from the *Lockett/Edding* line of cases, in favor of a broader interpretation of the "individualized sentencing" mandate).

117 *Payne*, 501 U.S. at 822.

118 *Id.* at 823 (citing *Booth*, 482 U.S. at 506–507).

119 *Id.*

120 *Id.*

121 *Id.* (citing Barefoot v. Estelle, 463 U.S. 880, 898 (1983)).

122 *Id.* at 827–828.

123 *Id.* at 828. For this proposition Rehnquist cites to a number of Supreme Court precedents including: Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Or. *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458 (1852).

Rehnquist goes on to write, "the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828. He fails to buttress this assertion with a single citation.

ity for defining crimes, . . . fixing punishments, . . . and establishing procedures for criminal trials rests with the States . . . subject to the overriding provisions of the United States Constitution."[124] Those considerations led the majority to the ultimate holding, "if the State chooses to permit victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar."[125]

The *Payne* decision stopped short in three areas. First and most obviously, it does not create a constitutional right for victims. It merely allows states to enact victim impact statutes and apply them in the capital sentencing context rather than mandating that states do so. Second, it explicitly limits the holding to the overruling of *Booth* and *Gathers* only in regards to their ban on information relating to the victim and impact on his family.[126] In *Booth*, evidence of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence was held inadmissible. In *Payne*, no such evidence was at issue. Therefore, that portion of *Booth* remains intact. Third, Rehnquist recognized the possibility that evidence may be "introduced that is so unduly prejudicial that it renders the trial fundamentally unfair,"[127] however a prejudiced party should seek remedy through the Due Process Clause of the Fourteenth Amendment.[128]

Justice O'Connor wrote a two-part concurring opinion joined by Justices White and Kennedy. In the first part, O'Connor stressed the federalism implications. States can "choose" not to have victim impact statements in capital sentencing.[129] Further, even if a victim impact statement is unduly inflammatory, there are procedural protections in place. She argued that a defendant can seek refuge in the Fourteenth Amendment and the appellate courts.[130] In the second part, O'Connor specifically addressed Justice Marshall's dissent. She asserted, "I do not think it fair . . .

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124 *Id.* at 824.

125 *Id.* at 827.

126 *Id.* at 830 n.2.

127 *Id.* at 824.

128 *Id.* at 825.

129 *Id.* at 830–31.

130 *Id.* The potential of the Fourteenth Amendment's Due Process Clause for such relief has been unrealized in the years since *Payne*. Justin D. Flamm, *Due Process on the "Uncharted Seas of Irrelevance:" Limiting the Presence of Victim Impact Evidence at Capital Sentencing After Payne v. Tennessee*, 56 WASH. & LEE L. REV. 295 (1999). Likewise O'Connor's faith in the appellate courts may be misplaced, especially because the Tennessee Supreme Court failed to see the evidence at issue in *Payne* as a violation of then existing federal law.

[that] plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes."[131]

The issue of foreseeability was addressed in a separate concurring opinion by Justice Souter joined by Justice Kennedy. Souter wrote, "[e]very defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death."[132] Souter went on to state that the purpose of his separate concurrence is his particular displeasure with *Booth*'s "unworkable standard of constitutional relevance."[133] To illustrate the point he grounded his defense for overturning precedent in a separate body of case law from the majority.[134]

Two separate dissents were filed that both warned of the potential danger of the majority's precedent and exposed the faulty reasoning behind their opinion. The first, by Justice Marshall and joined by Justice Blackmun, is vitriolic and personal. It starts, "Power, not reason, is the new currency of this Court's decision making."[135] The essence of his dissent is that, because of a personnel change, the Court "declares itself free to discard any concept of constitutional liberty"[136] and create an exception to the general rule of stare decisis. Marshall concluded by cautioning against creating a slippery slope. He warned, "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent."[137] On June 27, 1991, Marshall resigned his tenure at the Supreme Court—two short hours after reading this dissent from the bench.[138]

Justice Stevens's dissent, also joined by Blackmun, seconded Marshall's concerns, but went on to systematically dissect the majority's reasoning. The opening paragraphs of this dissent draw the reader in by creating a counter-factual example to the type of evi-

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131 *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

132 *Id.* at 838 (Souter, J., concurring).

133 *Id.* at 839 (Souter, J., concurring).

134 *Id.* at 842–43 (Souter, J., concurring) (citing Darden v. Wainwright, 477 U.S. 168, 178–83 (1986), which is used by Souter to suggest that refuge from prejudicial victim impact statements can be sought in the Due Process clause).

135 *Id.* at 844 (Marshall, J., dissenting).

136 *Id.* at 845 (Marshall, J., dissenting).

137 *Id.* 856 (Marshall, J., dissenting).

138 Randall Coyne, *Taking the Death Penalty Personally: Justice Thurgood Marshall*, 47 OKLA. L. REV. 35, 54 (1994).

dence the majority foresees coming in under the new *Payne* rule. Justice Stevens wrote:

> If a defendant, who had murdered a convenience store clerk in cold blood . . . offered evidence . . . about the immoral character of his victim, all would recognize immediately that the evidence was irrelevant and inadmissible. Evenhanded justice requires the same constraint be imposed on the advocate of the death penalty.[139]

Stevens saw the majority's argument, that victim impact evidence offers the prosecution an answer to mitigating character evidence of the defendant, as a *non sequitar* because "the victim is not on trial."[140] Stevens further argued that victim impact evidence allows for arbitrary, inconsistent sentencing[141] and presents a defendant with an impossible tactical decision on how to rebut.[142]

III. How the Jurisdictions Treat *Payne*

As of this article, twenty states do not allow any victim impact evidence in capital sentencing.[143] In his 2003 retrospective of post-*Payne* jurisprudence, John H. Blume observed that thirty-three of the thirty-eight death penalty states, as well as the federal government and the military, allow some type of victim impact evidence in capital sentencing.[144]

What constitutes victim impact evidence varies between jurisdictions because *Payne* does not mandate that states adopt victim impact statutes, nor does it provide guidance to the type of statutes

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139 *Payne*, 501 U.S. at 857 (Stevens, J., dissenting).

140 *Id.* at 859 (Stevens, J., dissenting).

141 *Id.* at 860–61 (Stevens, J., dissenting).

142 *Id.* at 864 (Stevens, J., dissenting).

143 The Eighth Amendment has been interpreted to comport with an "evolving standard of decency." Trop v. Dulles, 356 U.S. 86, 100 (1958). This evolving standard has been quantified by certain objective measurements. Typically, this includes a count of the jurisdictions that subscribe to a certain practice, such as executing juveniles, and those that do not. When calculating which jurisdictions do not participate in the practice the United States Supreme Court will include jurisdictions which have no death penalty into their count. *See, e.g.*, *Roper*, 543 U.S. at 552–53 (held unconstitutional the execution of persons under the age of 18, noting that "30 states prohibit the juvenile death penalty altogether, comprising 12 that have rejected the death penalty altogether and 18 that maintain it . . . but exclude juveniles from its reach."); *Tison*, 48 U.S. at 175 n.13 (Brennan, J., dissenting) ("Thus it appears that about three-fifths of the States and the District of Columbia have rejected the position [that non-triggerman convicted of felony murder in certain circumstances can face the death penalty] the Court adopts today.").

144 John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 Cornell L. Rev. 257, 267–268 (2003).

states should adopt.[145] *Payne* merely states, "the Eighth Amendment erects no per se bar [to victim impact statements]."[146] Therefore, state legislatures and courts have shaped the type and extent of victim impact evidence.

Professor Blume grouped states with active death penalty statutes into three categories of victim impact evidence admissibility: undecided, limited admissibility, and admissible.[147] Professor Blume's categories, although straightforward, must be redefined slightly to comport with changes in the law.[148] Since his article,

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145 Professor Blume states in his 2003 article that "thirty-three of the thirty-eight states with the death penalty, as well as the federal government and the military, currently allow the use of VIE in capital trials." *Id.* at 267. Following are examples of how different jurisdictions that allow victim impact evidence in capital sentencing hearings treat such admissions post-*Payne*.

Arizona: State v. Garza, 163 P.3d 1006, 1019 (Ariz. 2007) (discussing how ARIZONA RULE CRIM. PRO. 19.1(d) expressly allows victim impact statements after opening statements and before the defense's mitigation evidence and is thus not unduly prejudicial for the victim's mother to compare her loss to the September 11th terrorist attacks).

Florida: Franklin v. State, 965 So. 2d 79, 97 (Fla. 2007) (holding that the testimony of the victim's family and coworker about his military service was within the bounds of victim impact evidence as provided in both FLA. STAT. ANN. § 921.141(7) and *Payne*).

Maryland: Williams v. State, 679 A.2d 1106, 1127 (Md. 1996) (interpreting MD. CODE ANN., art. 41, § 4-609(d) (1993) to limit the use of written victim impact statements in death penalty cases to those statements made in a pre-sentence investigation, and ruling the statement at issue inadmissible because it was not made in such an investigation).

Oklahoma: Williams v. State, 22 P.3d 702, 718 (Okla. Crim. App. 2001) (holding that victim impact statements are admissible pursuant to OKLA. STAT. ANN. 22 § 984 and precedent, but are limited to "financial, emotional, psychological, and physical effects" on the victim's survivors).

Military: U.S. v. Loving, 41 M.J. 213, 258-259 (C.A.A.F. 1994) (holding that it was not an abuse of discretion to allow testimony of a victim's wife).

146 *Payne*, 501 U.S. at 827.

147 Blume, *supra* note 144, at 268.

148 Since Professor Blume's article, the national death penalty climate has changed. When he wrote his article thirty-eight states had active death penalty statutes. Now only thirty-six states do. New Jersey passed legislation which replaced the death penalty with life imprisonment without parole. Governor Jon Corzine commuted all eight death row inmates' sentences to life without parole. Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3. Also, New York's Court of Appeals held that the death penalty statute's jury deadlock instruction violated the state constitution's procedural due process provision and the only admissible remedy was legislative. People v. Lavalle, 3 N.Y.3d 88 (2004). The legislature chose not to amend the statute and restore the death penalty. The Court of Appeals affirmed *Lavalle*, reversing the final death sentence on October 23, 2007. People v. Taylor, 848 N.Y.S.2d 554 (2007).

Further, many states have non-legislative moratoria on the death penalty, prescribed either through executive or judicial means. Illinois continues a governor-imposed moratoria on executions, although state prosecutors still bring capital charges.

New Jersey, a state with an interesting treatment of the issue,[149] has abolished its death penalty statute.[150] Wyoming has deemed victim impact evidence inadmissible.[151] Further, the treatment of victim impact evidence by certain states defies tidy classification and therefore should be explored in greater detail.

Only two states, New Hampshire[152] and Connecticut,[153] have active death penalty statutes and statutory provisions allowing victim impact evidence, yet have not determined whether such evidence can be used in capital sentencing. Montana case law clearly admits non-testimonial victim impact evidence, but it is unclear whether live victim impact testimony is admissible.[154] Indiana and Mississippi continue their significant limitations on admissibility.[155]

Monica Davey, *Illinois Governor in the Middle of New Death Penalty Debate*, N.Y. TIMES, Mar. 15, 2004; Illinois Coalition to Abolish The Death Penalty, 2008 Annual Report, http://www.icadp.org/ICADPannualreport08.pdf (last visited Mar. 23, 2008). Similarly, a de facto moratorium on lethal injections nation-wide was halted when the Supreme Court held such executions were not a violation of the Eighth Amendment. Baze v. Rees, 128 S.Ct. 1520 (2008).

149 Until New Jersey abolished the death penalty, it stood alone as the only state among the jurisdictions that permit victim impact evidence. There, the admission of victim impact testimony is permitted only in those cases in which the defendant places his character or record at issue as a mitigating circumstance. State v. Muhammad, 678 A.2d 164, 168 (N.J. 1996).

150 *See* Peters, *supra* note 148.

151 Olsen v. Wyoming, 67 P.3d 536, 594 (Wyo. 2003) (held existing Wyoming law does not permit victim impact evidence in capital sentencing).

152 *See infra* note 201.

153 Connecticut has yet to address the issue directly. However, a statute, CONN. GEN. STAT. ANN. § 53a-46d (2008), permitting victim impact statements in capital sentencing hearings was adopted subsequent to a 2003 trial, no capital statutes have been conducted since its adoption. As such the issue under Connecticut state law, remains open. State v. Rizzo, 833 A.2d 363, 415 n.44 (Conn. 2003).

154 In Kills On Top v. State, 15 P.3d 422, 438 (Mont. 2000), the Montana Supreme Court noted that they had previously admitted non-testimonial victim impact evidence. The court also noted that *Payne* expressly overrules *Booth*. *Id.* It seems that the latter language is an invitation to expand the Montana rule to include testimonial victim impact evidence as well.

155 In Indiana and Mississippi, both "weighing" states where non-statutory aggravating factors are not considered, victim impact evidence is limited to proving the existence of statutorily enumerated aggravating factors. The Indiana Supreme Court wrote, "[w]ith our determination today that Indiana's statutory death penalty aggravators are the only aggravating circumstances available, the admissibility of the victim impact evidence in the present case hinges upon its relevance to the death penalty statute's aggravating and mitigating circumstances." Bivins v. State, 642 N.E.2d 928, 957 (Ind. 1994). Mississippi capital jurisprudence has a history of questioning the scope of *Payne*. *See* Jenkins v. State, 607 So.2d 1171, 1183 (Miss. 1992); Hansen v. State, 592 So.2d 114, 146–147 (Miss. 1991). In one decision the Mississippi Supreme Court recognized "[t]his Court, however, has been hesitant to embrace the full constitutional panoply afforded by *Payne*." Berry v. State, 703 So. 2d 269, 275 (Miss. 1997). The Court went on to say that victim impact evidence could only be

This section of the paper will first provide a brief overview of victim impact evidence. Second, it will discuss the many jurisdictions that allow victim impact statements. Third, it will discuss the few jurisdictions that, while retaining the death penalty, have barred or significantly limited the admission of victim impact statements. Last, this section will explore the two remaining death penalty jurisdictions to rule on the issue.

A. What is Included in the Term "Victim Impact Evidence"?

The type of victim impact evidence permitted varies across jurisdictions. Because *Payne* clearly invited states to allow evidence related to the victim's personal characteristics and the emotional impact of the murder on family members,[156] evidence about the victim's good character is probably the most common.[157] Also common is evidence of the victim's talents,[158] intelligence,[159] spirituality, work ethic, educational background, and standing in the community.[160] Similarly, jurisdictions differ in their approach to the permissibility of evidence that the defendant's conduct negatively impacted the law enforcement community.[161]

Murder victims' family members have been allowed to testify about a wide range of effects including miscarriages, heart attacks,

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used to establish an existing aggravating factor listed in the capital sentencing statute, MISS. CODE ANN. § 99-19-101(5) (1994). *Berry*, 703 So. 2d. at 275– 276.

156 *Payne*, 501 U.S. at 827.

157 *See, e.g.*, Roberts v. Bowersox, 61 F. Supp. 2d 896 (E.D. Mo. 1999) (held that victim impact evidence, including witnesses' testimony about the victim's kindness and their close friendship with her, did not improperly or unconstitutionally influence the jury's sentencing determination); Raulerson v. State, 491 S.E.2d 791 (Ga. 1997) (holding admissible testimony read by the prosecutor, including testimony from the first victim's father that, at the time of his death, the victim attended college and planned to marry the second victim; a statement from the second victim's father that she was a senior honor student in high school who planned to marry the first victim; and testimony by the third victim's son that she was a nurse and the divorced mother of two children); State v. Reeves, 448 S.E.2d 802 (N.C. 1994) (holding admissible testimony that the victim was a very good person, that she always went to church, that she was a good wife and mother, would do anything for anyone, and died not knowing what happened to her daughter). Blume, *supra* note 144, at 269.

158 *See* Whittlesey v. State, 665 A.2d 223, 250–252 (Md. 1995) (holding evidence that victim was a highly skilled pianist as relevant).

159 *See* State v. Frost, 727 So. 2d 417, 431–432 (La. 1998) (holding evidence that the victim was intelligent as relevant).

160 Blume, *supra* note 144, at 270.

161 Hyde v. State, 778 So. 2d 199, 213–216 (Ala. Crim. App. 1998) (holding that the prosecutor's comments made during sentencing that the victim was a police officer was not improper); *but see* Lambert v. State, 675 N.E.2d 1060, 1062–1065 (Ind. 1996) (finding error in admission of evidence that since the murder of a police officer the police chief could no longer do his job).

and other illnesses and negative effects that they attribute to the loss.[162] This type of evidence was also admitted in the *Payne* trial itself.[163] Additionally, most states allowing victim impact evidence place no limits on the number of witnesses that may testify.[164]

A new variety of victim impact evidence, seemingly not contemplated at the time of the *Payne* decision, is now finding its way into capital sentencing hearings. This includes archived video footage of statements made by the deceased instead of their family.[165] This type of evidence was admitted against Ronell Wilson,[166] the only federal defendant to be sentenced to death by a New York jury.[167]

Many courts operating with loose restrictions on victim impact evidence reason along the lines of Scalia's concurrence in *Payne* and hold that victim impact evidence provides an answer to *Lockett*'s requirement for mitigating evidence.[168] Still, this reasoning flies in the face of established case law because the "all relevant evidence" language should speak only to mitigation. As Justice Stevens asserted, " '[v]ictim impact' evidence was still unheard of when *Lockett* was decided."[169]

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162 Blume, *supra* note 144, at 270.

163 *Payne*, 501 U.S. at 814.

164 *See* Blume, *supra* note 144, at 270.

165 U.S. v. Wilson, 493 F.Supp.2d 491, 505–506 (E.D.N.Y. 2007) (holding that a video depicting the murdered police officer describing his job was admissible); Whittlesey v. State, 665 A.2d 223, 230 (Md. 1995) (holding admissible a 90 second video clip of the deceased playing the piano, a skill for which he was nationally recognized); State v. Allen, 994 P.2d 728, 751 (N.M. 1999) (holding admissible a three minute videotape of the deceased on a camping trip); *compare with* U.S. v. Sampson, 335 F.Supp.2d 166 (D.Mass. 2004) (holding a 27 minute video of victim made for a memorial service, featuring over 200 still photographs of the victim, and set to music, as inadmissible because its probative value was outweighed by the danger of unfair prejudice and created a danger of provoking undue sympathy and a verdict based on passion as opposed to reason); United States v. McVeigh, 153 F.3d 1166, 1221 n. 47 (10th Cir.1998) (holding wedding photographs and home videos as inadmissible).

166 Judge Garaufis engaged in a FED. R. EVID. 403 styled balancing test before admitting the video of the murder victim. *Wilson*, 493 F. Supp.2d at 505. Judge Garaufis also attempted to limit the prejudicial effect of the victim impact evidence by instructing the jurors that they should not permit the testimony of such witnesses to overwhelm their ability to follow the law. *Id.* at 505–506. The effectiveness of such an instruction is questionable.

167 Anthony M. Destefano, *Judge: Death penalty in drug case not worth pursuing*, NEWSDAY, Mar. 1, 2008; *see also* Alan Feuer, *An Aversion to the Death Penalty, but No Shortage of Cases*, N.Y. TIMES, Mar. 10, 2008, at B1.

168 For example, Pennsylvania has reasoned that state law favors the introduction of "all relevant" evidence at capital sentencing. Pennsylvania v. Means, 773 A.2d 143, 153 (Pa. 2001).

169 *Payne*, 501 U.S. at 858 (Stevens, J., dissenting).

B. Two Approaches

1. Jurisdictions Embracing *Payne*

Thirty states make victim impact evidence more or less admissible.[170] The federal and military systems also allow victim impact evidence with few restrictions.[171]

Prior to legislation, courts in two of these states, Oregon and Utah, had found that victim impact statements were inadmissible, reasoning that they are not relevant to any issue under their capital sentencing statutes.[172] In *State v. Guzek* the Supreme Court of Oregon reasoned that victim impact evidence, while tending to prove the fact at which it was directed, was immaterial to the special questions directed to the jury.[173] The Oregon legislature amended their death penalty statute to explicitly mention victim impact evidence.[174] Such evidence was later held admissible.[175] In *State v. Carter*, the Supreme Court of Utah held victim impact evidence was not relevant to the sentence and lacked probative force, and therefore was inadmissible.[176] The Utah legislature later amended the death penalty statute to permit such evidence, if it is presented without comparison to other victims.[177] Although both Oregon and Utah can now technically be included in the list of states where

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170 Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington. *See* Blume, *supra* note 144.

171 *Id.*

172 State v. Carter, 888 P.2d 629, 651 (Utah 1995) (held that a victim impact statement was irrelevant to sentencing and lacked probative force pursuant to UTAH CODE ANN. § 76-3-207(2) (West 2007)); State v. Guzek, 906 P.2d 272 (Or. 1995) (rejected a victim impact statement, similar to that introduced in *Payne*, on relevancy grounds).

173 *Guzek*, 906 P.2d at 284. Oregon's capital statute is different from the majority states' because it does not have listed aggravating and mitigating factors. It puts questions to the jury where aggravation and mitigation should be considered. *See infra* note 172.

174 OR. REV. STAT. ANN. § 163.150(1)(a) (West 2007) reads:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence including, but not limited to, victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim's family and any aggravating or mitigating evidence relevant to the issue in paragraph (b)(D) of this subsection.

Id.

175 State v. Hayward, 963 P.2d 667 (Or. 1998).

176 *Carter*, 88 P.2d at 651 (1995) (noting that although the Rules of Evidence are not binding in Utah capital sentencing, they still provide guidance).

177 UTAH CODE ANN. 1953 § 76-3-207(2)(1)(iii) (West 2007) ("In capital sentencing proceedings, evidence may be presented on: . . . the victim and the impact of the

victim impact statements are admissible, their unique history is worth noting for the struggle between courts that find victim impact evidence irrelevant to capital sentencing and legislatures that are driven to render such evidence admissible.

2. Jurisdictions Limiting or Rejecting *Payne*

Payne merely states that the Eighth Amendment erects no per se bar to victim impact evidence.[178] It does not create a constitutional right for victims. Therefore, states are permitted to place limits on the use of victim impact statements. States that reject the logic of *Payne* often determine that victim impact evidence is irrelevant to capital sentencing and creates the risk of a fact-finder rendering an arbitrary decision with life or death consequences for the defendant.

Indiana and Mississippi have significant limitations on victim impact statements at capital sentencing hearings.[179] In Indiana, the court limits victim impact evidence to that which is relevant to mitigating and aggravating factors. Procedurally, a trial court will grant a motion in limine prior to a sentencing hearing in order to satisfy this limitation.[180] Indiana is distinguished by the fact that it is a strict "weighing state," allowing only consideration of enumerated aggravating factors,[181] which has the effect of further limiting victim impact evidence. Mississippi does not have a per se bar on victim impact evidence. It allows only evidence relevant to establishing an aggravating circumstance.[182]

Recently, the Supreme Court of Wyoming has gone a step further and rejected the underlying basis of *Payne*. The Wyoming high court addressed the power shift on the United States Supreme Court.[183] In *Olsen v. Wyoming*, the defendant articulated a three-fold argument for the preclusion of victim impact statements. First, *Payne* is not mandatory. *Payne* does not require victim impact statements be admitted; it merely allows them, leaving the

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crime on the victim's family and community without comparison to other persons or victims.").

178 *Payne*, 501 U.S. at 827.

179 Annual Report of the Illinois Coalition to Abolish the Death Penalty, *supra* note 148.

180 Holmes v. State, 671 N.E.2d 841, 848–849 (Ind. 1996); *Bivins*, 642 N.E.2d 928.

181 *Means*, 773 A.2d at 154.

182 *Berry*, 703 at 275.

183 *Olsen*, 67 P.3d at 594 (holding that existing Wyoming law does not permit victim impact evidence). The Wyoming Court wrote, "For example, not all judges agree that victim impact is relevant to a determination of the sentence in a capital case. *Booth* and *Payne* were not unanimous decisions." *Id.* at 598.

ultimate decision to the state courts. Second, after *Payne*, the Wyoming legislature did not amend its death penalty statute to include a victim impact provision. Third, the general victim impact statute that already existed in Wyoming is not applicable to capital sentencing.[184] The Court accepted this reasoning, seizing on the fact that the Wyoming Legislature did not explicitly authorize the admission of victim impact evidence.[185]

Unfortunately, as remarkable as the *Olsen* decision was, another Wyoming case handed down the same day limited its applicability.[186] That case held that admission of victim impact statements was subject to a harmless error review on a case-by-case basis.[187] However, Martin J. Olsen did get a new sentencing hearing in which victim impact evidence was inadmissible.[188]

There are common themes on how states reign in the scope of victim impact evidence. For example, some states limit who may testify.[189] Other states have reversed sentences when the scope of victim impact statements went too far.[190] "Too long and too emotional" seems to be a guiding principle for when victim impact evi-

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184 *Id.* at 594.

185 The *Olsen* court wrote, "It is interesting that, in the aftermath of *Payne,* a number of state legislatures amended their capital sentencing statutes to explicitly authorize the admission of victim impact evidence." *Id.* at 599. The Court continued, "In addition to Pennsylvania and Florida, ten other states revised their death penalty statutes after *Payne* to provide for consideration of victim impact evidence during capital sentencing proceedings; Ark.Code Ann. § 5-4-602 (Michie Supp.1995); Colo.Rev.Stat. Ann. § 16-11-103 (West Supp.1996); La.Code Crim. Proc. Ann. art. 905.2 (West Supp.1997); Mo. Ann. Stat. § 565.030 (Vernon Supp.1997); Mont.Code Ann. § 46-18-302 (1995); N.J. Stat. Ann. § 2C:11-3 (West 1995); Okla.Rev.Stat. § 163.150 (Supp.1996); S.D. Codified Laws Ann. § 23A-27A-2(2) (Supp.1997); and Utah Code Ann. § 76-3-207 (Supp.1996)." *Id.* at 599 n.14.

186 Harlow v. Wyoming, 70 P.3d 179 (Wyo. 2003).

187 *Id.*

188 *Olsen*, 67 P.3d at 600.

189 *See* Blume, *supra* note 144, at 270 n.122. Idaho allows families of homicide victims to testify at sentencing hearings. Idaho Code § 19-5306(3) (Michie 2002). Similarly, the Illinois Supreme Court in People v. Hope, 702 N.E.2d 1282, 1287 (Ill. 1998), limited the meaning of "crime victim" in the Illinois Rights of Crime Victims and Witnesses Act to a spouse, child, parent, or sibling of the victim. *See also* CAL. PENAL CODE § 1191.1 (West 2008) (allowing only "next of kin" to testify, § 1191.1 passed as Prop 8, "The Victims' Bill of Rights," in early 1982).

190 Blume, *supra* note 144, at 279, n.171; Wimberly v. State, 759 So. 2d 568, 574 (Ala. Crim. App. 1999) (reversing on other grounds but noting "[i]f we were not already reversing this case for a new trial, we would set aside the sentence and remand this case to the trial court for a new sentencing phase before the jury and a new sentencing hearing before the trial court based on . . . admission of improper [victim impact evidence]"); Clark v. Commonwealth, 833 S.W.2d 793, 796–97 (Ky. 1991) (ordering new sentencing trial due to improper exploitation of the grief of the victim's family); State v. Bernard, 608 So. 2d 966, 973 (La. 1992) (remanding the case because the defendant did not receive a pretrial hearing regarding the admissibility of the

dence can be precluded where it would be otherwise permissible.[191] Courts and legislatures have imposed similar limitations on victim impact video footage.[192] The unifying theme in these limitations is that the intention of *Payne* was to provide a "quick glimpse" into the life of the victim.[193] Courts have held that this "quick glimpse" should indeed be quick.[194]

Further, victim impact statements from victims of a defendant's previous crimes are typically inadmissible because they are irrelevant to the case for which the defendant is standing trial.[195] The most important limitation on the scope of victim impact evidence is that a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence are inadmissible. This part of *Booth* survives in theory and in practice.[196]

C. Two Remaining States: A Last Frontier?

New Hampshire and Connecticut are the remaining two states with active death penalty statutes that have yet to deal with the issue of whether victim impact statements are admissible. Both should reject the logic of *Payne* and follow Wyoming's example.

The last execution in New Hampshire was in 1939.[197] However, there have been capital prosecutions,[198] and the death penalty statute has remained on the books with the last amendment to the statute occuring in the 1990 legislative session.[199] In the last year, the Attorney General's Office has announced its intent to seek the death penalty in two different cases.[200]

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victim impact evidence and more particularized notice of what victim impact evidence the State intended to introduce at trial).

191 Malone v. State, 168 P.3d 185, 211 (Okla. Crim. App. 2007).

192 *See Olsen*, 67 P.3d at 594.

193 *Payne*, 501 U.S. at 822.

194 *See* Hain v. Gibson, 287 F.3d 1224, 1236 (10th Cir. 2002) (limiting victim evidence to statements "showing how the victim's death is affecting or might affect the victim's survivors, and why the victim should not have been killed.").

195 Colorado, Illinois, and Nevada have expressly rejected admission of victim impact statements from victims not named in the indictment. Blume, *supra* note 144, at 272.

196 *See* State v. Lovelace, 90 P.3d 298 (Idaho 2004); State v. Bjorklund, 604 N.W.2d 169 (Neb. 2000).

197 Howard Long of Alton, N.H. was hanged on July 14, 1939. Kathryn Marchocki, *Addison Pleads Not Guilty*, NEW HAMPSHIRE UNION LEADER, Feb. 28, 2007, at A1.

198 *See, e.g.*, State v. Johnson, 134 N.H. 570 (N.H. 1991).

199 N.H. REV. STAT. ANN. § 630:5 (West 2008) (amended 1990).

200 One prosecution is against Michael Addison, the other John Brooks. Dan Gorenstein, *Two Very Different Defendants*, NEW HAMPSHIRE PUBLIC RADIO, Apr. 10, 2008, http://www.nhpr.org/node/15776 (last visited Feb. 5, 2009).

New Hampshire's capital sentencing statute enumerates certain aggravating factors, and other non-statutory aggravating circumstances can be introduced upon proper notice. The statute does not enumerate victim impact evidence. Therefore, if it is admitted, it must be as a non-statutory aggravating factor.

Law and logic dictate that New Hampshire should make victim impact evidence inadmissible. Similar to Wyoming, the state legislature has not seriously contemplated the use of victim impact statements in capital sentencing. The capital statue does not explicitly mention victim impact evidence, and there is no evidence that the legislature amended the statutory language of the general victim impact statute to keep up with modern Eighth Amendment jurisprudence.[201]

Further, there is an inconsistency between the general victim impact statute[202] and the capital sentencing statute.[203] Although the first sentence of the general victim impact statute includes "capital murder," this statute is intended for situations where a judge is the sentencer. Constitutional law[204] and the capital sen-

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201 The last amendment to the New Hampshire victim impact statute was in 1994. N.H. REV. STAT. ANN. § 651:4-a (West 2008).

202 The general victim impact statute states:

> Victims of Certain Violent Crimes Against a Person Permitted to Speak Before Sentencing and at Sentence Reduction or Suspension Hearings. Before a judge sentences or suspends or reduces the sentence of any person for capital, first degree or second degree murder, attempted murder, manslaughter, aggravated felonious sexual assault, felonious sexual assault, first degree assault, or negligent homicide committed in consequence of being under the influence of intoxicating liquor or controlled drugs, the victim of the offense, or the victim's next of kin if the victim has died, shall have the opportunity to address the judge. The victim or victim's next of kin may appear personally or by counsel and may reasonably express his views concerning the offense, the person responsible, and the need for restitution. The prosecutor, the person to be sentenced, and the attorney for the person to be sentenced shall have the right to be present when the victim or victim's next of kin so addresses the judge. The judge may consider the statements of the victim or next of kin made pursuant to this section when imposing sentence or making a decision regarding sentence reduction or sentence suspension.

N.H. REV. STAT. ANN. § 651:4-a.

203 N.H. REV. STAT. ANN. § 630:5; Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 100 n.56 ("[Section 651:4-a] seems to allow victim impact statements only when a judge is the sentencer, but [630:5] delegates the capital sentencing task to a jury.").

204 Ring v. Arizona, 536 U.S. 584, 606 (2002) (holding that capital defendants are entitled to a jury determination of any fact on which the legislature conditions their maximum punishment).

tencing statute make clear that a judge cannot be the sentencer.[205] In the states that do allow victim impact evidence, the state legislature has explicitly included it in the death penalty statute or separate victim impact statute in which capital punishment is mentioned.[206] Other states will only allow victim impact statements if they are relevant to a statutory aggravating factor.[207] Lastly, the New Hampshire Constitution has been interpreted to be more protective of defendants.[208]

The strength of the argument against victim impact evidence in a Connecticut capital hearing is, perhaps, weaker than in New Hampshire. The capital statute specifically mentions inclusion of such evidence.[209] Nonetheless, for all the reasons stated above, *Payne* is still flawed precedent. Other states have rejected *Payne* because victim impact evidence is irrelevant and results in arbitrary decisions as to which defendants live and which die. New Hampshire and Connecticut should accept this logic as well.

IV. PROBLEMS WITH *PAYNE*

Eighth Amendment jurisprudence carves a delicate path between two pillars. Capital sentencing must be based on clear and objective guidelines, which guard against arbitrariness,[210] and must take into account the individualized characteristics of the accused and circumstances of the offense.[211] Victim impact statements, when used in capital sentencing, run head on into both pillars. Not only does this type of evidence make arbitrary the decision of who lives and who dies, but it is irrelevant to the character of the defendant and circumstance of the offense.[212]

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[205] N.H. REV. STAT. ANN. § 630:§5-II(a).

[206] *See, e.g.*, OR. REV. STAT. ANN. § 163.150(1)(a); *see supra* text accompanying note 174.

[207] *See* 17 ARIZ. REV. STAT. ANN. § 19.1 (d)(3); *see supra* text accompanying note 38.

[208] James R. Acker and Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299 (1989).

[209] The statute reads:

> Victim impact statement read in court prior to imposition of sentence for crime punishable by death.
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> . . . .
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> A victim impact statement prepared with the assistance of a victim advocate to be placed in court files in accordance with subdivision (2) of subsection (a) of section 54-220 may be read in court prior to imposition of sentence upon a defendant found guilty of a crime punishable by death.

CONN. GEN. STAT. § 53a-46d (2007).

[210] Coley v. State, 231 Ga. 829, 615 (Ga. 1974).

[211] Lockett v. Ohio, 438 U.S. 586, 605 (1982).

[212] Of course, eyewitness testimony regarding the offense is not of the same type.

Booth and *Gathers* recognized these two issues and sculpted a rule that affronted neither pillar. As such, there is a fundamental flaw in the *Payne* decision itself: it overturns two decisions based in sound law and logic. *Payne* retracts a constitutional right—the right to be free of arbitrary decision-making in capital sentencing—in an area of law measured by evolving standards.

This section of the paper will first show how victim impact evidence violates the *Gregg* mandate because it creates arbitrary capital decisions. Next it will show how victim impact evidence is irrelevant to capital sentencing. Because some state courts have cited relevancy as the justification for prohibiting victim impact statements, relevancy is indeed what provides a practical ground for objecting to victim impact evidence in capital trials. Last, this section makes a theoretical argument for why *Payne* should be overturned, recognizing that the *Payne* decision itself was a result of ideological changes on the Court. Professor Randall Coyne emphasized the futility of seeking relief for the introduction of victim impact evidence in the United States Supreme Court by creating this analogy:

> Once upon a time, a criminal defendant whose constitutional rights had been violated could confidently seek relief in the United States Supreme Court, regardless of the nature of the criminal charges against her. Once upon a time, a villager suffering a toothache might profitably repair to the local blacksmith to have the offending tooth removed. Today, both would be advised to seek relief elsewhere.[213]

Unlike the former two sections, this last section does not provide a tool that is immediately practical to capital lawyers. Rather it is a discussion of logic and judicial morality. In a hypothetical world, where the Court was composed of personalities that would consider a return to *Booth*, lawyers would need to place before these judges compelling legal, moral, and logical arguments for overturning *Payne*. Hopefully, this section provides that backing.

A. Victim Impact Statements Result in Arbitrary Decisions

The Eighth Amendment prohibits the consideration of arbitrary sentencing factors in capital sentencing hearings. This mandate originated in *Furman* and *Gregg*.[214] The *Furman* Court struck a

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[213] Randall Coyne, *Inflicting Payne on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 611 (1992).

[214] 214 *See* Kaine, *supra* note 18.

capital statute that allowed for complete jury discretion because, as Justice Stewart wrote:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.[215]

In *Gregg*, the Court deemed constitutional a capital statute in which discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[216] Notably, the statute in question contained ten clearly enumerated aggravating factors.[217] Since *Gregg*, the Court has extended the mandate barring arbitrary sentencing.[218]

Arbitrary is defined as "[d]epending on individual discretion" or "founded on prejudice or preference rather than reason or fact."[219] Both qualitative logic and quantitative research show that victim impact evidence does result in arbitrary decisions,[220] clearly violating the *Gregg* mandate. Qualitative analysis is clear: it is arbitrary to sentence the accused to death based on the ability of the victim's family to be present at the trial and effectively communicate their loss to the jury.[221]

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215 *Furman*, 408 U.S. at 309–310 (Stewart, J., concurring).

216 *Gregg*, 428 U.S. at 189.

217 *Id.* at 165 n.9.

218 Turner v. Murray, 476 U.S. 28 (1986) (reaffirming its obligation to strike down death sentences imposed under circumstances that "created an unacceptable risk" of arbitrariness, caprice or mistake, the U.S. Supreme Court held that a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias). Defendant Turner was granted a new sentencing hearing. *Id.* at 38.

219 BLACK'S LAW DICTIONARY 85 (8th ed. 2005).

220 *See McCleskey*, *infra* note 227; *see also* Baldus, *infra* note 227.

221 In an NAACP amicus brief for John Booth, Vivian Berger wrote:

> Such characteristics as the articulateness of family members will often be the products of class or wealth, thereby serving as surrogates for impermissible status considerations that no one would claim should influence capital sentencing. Further, not only the mode of expression but also its substance typically encourages the jurors to consider the social value of the victim and "compare the relative worth of the victim and the defendant to society.
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> . . . .
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> . . . Social worth, as the jurors view it, will also tend to vary with factors like education, class and wealth, whether of the victim or the survivors—and, regrettably, often with race or religion as well.
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> . . . .
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> . . . By its very nature, this type of evidence invites the jury to "choose up sides," to empathize with the (usually more attractive) victim or the vic-

Victim impact statements are emotional by nature. Emotional displays, such as crying on a witness stand, provide important cues as to how jurors themselves should feel.[222] There is an extensive body of research that proves individuals who witness strong emotional displays may become emotionally aroused themselves.[223] The emotional effects are further compounded by concepts of "psychological equity," suggesting that individuals may distort facts to justify punishing an individual,[224] and "affect infusion," suggesting that emotion will influence one's judgment process when engaged in constructive information processing.[225] Simply put, empathy confounds clear decision-making. This results in decisions based on "prejudice or preference rather than reason."[226]

Even absent victim impact evidence, juries often consider improper factors in capital sentencing hearings.[227] Jurors are over-

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tim's family, in particular where these are white, middle-class, and otherwise similar to most of the jurors.

Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. in Support of Petitioner at 38–40, *Booth*, 482 U.S. 496 (No. 86-5020), 1986 WL 727592.

222 As a personal and anecdotal note, this assertion was made painfully clear when the author observed a recent capital sentencing hearing. It may seem obvious, but, when witnesses cried, jurors cried. For example, numerous jurors wept as the deceased's cousin read a statement by his adult daughter who was taunted for being fatherless as a child. The statement then described the daughter's experience of growing up without a father.

When witnesses cracked a joke, jurors laughed. For example, when the victim's former fiancée humorously described the purchase of an "especially ugly" iguana. Observation of Capital Sentencing Hearing of U.S. v. Caraballo, 282 Fed. Appx. 910, Mar. 10–14, 2008.

223 *See* J.C. Coyne, *Depression and the response of others*, 85 JOURNAL OF ABNORMAL PSYCHOLOGY 186–93 (1976); C.L. Hammen, and S.D. Peters, *Interpersonal consequences of depression: Responses to men and women enacting a depressed role*, 87 JOURNAL OF ABNORMAL PSYCHOLOGY 322–32 (1978); E.S. Sullins, *Emotional contagion revisited: Effects of social comparison and expressive style on mood convergence*, 17 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 166–174 (1991).

224 *See* S. Lloyd-Bostock, *Attributions of Cause and Responsibility as Social Phenomena*, in J. Jaspars, F. Fincham and M. Hewstone (eds.), ATTRIBUTION THEORY AND RESEARCH, 261–289, San Diego, CA: Academic Press (1983).

225 Joe Forgas, *Mood and judgment: The affect infusion model (AIM)*, 117 PSYCHOLOGICAL BULLETIN 39–66 (1995).

226 BLACK'S LAW DICTIONARY, *supra* note 219.

227 For example, McCleskey v. Kemp, 481 U.S. 279 (1987), which held that discriminatory impact was not enough to sustain an Equal Protection challenge to the death penalty, made apparent the fact that race plays an enormous role in capital determinations. The *McCleskey* case made famous a study showing that defendants who have been convicted of killing a white victim are 4.3 times more likely to receive a death sentence. *See* David C. Baldus, *et al.*, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 140 (Northeastern University Press 1990); *see also* Phillips, *supra* note 203, at 102.

In an amicus brief on behalf of Pervis Payne, the Southern Christian Leadership Conference noted:

whelmingly white and middle class.[228] Studies have observed that people have more empathy towards people like themselves. Economics, religion, race and ethnicity all play a significant role.[229] Although sameness-based empathy is unconscious, it is not benign. It results in decisions where white, middle class people sentence those convicted of killing other white, middle class people to much harsher sentences than those convicted of killing poor, non-white victims. Further, overt racism is far from unheard of on capital juries.[230] These biases, while not random when measured on race and class axes, do produce arbitrary sentences compared to the heinousness of the crime. The punishment of some of the worst crimes is life in prison, while lesser crimes earn the defendant a death sentence based on the distorting effect the victim impact evidence had on the jury.

Because victim impact statements are subjective in nature and

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> The race and prominence of the victim are factors which already lurk dangerously close to the surface in determining whether the death penalty is sought by a prosecutor, whether a plea is offered in exchange for a less severe sentence, and whether a jury imposes a death sentence. Overruling *Booth* would allow the role that the color and standing of the victim to influence the process beyond constitutionally acceptable limits.

Brief of Southern Christian Leadership Conference as Amicus Curiae in Support of Petitioner at 8, Payne v. Tennessee, 501 U.S. 808 (1991), No. 90-5721, 1991 WL 11007882 at *9.

[228] Juries are generally drawn from two sources: voting registration lists and Department of Motor Vehicle lists. These sources under-represent minorities, the poor, and the young. *See* State's Objection to Petition for Writ of Certiorari and for Stay at 10, State of New Hampshire v. Addison, No. 2007-0737 (N.H. Aug. 30, 2007).

[229] Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 399 (1996).

[230] An amicus filed on behalf of Pervis Payne describes examples of recorded overt racism. It reads in part:

> The predominantly white juries selected—whether because of these practices or because of a low percentage of blacks in the population—often bring with them to the jury box, either consciously or unconsciously, "racial stereotypes and assumptions" which influence them "in the direction of findings of black culpability and white victimization, . . . black immorality and white virtue . . . blacks as social problems and whites as valued citizens." *See, e.g.*, Dobbs v. Zant, 720 F. Supp. 1566, 1576–1578, 1576 n.22 (N.D. Ga. 1989) (many white jurors who sentenced black man to death for murder of white victim demonstrated an "insensitivity to racial matters" and felt "races should mix to a limited extent only;" two jurors found blacks "scarier than whites" and two jurors admitted to using the slur "nigger").

Brief of Southern Christian Leadership Conference as Amicus Curiae in Support of Petitioner, *supra* note 227 at 22–23. *See also* Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1020 n.27 (1988) (describing persons in our society who "maintain a distance" between themselves and minorities and as a result are "less likely to feel empathy for minorities due to this distance).

focus on human characteristics, the effects of discrimination are compounded. In practice, they give jurors a tool in which to voice their prejudices. They give a reason to vote for death in a situation where a juror may ordinarily not. Unlike a clear aggravating factor, such as whether the murder was conducted by torture—which is either established or not, a victim impact statement cannot be "proven."

Quantitative jury simulation research has shown that the use of victim impact evidence in capital proceedings produces arbitrary results. For example, one study required participants to read one of four trial summaries.[231] The study, while using all first degree murder scenarios, varied the severity of the crime and the presence of a victim impact statement.[232] One half of the participants read a victim impact statement similar to the one introduced in *Booth*; the other half read no such evidence.[233] Where victim impact evidence was present, 51% of participants voted for the death penalty.[234] Where it was absent, only 20% voted for the death penalty.[235]

Another study produced similar results. In this study, a victim impact statement, similar to the one in *Payne*, was introduced in a videotaped trial simulation. The victim's mother testified that the death of her daughter had placed emotional, physical, and financial burdens on her and led to severe emotional trauma in the victim's surviving son. Of the jurors who voted to convict, 67% of those who viewed the victim impact statement voted for death. Of those who did not see the statement, 30% voted for death.[236] While these studies may not be flawless,[237] they do provide insight into just how powerful victim impact evidence is.

In light of the Eighth Amendment's clear mandate barring arbitrary sentencing factors, it seems that the qualitative and quantitative proof of the effects of victim impact statements is alone sufficient to establish it unconstitutional.

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231 James Luginbuhl and Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM JUST. 1, 16 (1995).

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 Brian Myers and Jack Arbuthnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing of Mock Jurors*, 29 J. OFFENDER REHABILITATION 95, 112 (1999).

237 Myers & Greene, *supra* note 45, at 14 (noting that the studies were conducted on largely heterogeneous groups and without the effect of real consequences).

B. Victim Impact Evidence is Irrelevant to Capital Sentencing Decisions

Victim impact evidence also violates the relevance mandate of the Eighth Amendment. In *Payne*, Justice Stevens filed a dissenting opinion that was as logical as Justice Marshall's dissent was impassioned. Stevens cautioned that "relying on nothing more than those dissenting opinions, the Court abandons rules of evidence that are older than the Nation itself and ventures into uncharted seas of irrelevance."[238]

The rules of evidence abandoned by the Court are of two types. First are the rules of evidence that apply in all cases. These are basic rules concerned more with the fairness of the process and accurate results than with the Constitution. Second are evidentiary concerns arising from the Constitution, particularly post-*Furman* Eighth Amendment requirements. That said, the two considerations are not independent of each other.

In many capital jurisdictions, the rules of evidence do not to apply during capital sentencing hearings.[239] However, the Federal Rules of Evidence, in particular Rules 401 and 403, have been turned to for guidance[240]. In instances where courts have held that victim impact evidence is inadmissible, the Rules have been discussed.[241] Courts, in those instances, have conducted a close reading of their state's capital sentencing statute and any relevant victim impact law using the Federal Rules of Evidence as a guide. These courts have taken an approach to *Lockett* that favors defendants, and rejected arguments that victim impact evidence is relevant to an individualized sentencing determination.[242]

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238 *Payne*, 501 U.S. at 858–859 (Stephens, J., dissenting).

239 *See, e.g.*, State v. Raines, 653 S.E.2d 126, 136 (N.C. 2007) (holding that "the Rules of Evidence are not controlling in a capital penalty proceeding."); *See also* Jason E. Barsanti, *Ring v. Arizona: The Sixth and Eighth Amendments Collide: Out of the Wreckage Emerges a Constitutional Safeguard for Capital Defendants*, 31 PEPP. L. REV. 519, 570 n.455 (listing fourteen states that do not apply their usual rules of evidence in capital sentencing: Ala. Code § 13A-5-45(d) (2002); Fla. Stat. Ann. § 921.141 (West 2001); Miss. Code Ann. § 99-19-101(1) (1999); Mont. Code Ann. § 46-18-302 (2002) (amended 2003); Neb. Rev. Stat. Ann. § 27-1101(4)(b) (Michie 2002); Nev. Rev. Stat. § 175.552.1 (2002); N.H. Rev. Stat. Ann. § 630:5(III) (1996); Ohio Rev. Code Ann. § 2929.03(D)(1) (West 2001); Ore. Rev. Stat. § 163.150(a)(1) (2001); S.D. Codified Laws § 19-9-14(4) (Michie 2002); Tenn. Code Ann. § 39-13-204(c) (2002); Utah Code Ann. § 76-3-207(2)(b) (2002); Wash. Rev. Code Ann. § 10.95.060(3) (West 2002); Wyo. Stat. Ann. § 6-2-102(c) (Michie 2002)).

240 FED. R. EVID. 401, 403.

241 *See, e.g.*, *Carter*, 888 P.2d 629.

242 *See* Smith, *supra* note 42; *but see* Commonwealth v. Means, 565 Pa. 309, 326 (Pa. 2001) (overturning a lower court's preclusion of victim impact evidence, the Supreme Court of Pennsylvania wrote that the state's "sentencing scheme does not limit the

Booth relied on a line of cases deriving from *Woodson* itself.[243] In establishing the state of the law the *Booth* Court cites *Zant* and *Eddings* for the proposition that "a jury must make an '*individualized* determination' whether the defendant in question should be executed, based on 'the character of the individual and the circumstance of the crime.'"[244] The Court also cited *Enmund* and reiterated that the consideration of sentencing factors must have "some bearing on the defendant's 'personal responsibility and moral guilt.'"[245] To consider other factors "would create the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing proceeding.'"[246]

The cases the Court cited in *Booth* had two main streams of reasoning. They either dealt with the procedural mandate that capital sentencing must take into account individualized characteristics of the defendant; or, they focused on the evolving standards argument, where the types of death-eligible crimes have been historically narrowed. For example, in *Eddings* the Court held youth was a relevant mitigating factor.[247] In *Enmund*, the Court held it unconstitutional to execute a defendant with a relatively minor role—such as the getaway driver—in the murder.[248] These cases remain good law and their logic is still sound.

The *Payne* majority noted that the Fourteenth Amendment may exclude victim impact statements, "[i]n the event that [victim impact evidence is] so unduly prejudicial that it renders the trial fundamentally unfair . . . ."[249] This protection is insufficient. In a non-capital criminal proceeding, where the Federal Rules of Evidence apply, Rule 403 also protects against this type of prejudicial evidence. In a capital prosecution, where death is on the line, a defendant should be provided more—not fewer—evidentiary protections.

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evidence admissible in the penalty phase to only the information necessary to establish aggravating and mitigating circumstances.").

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

244 *Booth*, 482 U.S. 496 at 502 (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983)).

245 *Booth*, 482 U.S. at 502 (quoting *Enmund*, 458 U.S. at 801).

246 *Booth*, 482 U.S. at 502 (citing *Zant*, 462 U.S. at 885).

247 *Eddings*, 455 U.S. at 104.

248 *Enmund*, 458 U.S. at 782.

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

C. *Continued Adherence to* Payne *Affronts Reasoned Notions of Stare Decisis*

"Power, not reason, is the new currency of this Court's decision making."[250] Marshall's words marred the *Payne* majority; the strength of the decision itself is compromised by the majority's eagerness to join a populist cause[251] and disregard well established law.

Black's Law Dictionary defines stare decisis as, "Latin 'to stand by things decided.' The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation."[252] This principle is crucial in a common law system because it ensures the law will be applied consistently to each litigant.[253]

Chief Justice Rehnquist was correct when he wrote, "stare decisis is not an inexorable command."[254] The validity of his analysis, in the majority opinion of *Payne*, ends there. The Court acknowledged that stare decisis, "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process,"[255] but went on to state that these important considerations are reserved for property and contract cases "where reliance is involved."[256] This assertion is ludicrous.

Pervis Payne continues to sit on death row, awaiting his execution.[257] Demitrius Gathers and John Booth both had their death sentences overturned by the Supreme Court just a few short years prior to the affirmation of Payne's death sentence. This is not "predictable," "consistent," nor "evenhanded."[258] Just as a party to a contract relies on a consistent application of the law when decid-

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250 *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

251 *See* Toobin, *supra* note 41.

252 BLACK'S LAW DICTIONARY 1173 (8th ed. 2005).

253 William O. Douglas, *Stare Decisis*, 49 COL. L. REV. 735, 736 (1949).

254 *Payne*, 501 U.S. at 828 (citing Vasquez v. Hillery, 474 U.S. 254, 265–266 (1986)).

255 *Payne*, 501 U.S. at 828; *see also* Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 GEO. L. J. 1689, 1693 (noting that stare decisis promotes four principles: certainty, equality, efficiency, and the appearance of justice).

256 *Payne*, 501 U.S. at 828.

257 An April 11th, 2007 execution date was stayed. A new date was set for December 2007. No executions occurred on this date either. Tennessee had imposed a stay on all executions pending decision of Baze v. Rees, 128 S.Ct. 1520 (2008). Following the *Baze* decision on April 16, 2008, Tennessee lifted its moratorium. It executed its last inmate on September 12, 2007. Leon Alligood, *Tennessee Killer Set to Die in Electric Chair*, USA TODAY, Sep. 11, 2007, at 3A.

258 *Payne*, 501 U.S. at 828.

ing to enter a deal—Pervis Payne relied on consistent application of the law in preparation of his capital defense.

Justice Scalia's concurrence in *Payne* asserts that precedent can be overturned—when it is "wrong."[259] "Wrong" does not provide any objective guidance. In constitutional law, and Eighth Amendment jurisprudence in particular, there are two types of cases. There are cases that interpret the constitution to *expand* an existing constitutional right, and there are cases that interpret the constitution to *constrict* an existing constitutional right. Subjectively, one might see these as "wrong" or "right" decisions but the law needs objective guidance if it is to achieve any modicum of consistency.

Scalia also argued that the *Payne* decision rests solidly, and therefore the departure from precedent is justified, because, "*Booth* . . . conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."[260] This invocation of a populist movement, as a justification for overturning constitutional law, runs contrary to the typical view that the Court's role is to protect minority rights in the face of a majority will.

The Eighth Amendment has been interpreted according to the "evolving standards of decency."[261] This is one of the few areas of constitutional law where the Court expressly accepts an evolutive interpretation of the constitution.[262] This method of interpretation makes the distinction between right expanding and right constricting precedent especially poignant. When the Court overturns a precedent that expands a right, it takes a step backwards. *Booth*

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[259] After citing to out of context quotations from previous Marshall decisions, where precedent was overturned, Scalia writes, "Today, however, Justice Marshall demands of us some 'special justification'—*beyond* the mere conviction that the rule of *Booth* significantly harms our criminal justice system and is egregiously wrong . . . ." *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

[260] *Payne*, 501 U.S. 834 (Scalia, J., concurring).

[261] Transcript of Oral Argument, Kennedy v. Louisiana, *supra* note 1; *see also* Trop v. Dulles, 356 U.S. 86, 100 (1958).

[262] In a recent case banning the execution of juveniles within the United States, Justice Kennedy, who voted with the majority in *Payne* conceded,

> The Eighth Amendment's prohibition against "cruel and unusual punishments" must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework this Court has established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual."

Roper, 543 U.S. at 560–561 (citing Trop v. Dulles, 356 U.S. at 100–01).

and *Gathers* protected a defendant's Eighth Amendment right to be free from arbitrary decision making in capital sentencing hearings. Overruling this precedent in *Payne* runs contrary to other recent Eighth Amendment law. *Ford*, *Atkins*, and *Roper*, three well-known and crucial cases, all used the evolving standards argument to limit the pool of those eligible to be executed.[263] Justice Stevens has described this process as a "one-way ratchet."[264] In short, the Court looks at trends in one direction—the direction narrowing the pool that can be executed. The Court will not look to see if we "have changed gears and go in the other direction."[265] Contrary to this reasoning, the *Payne* Court used a devolving standards argument to expand the pool of those that *might* be executed; defendants that were unfortunate enough to have killed victims with articulate, white[266] family members.

There is an obvious tension between the import of stare decisis on equality, consistency, predictability, and the fact that it is not an "inexorable command." Obviously, different justices accept different guiding principles when considering whether to overturn a precedent, versus when stare decisis should apply. Responding to Marshall's "power not reason" argument, Scalia observed, "what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes."[267] This back-and-forth may sound like a common argument between brothers. "You're a knucklehead" is countered with "no, you're the knucklehead." However, there is more to Marshall's argument than constitutional bickering.

After reading his impassioned dissent from the bench, an obviously upset Marshall resigned from his tenure on the Court.[268] The outgoing justice made the link that a mere "change in person-

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263 Ford v Wainwright, 477 U.S. 399 (1986) (holding that the Eighth Amendment prohibits state from inflicting the penalty of death upon a prisoner who is insane); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005).

264 Justice Stevens, oral arguments, Kennedy v. Louisiana, No. 07-343, (Apr. 16, 2008) at 41.

265 *Id.*

266 *See* Brief of Southern Christian Leadership Conference as Amicus Curiae in Support of Petitioner, *supra* note 227.

267 *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

268 Coyne, *supra* note 138, at 54.

nel"[269] results in a death sentence for Pervis Payne. Marshall's humanist approach puts him on the correct, rights-expanding end of the Eighth Amendment debate, and accordingly he has the moral and legal authority to invoke the "evolving standards" command and implore an affirmation of *Booth*.

Conclusion

Victim impact statements have no place in capital decisions. Even if a state's general victim impact statute allows victim impact evidence in non-capital trials, it does not function the same way in capital sentencing hearings because there are additional procedural protections afforded to those facing the possibility of a death sentence.

"Death is different," and as such, a capital jury's sentencing discretion must be controlled by "clear and objective standards so as to produce [a] non-discriminatory application."[270] A capital sentencing statute must also provide a "meaningful basis for distinguishing the few cases in which the [the death penalty is imposed] from the many cases [in] which it is not."[271]

Running parallel to the requirements that a capital sentencing scheme provide objective guidelines that meaningfully narrow the class of death eligible defendants are considerations of individualized sentencing. To withstand constitutional muster a sentencing scheme must allow for "particularized considerations of relevant aspects of the character and record of each convicted defendant."[272] The Supreme Court has interpreted this mandate as a requirement that a sentencer must consider, as a mitigating factor, "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."[273] Victim impact statements serve neither of the two parallel constitutional mandates. They are irrelevant and arbitrary.

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269 *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

270 Gregg v. Georgia, 428 U.S. 153, 198 (1976).

271 *Godfrey*, 446 U.S. at 427–428 (holding that the use of "outrageously or wantonly vile, horrible and inhuman" murder as an aggravating factor is unconstitutional because all murders could be described as such and therefore no meaningful narrowing function is served).

272 *Woodson*, 428 U.S. at 303.

273 *Lockett*, 438 U.S. at 604 (invalidating the Ohio death penalty statute because it limited mitigating factors to those enumerated in the statute).