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Payne v. Tennessee: The Supreme Court Places Its Stamp of Approval on the Use of "Victim Impact Evidence" During Capital Sentencing Proceedings

I. INTRODUCTION

Over the past few years, "victims' rights" advocates have insisted that state legislatures and Congress make the criminal justice system more responsive and accountable to the victims of crime.¹ These advocates have been particularly outspoken about the lack of attention paid to crime victims during the sentencing phase of capital trials.² The majority of state legislatures³ and Congress⁴ responded to these demands by passing laws that allow the sentencing authority to consider "victim impact evidence"⁵ when meting out a criminal's punishment. In *Payne v. Tennessee*⁶ the Supreme Court also placed its stamp of approval on the use of victim impact evidence during the sentencing phase of capital trials. The *Payne* Court held that the Eighth Amendment does not erect a per se bar prohibiting 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.⁷

This Note examines the Supreme Court's decision in *Payne*. Part II provides the background for the case by briefly

1. See Diane Kiesel, *Crime and Punishment: Victim Rights Movement Presses Courts, Legislatures*, A.B.A. J., Jan. 1984, at 25, 25; Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1984).

2. See Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 172-76 (1984).

3. See Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 200 (1988).

4. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(b)(1), 96 Stat. 1248, 1248-49.

5. In this Note, the term "victim impact evidence" includes any evidence relating to the personal characteristics of the victim or the emotional effects of the crime on the victim's family. See Charlton T. Howard III, Note, *Booth v. Maryland—Death Knell for the Victim Impact Statement?*, 47 MD. L. REV. 701, 701 n.2 (1988).

6. 111 S. Ct. 2597 (1991).

7. *Id.* at 2609.

summarizing the two Supreme Court decisions that *Payne* overruled.⁸ Part III outlines the facts of the case and sets forth the Court's reasons for allowing a capital sentencing jury to consider victim impact evidence. Part IV analyzes *Payne* by focusing on the decision's underlying rationale and the new standard the decision establishes. This Note concludes that *Payne* achieves a just result by striking a balance between the rights of murder victims and the rights of capital murder defendants.

II. BACKGROUND

The Supreme Court first ruled on the use of victim impact evidence during the sentencing phase of capital trials in the 1987 case of *Booth v. Maryland*.⁹ In *Booth* the Court reviewed a Maryland statute¹⁰ requiring that a "victim impact statement"¹¹ be presented at the sentencing phase of a capital murder trial. The High Court declared the statute invalid, to the extent that it required consideration of victim impact evidence,¹² because a capital sentencing jury's consideration of such evidence violated the Eighth Amendment's prohibition against cruel and unusual punishment.¹³ The Court reasoned that victim impact evidence was "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."¹⁴

The Supreme Court reiterated this holding two years later in *South Carolina v. Gathers*.¹⁵ In *Gathers* the trial court admitted into evidence a religious tract and a voter registration

8. *Payne* expressly overruled *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989). *Payne*, 111 S. Ct. at 2611.

9. 482 U.S. 496 (1987).

10. MD. ANN. CODE art. 41 § 4-609(d) (1986). The statute stated that "[i]n any case in which the death penalty . . . is requested . . . a presentence investigation, including a victim impact statement, shall be completed . . . and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted" *Id.*

11. The victim impact statement in *Booth* "emphasized the victims' outstanding personal qualities [It also] described the emotional and personal problems the family members [had] faced as a result of the crimes." *Booth*, 482 U.S. at 499.

12. *Id.* at 509.

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

14. *Booth*, 482 U.S. at 502-03.

15. 490 U.S. 805 (1989).

card that were found on the victim. In his closing argument, the prosecutor suggested that these items were indicative of the victim's outstanding personal characteristics and his value to the community. On appeal, the Court extended *Booth* by declaring that victim impact evidence offered by a prosecutor during the sentencing phase of a capital murder trial violated the Eighth Amendment.¹⁶ The *Gathers* Court reasoned that "[a]llowing the jury to rely on [this information] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."¹⁷ The decision also noted "that [f]or purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt."¹⁸

In both *Booth* and *Gathers*, the Court clearly held that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that it was per se inadmissible in the sentencing phase of a capital trial unless it "relat[e]d directly to the circumstances of the crime."¹⁹ *Payne* expressly overruled *Booth* and *Gathers*²⁰ by attacking the reasoning on which the two cases relied.²¹

III. *Payne v. Tennessee*

A. *The Facts*

Pervis Tyrone Payne's girlfriend lived in an apartment complex in Millington, Tennessee. On Saturday, June 27, 1987, Payne visited the apartment complex several times in search of his girlfriend, but she was not at home. Payne returned to the apartment complex around 3:00 p.m., after having passed the morning and early afternoon drinking beer and injecting cocaine. He then entered an apartment across the hall from his girlfriend's and began making sexual advances towards Charisse Christopher. Payne became violent when Charisse resisted his advances. A neighbor called the police after hearing

16. *Id.* at 811.

17. *Id.* (alteration in original) (quoting *Booth*, 482 U.S. at 505).

18. *Id.* at 810 (alteration in original) (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

19. *Booth*, 482 U.S. at 507 n.10; *Gathers*, 490 U.S. at 811.

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

21. *See id.* at 2605.

Charisse yell, "Get out, get out," followed by a "blood-curdling scream."²²

Upon their arrival, the police encountered a horrifying scene. Blood was smeared on the walls and floor of the apartment. Charisse, her two-year old daughter Lacie, and her three-year old son Nicholas were lying on the kitchen floor. Charisse and Lacie were both dead. The police found that Charisse had sustained forty-two direct knife wounds and forty-two defensive wounds on her arms and hands. Lacie had suffered stab wounds to the chest, abdomen, back, and head. Nicholas survived despite several wounds inflicted by a butcher knife that penetrated his body from front to back. The murder weapon, a butcher knife, was found at Lacie's feet. The police also found Payne's baseball cap on Lacie's arm and discovered three cans of malt liquor bearing Payne's fingerprints near her body.²³

Payne was apprehended later that day hiding in the attic of a former girlfriend's home. He had blood on his body and clothes and several scratches across his chest. The police also found in a nearby dumpster a bloody white shirt stuffed in Payne's overnight bag. The blood stains on Payne's body and clothes matched the victims' blood types.²⁴

At trial, the jury convicted Payne on two counts of first degree murder and one count of assault with intent to commit murder in the first degree.²⁵ During the sentencing phase of the trial, Payne presented the testimony of four witnesses: his mother and father, his current girlfriend, and a clinical psychologist specializing in criminal court evaluation work. The parents said that he was good with children and that he was a good son.²⁶ Payne's girlfriend stated that he was a very caring person and "behaved just like a father that loved his kids."²⁷ The clinical psychologist testified that Payne was the most polite prisoner he had ever met.²⁸

The State then presented the testimony of Charisse's mother. When asked how her grandson Nicholas had been affected by the murders of his mother and sister, she responded:

22. Respondent's Brief at 3-4, *Payne* (No. 90-5721).

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

24. *Id.*

25. *Id.* at 2601.

26. *Id.* at 2603.

27. *Id.* at 2602.

28. *Id.*

"He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie."²⁹

In his closing argument for the death penalty, the prosecutor emphasized the emotional impact that the murders had, and would continue to have, on Nicholas's life.³⁰

Following the testimony and the prosecutor's closing statement, the jury sentenced Payne to death on each of the murder counts. On appeal, the Supreme Court of Tennessee upheld Payne's conviction and sentence.³¹ The United States Supreme Court then granted certiorari and affirmed the decision.³² In so doing, the Court reversed its prior rulings, and held that the Eighth Amendment does not erect a per se bar prohibiting a capital sentencing jury from considering victim impact evidence.³³

B. The Payne Court's Reasoning

In *Payne*, the Court first criticized the reasoning set forth in *Booth* and *Gathers*, pointing out that both decisions were based on the premises that evidence relating to a victim, or the harm to a victim's family, does not "reflect on the defendant's 'blameworthiness,' and that only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision."³⁴ The *Payne* Court denounced these premises, reasoning that the harm caused by a criminal defendant has always been an essential concern of criminal law since the degree of harm caused is important in determining the elements of the offense and the appropriate punishment.³⁵ The majority concluded, therefore, that victim impact evidence is relevant to the sentencing decision because it conveys the full extent of the harm caused, which the Court felt reflected on the defendant's blameworthiness.³⁶

29. *Id.* at 2603 (citation omitted).

30. *Id.*

31. *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990).

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

33. *Id.* at 2609.

34. *Id.* at 2605.

35. *Id.* See *infra* note 64.

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

The Court also attacked *Booth* and *Gathers* on fairness grounds. First, the Court criticized *Booth's* requirement that the sentencing authority "focus on the defendant as a 'uniquely individual human bein[g]'"³⁷ when determining the defendant's punishment. The Court stated that this requirement was derived from a "misreading of precedent,"³⁸ and that the defendant should not receive such specialized treatment "wholly apart from the crime which he had committed."³⁹ The Court reasoned that it was inherently unfair to place a constitutional bar against victim impact evidence while at the same time allowing the defendant to introduce mitigating evidence totally unrelated to the circumstances of the crime.⁴⁰ Second, the Court pointed out that the victim of a crime is also a unique individual,⁴¹ and that admitting victim impact evidence makes the sentencing proceeding fair by providing the jury with all the information it needs to make its decision.⁴²

The Court rejected Payne's argument that "admission of

37. *Booth*, 482 U.S. at 504 (alteration in original) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (Stewart, Powell, & Stevens, JJ., plurality opinion)). The *Booth* Court reasoned that allowing a capital sentencing jury to consider victim impact evidence would violate this requirement. *Id.*

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

39. *Id.*

40. *Id.* at 2607-09. See also *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990), in which the Tennessee Supreme Court criticized the *Booth* rule:

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

41. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

Payne, 111 S. Ct. at 2608 (alteration in original) (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)). See also *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.")

42. *Payne*, 111 S. Ct. at 2608. In *Payne* the Court emphasized that

[b]y turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Gathers*, 490 U.S. at 821 (O'Connor, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

Id.

victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.⁴³ "Victim impact evidence," said the *Payne* Court, "is not offered to encourage comparative judgments of this kind,"⁴⁴ but rather to show "each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."⁴⁵

Payne also advanced a procedural argument laid down in *Booth*. The *Booth* Court "reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a "mini-trial" on the victim's character."⁴⁶ The *Payne* Court gave a two-fold answer to this argument. First, it explained that excluding victim impact evidence at the sentencing phase would not resolve the defendant's problem, since the jury may already be aware of the victim impact evidence because it is introduced as relevant evidence during the guilt phase of the trial.⁴⁷ Second, the Court noted that the defendant's tactical reasons for not wanting to rebut victim impact evidence did not distinguish him from other parties faced with this dilemma⁴⁸ because the defendant's tactical dilemma did not override the necessity of allowing a sentencing jury to hear all relevant evidence before making a decision.⁴⁹

The Court advanced another reason why capital sentencing juries should be allowed to consider victim impact evidence. Prior to *Booth* and *Gathers*, "the sentencing authority [was] always . . . free to consider a wide range of relevant material."⁵⁰ The *Payne* Court concluded that victim impact evidence

43. *Id.* at 2607.

44. *Id.*

45. *Id.*

46. *Id.* (quoting *Booth*, 482 U.S. at 507).

47. *Id.*

48. *Id.* Although the Court did not explain this "dilemma," the Court was probably referring to defense counsel's difficult choice between rebutting victim impact evidence or foregoing such an opportunity. By choosing not to rebut victim impact evidence, defense counsel runs the risk that the sentencing authority will place great weight in such evidence. On the other hand, if defense counsel elects to rebut victim impact evidence, the sentencing authority's sympathies for the victim may be aroused while its attitude toward the defendant may become hostile.

49. *Id.*

50. *Id.* at 2606.

falls within this "range" because the harm caused by the crime is an important factor to take into account when imposing a sentence.⁵¹

Finally, the Court emphasized that its decision to eliminate the *per se* bar against the use of victim impact evidence is not unfair to defendants because the Eighth and Fourteenth Amendments impose certain limits on a state's death penalty process.⁵² The Eighth Amendment limits state punishment schemes by disallowing the death penalty for certain crimes.⁵³ Once a state complies with this limitation, however, it has wide latitude to choose the factors that are relevant to a sentencing decision.⁵⁴ The Court reasoned, therefore, that "victim impact evidence serves entirely legitimate purposes"⁵⁵ and is merely another method "of informing the sentencing authority about the specific harm caused by the crime in question."⁵⁶ The Fourteenth Amendment also protects the defendant. If "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."⁵⁷

In the second half of the opinion, the Court rejected Payne's plea that the doctrine of *stare decisis* should prevent the Court from overruling *Booth* and *Gathers*.⁵⁸ This Note does not discuss the issue of *stare decisis* raised in the second half of *Payne*; rather, the Note analyzes the Court's new rule

51. *Id.*

52. *See id.* at 2607-08.

53. *Id.* The *Payne* Court identified these limits:

"[T]here is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense."

Id. at 2608 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987)).

54. *Id.* In *Payne* the Court stated that "[w]ithin the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished." *Id.* (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990)); *see also* *California v. Ramos*, 463 U.S. 992, 1001 (1983) ("Beyond these [constitutional] limitations . . . the Court has deferred to the State's choice of substantive factors relevant to the penalty determination.").

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

56. *Id.*

57. *Id.*

58. *Id.* at 2609-11.

which allows the sentencing authority in a capital murder trial to consider victim impact evidence.

IV. ANALYSIS

The *Payne* Court correctly overruled *Booth* and *Gathers*. The underlying rationale of *Booth* and *Gathers* was fundamentally unsound and did not justify a per se bar against the admission of evidence regarding the personal characteristics of a murder victim and the impact of the crime on the victim's family members.

A. Victim Impact Evidence Reflects Upon the Defendant's Personal Responsibility and Moral Guilt and Is Highly Relevant to the Sentencing Decision

Both *Booth* and *Gathers* reasoned that any evidence offered at the sentencing phase of a capital trial must have "some bearing on the defendant's 'personal responsibility and moral guilt.'"⁵⁹ While this is true, the decisions erroneously concluded that victim impact evidence does not reflect on the personal responsibility and moral guilt of the defendant.⁶⁰

1. Personal responsibility

Victim impact evidence illustrates the full extent of the harm caused and directly reflects on the defendant's personal responsibility. *Booth* incorrectly focuses on the defendant's mental state, which it claims is the sole indicator of blameworthiness,⁶¹ without considering the harm that results from the crime. However, the harm caused should also be considered by the sentencing authority.⁶² Two defendants with the same mental state frequently receive different punishments⁶³ be-

59. *Booth*, 482 U.S. at 502 (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)); see also *Gathers*, 490 U.S. at 810-11.

60. In *Booth* and *Gathers* the Court concluded that victim impact evidence is irrelevant to a capital sentencing decision because it presents "factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Booth*, 482 U.S. at 505; *Gathers*, 490 U.S. at 811.

61. See *Booth*, 482 U.S. at 502, 504.

62. In *Booth*, 482 U.S. at 519 (Scalia, J., dissenting), Justice Scalia opined that "the amount of harm one causes does bear upon the extent of his 'personal responsibility.'"

63. Justice Scalia gave an example in his dissenting opinion in *Booth*: "We may take away the license of a driver who goes 60 miles an hour on a residential

cause the harm caused is a relevant factor in determining personal responsibility and an appropriate punishment.⁶⁴ Thus, as *Payne* demonstrates, victim impact evidence is admissible because the full extent of the harm caused is a direct measure of the defendant's personal responsibility.⁶⁵

2. Moral guilt⁶⁶

Contrary to *Booth*, which claimed that victim impact evidence is generally "unrelated to the blameworthiness of a particular defendant,"⁶⁷ *Payne* correctly recognizes that victim impact evidence is often directly related to a defendant's moral culpability.⁶⁸ *Booth* conceded that if a defendant has subjective knowledge of a victim's particular circumstances prior to the crime, such knowledge is indicative of the defendant's moral guilt.⁶⁹ However, subjective knowledge of a victim's particular circumstances is not the only relevant factor in assessing a defendant's moral guilt.

The objective foreseeable consequences of a capital defendant's actions should also be considered in determining his or her moral guilt.⁷⁰ It is indisputable that "[m]urder has fore-

street; but we will put him in jail for manslaughter if, though his moral guilt is no greater, he is unlucky enough to kill someone during the escapade." *Id.*

64. *Payne*, 111 S. Ct. at 2605. See generally Stephen J. Schulhofer, *Harm and Punishment: A Critique of the Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1498 (1974) ("The criminal law attributes major significance to the harm actually caused by a defendant's conduct, as distinguished from the harm intended or risked.")

65. See *Payne*, 111 S. Ct. at 2605.

66. The terms "moral guilt" or "moral culpability" refer to the mental state of the defendant (i.e., mens rea) at the time the crime was committed. Cf. Howard, *supra* note 5, at 711; Richard S. Murphy, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1317 (1988).

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

68. See *Payne*, 111 S. Ct. at 2605.

69. See *Booth*, 482 U.S. at 504-05. *Booth*, however, claimed that the "foreseeable consequences of a defendant's actions . . . [are not] relevant in the unique circumstances of a capital sentencing hearing." *Id.* at 504.

70. The *Booth* Court itself implicitly recognized that the objective foreseeable consequences of a defendant's actions relate to his or her moral guilt. The Court noted that a "defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability in a constitutionally significant manner." *Id.* at 505 (emphasis added). The phrase "defendant's degree of knowledge" refers to the defendant's subjective knowledge, while the language "probable consequences" seems to refer to the objective foreseeable consequences of a defendant's actions. Thus, both an objective and a subjective inquiry must be made to determine whether a particular defendant is morally guilty.

seeable consequences."⁷¹ It is a fact of life that human beings develop personal relationships with family and friends.⁷² When someone is killed, people are left behind to suffer.

Defendants may claim that the unintended consequences of their actions—the suffering and grief borne by the victim's family members—are completely unforeseeable and irrelevant in determining moral guilt. Such an argument cannot stand up to scrutiny. When someone voluntarily chooses to engage in a criminal act, he or she runs a risk that unintended consequences will follow. Because defendants knowingly run this risk, they are morally culpable for any harm which should be "reasonably anticipated."⁷³ What should be reasonably anticipated depends on human and societal experience.⁷⁴ Since all defendants are human beings living in society, each defendant should reasonably anticipate the full range of consequences that may flow from his or her actions (e.g., that the victim may have family and friends who will grieve and suffer). Moreover, because each defendant should anticipate the consequences of his or her actions, the defendant's *choice* to run a risk is highly relevant in assessing the defendant's mental state.⁷⁵ Thus, the objective foreseeability of murder's consequences converts victim impact evidence into relevant information which bears upon the defendant's moral guilt.

71. *Payne*, 111 S. Ct. at 2615 (Souter, J., concurring).

72. Justice Souter commented on the personal relationships that human beings develop:

Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents.

Id.

73. Respondent's Brief at 8, *Payne* (No. 90-5721).

74. *Id.*

75. If the defendant is aware of particular circumstances related to the crime or the victim's life, even the *Booth* Court recognized that victim impact evidence would reflect upon the defendant's moral guilt. See *Booth*, 482 U.S. at 505.

*B. Admitting Victim Impact Evidence
During the Sentencing Phase Recognizes
the Rights of the Victim as an Individual
and Effects a Broad and Balanced Inquiry into
Both the Defendant's and the Victim's Rights*

Payne strikes a fair balance between the rights of the criminal defendant and the murder victim. *Booth* advanced the requirement that a capital defendant be treated as a "uniquely individual human being."⁷⁶ As part of this treatment, the defendant was allowed to introduce at the sentencing phase of a trial virtually any relevant mitigating evidence.⁷⁷ While virtually no limits were placed on what the defendant could introduce, the state was precluded from introducing evidence about either the victim's personal characteristics or the loss to the victim's family and society. *Booth* failed to realize that victim impact evidence is not inconsistent with the requirement of treating the defendant as a "uniquely individual human being." To the contrary, the admission of victim impact evidence makes the sentencing process more individualized by augmenting the information that the jury should consider in determining the appropriate punishment. Moreover, fairness demands that the state be able to introduce evidence showing the victim's uniqueness as an individual human being.⁷⁸ This gives the jury all the relevant information about the defendant's moral guilt to make a fully individualized decision based upon the personal responsibility of the particular defendant.

Precluding the sentencer from considering the harm resulting from a crime is inconsistent with longstanding principles of criminal responsibility and the basic tenets of our criminal justice system.⁷⁹ The effects of a crime on the victim and others is highly relevant to a sentencing determination of the defendant's culpability,⁸⁰ especially when one considers that "sentencing decisions [as opposed to conviction decisions] [are

76. *Id.* at 504 (alteration in original) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (Stewart, Powell, & Stevens, JJ., plurality opinion)).

77. *See Payne*, 111 S. Ct. at 2607.

78. As Justice Souter appropriately noted, "[a]ny failure to take account of a victim's individuality and the effects of his death upon close survivors would thus more appropriately be called an act of lenity than their consideration an invitation to arbitrary sentencing." *Id.* at 2616 (Souter, J., concurring).

79. *See supra* text accompanying notes 35-36.

80. *See Payne*, 111 S. Ct. at 2614 (Souter, J., concurring).

to] rest on a far-reaching inquiry into countless facts and circumstances."⁸¹

*C. Deference to the Legislatures Requires
Courts to Admit Victim Impact Evidence
at the Sentencing Phase*

The *Payne* Court's deference to the legislative decision to admit victim impact evidence is long overdue. Forty-four states and the federal government have laws allowing the admission of victim impact evidence during the sentencing phase of a trial.⁸² Such laws are permissible because neither the language nor the history of the Eighth Amendment delineate the criteria that states or the federal government should lay down in determining appropriate punishment schemes. Moreover, these laws deserve special deference because the determination of appropriate punishment schemes is strictly a question of legislative policy.⁸³ And because legislatures reflect the will of the people, victim impact evidence should be admitted at the sentencing phase.⁸⁴

*D. Payne Resolves the Unworkable
Rule Set Forth in Booth*

Booth's prophylactic ban on victim impact evidence at the sentencing phase of a capital murder trial created an unworkable rule. Evidence of the victim's personal characteristics and the crime's results on the victim's family is often presented to the jury in conjunction with the facts that establish the circum-

81. *Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring).

82. Through 1988, 38 states had enacted victim impact evidence legislation. See Talbert, *supra* note 3, at 200 n.12. Six jurisdictions have since enacted legislation. ALASKA STAT. § 12.55.022 (1990); ARK. CODE ANN. § 5-65-109 (Michie Supp. 1991); D.C. CODE ANN. § 23-103a (1989); KY. REV. STAT. ANN. § 421.520 (Baldwin Supp. 1990); MO. ANN. STAT. § 217.762 (Vernon Supp. 1991); TEX. CODE CRIM. PROC. ANN. art. 5603 (West 1990). See also Respondent's Brief at 10 n.1, *Payne* (No. 90-5721).

83. "The deference . . . owe[d] to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for these are peculiarly questions of legislative policy." *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (plurality opinion) (citations omitted).

84. The people themselves should decide the appropriate punishment to be meted out. In *Gregg v. Georgia*, 428 U.S. at 184, the Court said, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

stances of the crime.⁸⁵ The two are often inextricably intertwined. Allowing victim impact evidence to be introduced during the guilt phase (because it related directly to the circumstances of the crime) and then preventing references to the same information during the sentencing phase is inconsistent. The same jury that determines the defendant's guilt may play a crucial role in the sentencing decision as well. Thus, if these facts are not kept from the jury at the guilt stage, they will likely be on the jurors' minds at the sentencing stage.⁸⁶ In short, the *Booth* rule was practically impossible to apply.

One of two possible courses of action could have been pursued to correct the problem created by *Booth*. First, the procedural rules applied during the guilt phase of the trial could have been changed to exclude victim impact evidence unknown to the defendant.⁸⁷ However, this alternative "would [have] seriously reduce[d] the comprehensibility of most trials by depriving jurors of those details of context that allow them to understand what is being described."⁸⁸ Second, a separate jury could have been selected for the sentencing phase of the trial.⁸⁹ This alternative was also infeasible because imposing such a procedure on the states would have been unduly burdensome.⁹⁰

Furthermore, even if the jury could have been successfully prevented from considering victim impact evidence at the sentencing phase of a trial under the *Booth* rule, arbitrary sentencing results would still have occurred.⁹¹ *Booth* required that all evidence of which the defendant was unaware be excluded. Thus, if a defendant was unaware that a member of the victim's family was watching the murder, such evidence would have been inadmissible.⁹² However, if a defendant had happened to catch a glimpse of the victim's family member, evidence of the family member's presence would have been admissible because the defendant was aware of it. The decision of whether or not to admit victim impact evidence should not turn on such trivial distinctions. Allowing the death sentence to turn

85. See *Payne*, 111 S. Ct. at 2616 (Souter, J., concurring).

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

87. *Id.*

88. *Id.*

89. *Id.*

90. See *id.*

91. *Id.*

92. See *id.*

on such happenstance would have made the sentencing decision extremely arbitrary. The unworkable rule set forth in *Booth* was resolved by *Payne*, which allows admission of victim impact evidence during the sentencing phase of capital trials.

*E. Unduly Prejudicial Victim Impact Evidence
May Be Excluded by the Due Process
Clause of the Fourteenth Amendment*

In a concurring opinion, Justice O'Connor emphasized that the *Payne* decision does not mean that "victim impact evidence must be admitted, or even that it should be admitted."⁹³ The Court merely held that "if a State decides to permit consideration of this evidence, 'the Eighth Amendment erects no per se bar.'"⁹⁴ If states choose to admit victim impact evidence, Justice O'Connor pointed out that capital murder defendants can seek relief under the Due Process Clause of the Fourteenth Amendment if the evidence is unduly prejudicial.⁹⁵ By invoking the Due Process Clause, murder defendants can preserve their constitutional rights where such rights are jeopardized. In sum, *Payne* adopts a practical, flexible approach. It allows states to admit victim impact evidence at the sentencing phase of a capital trial, but provides murder defendants with recourse to the Due Process Clause if the evidence is unduly prejudicial.

V. CONCLUSION: THE FUTURE OF VICTIM
IMPACT EVIDENCE AT THE SENTENCING
PHASE OF CAPITAL MURDER TRIALS

The Supreme Court has finally paved the way for equality between defendants and murder victims. *Payne* ensures that the victims of violent crime can introduce victim impact evidence at the sentencing phase of a capital trial.

Victim impact evidence is highly relevant to the sentencing decision because it reflects on the defendant's personal responsibility. Such evidence also bears upon the defendant's moral culpability because each capital defendant should anticipate the foreseeable consequences of his or her actions. Additionally,

93. *Id.* at 2612 (O'Connor, J., concurring).

94. *Id.* (quoting *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991)).

95. "If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." *Id.*

permitting states to admit victim impact evidence brings the scales of justice back into balance because such evidence allows the sentencing authority to consider the uniqueness of both the defendant and the victim.

Opponents of *Payne* argue that the elimination of the per se bar against victim impact evidence during the sentencing phase of capital trials is unduly prejudicial to defendants. However, this objection is mitigated by a defendant's right to resort to the Due Process Clause of the Fourteenth Amendment to exclude victim impact evidence that is unduly prejudicial.

In short, the *Payne* Court reached a compromise by allowing the use of victim impact evidence during the sentencing phase of capital trials while providing defendants with an escape hatch in the event of undue prejudice. This, unlike *Booth* and *Gathers*, is a fair result.

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