Payne v. Tennessee: A Stunning IPSE Dixit

Michael Vitiello
PAYNE V. TENNESSEE: A “STUNNING IPSE DIXIT”

MICHAEL VITIELLO*

I. INTRODUCTION

Imagine a defense attorney inviting a jury to consider that a homicide victim was an unemployed homeless person or a prostitute or a homosexual or an AIDS victim and that the decedent’s human value was diminished, lessening the harm caused to society by that person’s death.¹ Or imagine defense counsel arguing that the decedent was elderly with a short life expectancy.² Or assume for a moment that Bernard Goetz killed his victims,

---


² See, e.g., In re Conroy, 486 A.2d 1209 (N.J. 1985) (guardian of incompetent nursing home patient sought permission to remove nasogastric feeding tube from the patient, an 84-year-old bedridden woman, with, among other things, a limited life expectancy). See also wrongful death actions, in which the life expectancy of the decedent is argued when damages are awarded: Seaboard Coast Line R.R. Co. v. Robinson, 263 So. 2d 626 (Fla. Dist. Ct. App. 1972) (calculated decedent’s life expectancy to determine damages to be awarded, based on her contribution to the family); Robards v. American Auto. Ins. Co., 128 So. 2d 44 (La. Ct. App. 1961) (decedent’s life expectancy calculated in order to determine damage award based on his contribution to family).

See also The Commercial Appeal, May 26, 1985, at E1, which tells of the ordeal surrounding Karen Ann Quinlan when her life was being sustained on a
instead of wounding them. Now during the sentencing phase, imagine defense counsel arguing that his victims were gangsters, uneducated thugs, who made their living by petty crime.3

Counsel's conduct would appear outrageous. Would the law allow an open appeal to the victims' lesser personal worth as a reason not to impose the death penalty? In a variety of settings, defense attorneys put victims of crime on trial.4 In some settings, the evidence is highly probative, as in cases of self defense or provocation.5 But the appeal to lesser human worth, inviting an

life support system. While on this system, she was kept behind a locked metal door because people threatened to pull her feeding tube.

3. Goetz's attorney, Barry Slotnick, did make such an argument in his opening statement. GEORGE P. FLETCHER, A CRIME OF SELF DEFENSE 102 (1988). The key difference is that under fairly narrow circumstances, see discussion infra notes 393-97, the victim's character may be relevant, but only when the defendant is aware of the relevant character trait. The most obvious example is a defendant's use of his victim's reputation for violence in cases of self-defense. See, e.g., Dubose v. State, 369 S.E.2d 924 (Ga. Ct. App. 1988) (evidence of murder victim's alleged prior assaults on defendant was admissible to show reasonableness of defendant's belief that victim was reaching for weapon when he placed hand in back pants pocket); State v. Tribble, 428 A.2d 1079 (R.I. 1981) (defendant who asserted self-defense claim entitled to adduce relevant evidence of specific act of violence perpetrated by victim against third parties where defendant was aware of the acts at the time of his encounter with the victim); McMorris v. State, 205 N.W.2d 559 (Wis. 1973) (defendant allowed to establish what defendant believed to be turbulent and violent character of victim).

4. See United States v. Wiley, 492 F.2d 547, 552 (1973) (Bazelon, J., concurring) (Judge Bazelon notes that "the requirement of corroboration, particularly rape, has come under sharp attack in recent years. . . . Numerous justifications have been advanced for the requirement of corroboration in sex cases. An examination of these rationales reveals a tangled web of legitimate concerns, out-dated beliefs, and deep-seated prejudices"); see also Vivian Berger, Man's Trial Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. Rev. 1, 13 (1977). The author describes situations where attorneys ask women if they enjoyed the intercourse; they also inquire about victim's use of birth control, her unescorted attendance at bars, existence of any illegitimate children, and number of prior sexual experiences. WILLARD GAYLIN, THE KILLING OF BONNIE GARLAND 207 (1982) ("It was important to taint [the decedent] a little bit, and here we see that inevitable part of the adversarial process that demands a 'second assault' on the victim. Bonnie must be made — at the minimum — an accomplice to her own killing.").

5. See, e.g., Scroggs v. State, 93 S.E.2d 583 (Ga. Ct. App. 1956) (wife killed the other woman); State v. Spaulding, 257 S.E.2d 391 (N.C. 1979) (actual showing of deadly force unnecessary as assailant who made threats and advanced with hand in pocket had stabbed defendant on prior occasion); Gonzales v. State, 546 S.W.2d 617 (Tex. Crim. App. 1977) (manslaughter where husband shot lover in bed with wife); State v. Flory, 276 P.2d 458 (Wyo. 1929) (defendant's father-in-law raped his daughter, defendant's wife; wife told defendant about it; defendant, on seeing father-in-law a day later, killed him. Held: jury could find voluntary manslaughter).
open appeal to prejudice, is contrary to notions of equality before the law. In allowing prosecutors to introduce evidence to show that a murder victim is "an individual whose death represents a unique loss to society," the Supreme Court has made the decedent's character a relevant inquiry, without more, during a capital sentencing hearing.

In 1991, the Supreme Court revisited for the third time in four years the relevance of evidence loosely characterized as victim impact evidence. In 1987, the Court held that admission of victim impact evidence without a showing that the evidence related to a "circumstance of the crime," violated the Eighth Amendment's prohibition against cruel and unusual punishment. After expanding that holding in 1989, the Supreme Court unceremoniously overruled Booth v. Maryland and South Carolina v. Gathers in Payne v. Tennessee.

Payne has produced considerable commentary, almost all critical. Most of the criticism has focused on the inequitable

See, e.g., Fed. R. Evid. 404(a)(2): "[E]vidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor [is admissible]."

6. See Model Penal Code § 3.02 cmt. 3 (1985) ("life of every individual must be taken . . . to be of equal value"; "lives in being must be of equal value, equally deserving the protection of the law").


8. Id. at 2608.

9. Id. at 2597. "Victim impact evidence" is somewhat ambiguous and includes three different kinds of evidence. It may include the personal characteristics of the victim, the impact on the victim's family, and family members' opinions on the appropriate sentence to be imposed. See R.P. Peerenboom, Victim Harm, Retribution and Capital Punishment: A Philosophical Critique of Payne v. Tennessee, 20 Pepp. L. Rev. 25, 27 n.11 (1992). Payne did not resolve whether family members' opinions are admissible. Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991).

and arbitrary results invited by the Court's holding and on the poor quality of the Court's philosophical analysis. Fewer com-

sentencing hearing has become an officially sanctioned display of private vengeance against the capital defendant, with the jury choosing between the defendant and the victim. The Court has abandoned accuracy for the sake of uniformity in capital sentencing. R.P. Peerenboom, Victim Harm, Retribution and Capital Punishment: A Philosophical Critique of Payne v. Tennessee, 20 Pepp. L. Rev. 25 (1992). The author argues that Payne cannot be justified under either retributivism or utilitarianism. Michael I. Oberlander, Note, The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings, 45 Vand. L. Rev. 1621 (1992). The author argues that the Court should not have allowed admission of victim impact evidence because victim participation does not further goals of sentencing; it leaves open the possibility that victim’s opinions as to appropriate punishment may be admitted during capital sentencing; and that it will lead to disparate treatment of similarly situated defendants. K. Elizabeth Whitehead, Note, Mourning Becomes Electric: Payne v. Tennessee’s Allowance of Victim Impact Statements During Capital Sentencing Proceedings, 45 Ark. L. Rev. 531 (1992). The author sees Payne as changing the criteria used to determine when the death penalty is appropriate, giving sentencers discretion to impose the death penalty by weighing the victim’s value to society.


15. See Vivian Berger, Payne and Suffering — A Personal Reflection and a Victim-Centered Critique, 20 Fla. St. U. L. Rev. 21 (1992). The author notes that because of Payne’s holding, unexpressed biases are available for counsel to exploit — most significantly, race. David R. Dow, When Law Bows to Politics: Explaining Payne v. Tennessee, 26 U.C. Davis L. Rev. 157 (1992). The author describes the stunning philosophical error at the heart of Payne that its presence reveals that the Court bowed to politics. Markus D. Dubber, Regulating the Tender Heart When the Axe is Ready to Strike, 41 Buff. L. Rev. 85 (1993). The author remarks that the newly created paradigm of Payne has discarded the accuracy of capital sentencing and replaced it with uniformity, leading to the possibility of arbitrary capital sentencing. Christopher W. Ewing, Note, Payne v. Tennessee: The Demise of Booth v. Maryland, 23 Pac. L. J. 1389 (1992). The author argues that one result of Payne is the introduction of tort theory of compensation — derived through vengeance or compensation — into death sentencing jurisprudence, a strictly criminal area. The decision may be creating an environment where the sentencing of capital defendants can be motivated by emotion or caprice. Michael I. Oberlander, Note, The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings, 45 Vand. L. Rev. 1621 (1992). The author argues that the use of victim impact statements at
mentators have focused on Payne's treatment of stare decisis.¹⁶ That is the primary focus of this article. After a brief review of 
Booth, Gathers and Payne, this article discusses the values that have traditionally supported stare decisis, most importantly, institutional values relating to the rule of law.¹⁷ It also reviews what has been called the "art" of overruling, a phrase coined by Professor Israel in arguing that the Court has developed a set of criteria to justify overruling precedent.¹⁸ The article then analyzes Payne in light of those criteria and finds it seriously wanting. Because of serious questions about Payne's analysis of the role of harm in the criminal law, this article speculates on Payne's future and argues that it should have a short life span.¹⁹

II. **Booth, Gathers and Payne: The Continuing Controversy Surrounding the Character of the Victim and the Impact of the Victim's Death.**

A state jury convicted Pervis Payne of the first degree murders of Charisse Christopher and her two year old daughter and of first degree assault upon, with intent to murder Charisse

sentencing will lead to disparate treatment of similarly situated defendants; also Payne left open the possibility that the victim's opinions as to appropriate punishment may be admissible. R. P. Peerenboom, *Victim Harm, Retributivism and Capital Punishment: A Philosophical Critique of Payne v. Tennessee*, 20 *Pepp. L. Rev.* 25 (1992). The author notes that the majority in Payne has abandoned mens rea retributivism and replaced it with a retributivism in which one is punished not only for all acts and consequences for which one possesses mens rea, but also for all the harmful consequences of one's acts, regardless of mens rea. However, the Court never offered any arguments to justify the relevance of harm in a capital context. K. Elizabeth Whitehead, Note, *Mourning Becomes Electric: Payne v. Tennessee's Allowance of Victim Impact Statements During Capital Sentencing Proceedings*, 45 *Ark. L. Rev.* 531 (1992). The author argues that because the Payne court failed to establish parameters for admitting victim impact statements, courtrooms are now open to theatrics, leading to arbitrary sentencing rather than individualized determinations of fate of defendant.


¹⁷ See discussion infra notes 119-69.


¹⁹ See infra part IV.
Christopher’s three year old son Nicholas.\textsuperscript{20} The facts were grisly.

On June 27, 1987, Payne injected cocaine and drank beer. Later, he drove around town with a friend, the two men taking turns reading a pornographic magazine.\textsuperscript{21} During that time, Payne made several visits to his girlfriend’s apartment, located across the hall from the victims’ apartment. On his final visit there, still unable to find his girlfriend, he entered the victim’s apartment where Charisse Christopher rejected his sexual advances.\textsuperscript{22} Enraged, Payne brutally murdered Christopher and her two year old daughter. Payne repeatedly stabbed Nicholas, the three year old. Payne used a butcher knife to inflict several wounds, some of which completely penetrated the child’s body.\textsuperscript{23}

During the sentencing phase of his trial, Payne called relatives and experts to testify about his background and personality.\textsuperscript{24} The state called Nicholas’ grandmother, who testified that Nicholas missed his mother and younger sister, that he cried for them and worried about them.\textsuperscript{25} In his closing argument, the prosecutor referred to the effects of the crimes upon Nicholas. Specifically, he stated that Nicholas was conscious during the brutal slayings of his mother and sister.\textsuperscript{26} In rebuttal, he again emphasized the emotional loss caused by his sister’s and mother’s deaths.\textsuperscript{27}

The prosecutor also argued that “[t]here is nothing [the jury] can do to ease the pain of [Nicholas’s grandparents] . . . . There is obviously nothing you can do for [the two decedents].”\textsuperscript{28}

\begin{itemize}
  \item \textsuperscript{20} Payne v. Tennessee, 111 S. Ct. 2597, 2599 (1991).
  \item \textsuperscript{21} Id. at 2601.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id. at 2602. Chief Justice Rehnquist’s factual account is far more graphic. For example, his description of Nicholas’ injuries included the following: “Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing several hours of surgery and a transfusion of 1700 cc’s of blood — 400 to 500 cc’s more than his estimated normal blood volume.” Id. The Chief Justice’s motive in developing these facts is obvious. Apart from the merits of the decision — and the analysis is highly questionable — the Court has “arouse[d] in the reader . . . the natural desire to avenge the outrage and to eliminate its perpetrator.” Markus D. Dubber, Regulating the Tender Heart When the Axe is Ready to Strike, 41 B U F F. L. R E V. 85, 128-29 (1993) (quoting Harris v. Vasquez, 943 F.2d 930, 967 (9th Cir. 1991) (Noonan, J., dissenting)).
  \item \textsuperscript{24} Payne, 111 S. Ct. at 2602.
  \item \textsuperscript{25} Id. at 2603.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id.
\end{itemize}
Although the jury could do nothing for them, he argued that the jury could do something for Nicholas. The jury could tell Nicholas by their verdict what kind of justice the system provides a victim of a brutal crime.\textsuperscript{29}

The jury sentenced Payne to death on each of the murder counts.\textsuperscript{30} The Tennessee supreme court affirmed, rejecting Payne's assertion that the admission of the grandmother's testimony and the prosecutor's closing argument violated the Eighth Amendment as applied in Booth and Gathers.\textsuperscript{31} The Supreme Court granted certiorari in order to reconsider Booth and Gathers. A brief review of those two decisions is necessary background to understand the Court's decision in Payne.

A. Booth v. Maryland\textsuperscript{32}

In Booth, John Booth and Willie Reid entered the victims' home to commit a robbery. Because Booth, a neighbor of the elderly couple, knew that they could identify him, he stabbed them to death.\textsuperscript{33}

Booth was found guilty of two counts of first degree murder, two counts of robbery and conspiracy to commit robbery.\textsuperscript{34} The prosecution requested the death penalty.\textsuperscript{35} Prior to the sentencing hearing, the State Department of Parole and Probation compiled a presentence report concerning Booth's background.\textsuperscript{36} Pursuant to a Maryland statute,\textsuperscript{37} the presentence report

\begin{itemize}
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990).
\item \textsuperscript{32} Booth v. Maryland, 482 U.S. 496 (1987).
\item \textsuperscript{33} Id. at 497-98.
\item \textsuperscript{34} Id. at 498.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} 10 Md. Ann. Code art. 41, § 4-609 (1990).
\end{itemize}

The last three decades have witnessed the rise of the victims' rights movement. The movement was spurred by the perception that the crime victim's interests were being subordinated to the interests of the state and the rights of the accused. A victim's post-crime role in criminal proceedings was that of a witness, nothing more. See generally Frank Carrington & George Nicholson, \textit{The Victim's Movement: An Idea Whose Time Has Come}, 11 Pepp. L. Rev. 1, 3 (1984). In his 1984 Crime Victim's Week proclamation, President Reagan stated, "For too long America's criminal justice system has protected the rights and privileges of the criminal before the victim." \textit{Id.} at 2 n.7. In response to the perceived need to increase the victim's role in the prosecution of his victimizer, statutes have been enacted on both the state and federal levels. The provisions of the statutes vary: many address compensation for the victims of the crimes; others require that victims be kept informed about the prosecution of offenders; a majority have gone further by ensuring that the victim has the opportunity or legal right to play a
included a victim impact statement (VIS) describing the impact of the crime on the victim and the family.\textsuperscript{38}

The lower courts found that the emotional harm to the victims' family and the personal characteristics of the victims were relevant because it revealed the full extent of the harm that the criminal defendant had caused.\textsuperscript{39} A closely divided Supreme Court reversed.\textsuperscript{40}

The majority held that evidence relating to the victims' personal characteristics and to the impact on the family was irrelevant in a capital sentencing hearing.\textsuperscript{41} The function of the capital sentencing hearing, according to the Court, was to "express the conscience of the community on the ultimate question of life and death,"\textsuperscript{42} and the key to such a determination was the defendant's blameworthiness. Specifically, a jury must make an "individualized determination whether the defendant should be executed, based on the 'character of the individual and the circumstances of the crime.'"\textsuperscript{43} Focusing on the character of the victim or the impact on the family, without more, might lead to the imposition of the death penalty based on a factor unknown to the accused at the time of the crime.\textsuperscript{44} The Court premised its holding on the proposition that factors not relating to culpability are irrelevant in assessing whether an individual may be subjected to the death penalty. Thus, "[a]llowing the jury to rely on a VIS . . . 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."\textsuperscript{45}

During the same term, the Court had held that a defendant may be subject to the death penalty if he acted with reckless dispart in the prosecution and the sentencing of the criminal. Donald J. Hall, \textit{Victim's Voices in Criminal Court: The Need for Restraint}, 28 AM. CRIM. L. REV. 233, 233-34 (1991).

38. Booth v. Maryland, 482 U.S. 496, 498-99 (1987). There were two types of information conveyed to the jury through the use of the victim impact statement in the \textit{Booth} case: (1) the emotional trauma suffered by the family and the personal characteristics of the victims and (2) the family members' opinions and characterizations of the crimes. The type of emotional trauma suffered by family members is like that experienced by the Bronsons' son: he testified that he suffered from lack of sleep and depression, and was "fearful for the first time in his life." \textit{Id.} at 499-500.


41. \textit{Id.} at 502-03.

42. \textit{Id.} at 504 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1966)).

43. \textit{Id.} at 502 (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983)).

44. \textit{Id.} at 505.

45. \textit{Id.}
regard towards the consequences of his action.\textsuperscript{46} \textit{Booth} rejected the state's argument that mere knowledge of "probable consequences" was sufficient to allow the use of VIS. The Court did so because of concerns about disparity of treatment of defendants based simply on whether a victim's family happened to be "articulate and persuasive in expressing their grief and the extent of their loss."\textsuperscript{47} Such a result would lead to the arbitrary imposition of the death penalty.

The Court also questioned whether different human worth of the victim was a permissible basis to mete out the death penalty. It rejected the obvious implication of relying on the victim's character, that some members of society are entitled to greater protection than others.\textsuperscript{48}

Finally, the Court recognized that, were VIS admissible, the defendant would be entitled to rebut the evidence of good character.\textsuperscript{49} Apart from concerns about the ability to rebut the evidence of good character, the Court found the idea of a "minitrial" on the victim's character both "unappealing" and a distraction that would lead the inquiry away from the relevant issue, the offender's culpability.\textsuperscript{50}

\textbf{B. South Carolina v. Gathers}\textsuperscript{51}

In \textit{Gathers}, the victim, Richard Haynes, was sitting on a park bench when Gathers and three companions met him.\textsuperscript{52} Haynes suffered from mental problems and was highly religious.\textsuperscript{53} Because Haynes refused to talk to him, Gathers and his companions assaulted Haynes, beat him and broke a bottle over his head.\textsuperscript{54} Before leaving, Gathers beat Haynes with an umbrella and then inserted it in his victim's anus.\textsuperscript{55} Later, Gathers returned and stabbed Haynes to death.\textsuperscript{56}

After the beating, Gathers and his companions searched Haynes' bags in an effort to find something to steal.\textsuperscript{57} The bags contained religious articles, including a religious prayer, relying

\begin{thebibliography}
\bibitem{47} \textit{Booth} v. Maryland, 482 U.S. 496, 505 (1987).
\bibitem{48} \textit{Id.} at 506.
\bibitem{49} \textit{Id.} at 506-07.
\bibitem{50} \textit{Id.} at 507.
\bibitem{51} 490 U.S. 805 (1989).
\bibitem{52} \textit{Id.} at 806-07.
\bibitem{53} \textit{Id.} at 807.
\bibitem{54} \textit{Id.}
\bibitem{55} \textit{Id.}
\bibitem{56} \textit{Id.}
\bibitem{57} \textit{Id.}
\end{thebibliography}
on sports’ metaphors about being a good sport in life.58 The perpetrators also found Haynes’ voter registration card in his wallet.59

During the guilt phase of Gathers’ murder trial, the state introduced the victim’s personal articles found at the scene of the crime without reference to their content.60 That evidence was reintroduced during the sentencing phase of the trial.61 During closing argument, the prosecutor referred to the content of those items in urging that the jury impose the death penalty.62 The prosecutor used the “Game Guy’s Prayer” and the voter registration card to humanize the victim.63

The South Carolina supreme court found that “the prosecutor’s remarks conveyed the suggestion that appellant deserved a death sentence because the victim was a religious man and a registered voter,”64 and found that the argument violated the Court’s holding in Booth. The Supreme Court granted certiorari in order to reconsider its holding in Booth.65 Instead, the Court

58. Id. “The Game Guy’s Prayer” reads as follows:
Dear God, help me to be a sport in this little game of life. I don’t ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won’t ever let anything come my way that you and I together can’t handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so I’ll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I’d only like to know that you felt that I have been a good guy, a good game guy, a saint in the game of life.
59. Id. at 809.
60. Id. at 807.
61. Id. at 808.
62. Id. at 808-09.
63. Id.
65. See Brief for Petitioner at 17, South Carolina v. Gathers, 488 U.S. 888 (1988) (Petitioner argues that certiorari should be granted because Booth was
extended *Booth* beyond admission of a VIS to include the prosecutor's closing argument.\textsuperscript{66}

A closely divided court found that absent a showing that Gathers was aware of Haynes' personal characteristics, the evidence was irrelevant to the offender's culpability.\textsuperscript{67} *Booth* indicated that victim impact evidence might be relevant if it related to the circumstances of the crime.\textsuperscript{68} Given that there was no evidence that Gathers read the religious tract or the voter registration card, the state could not argue that Gathers murdered Haynes because he was religious or a registered voter.\textsuperscript{69} Hence, the content of Haynes' papers was irrelevant because it was not a circumstance of the crime reflecting on Gathers' culpability.

C. Payne v. Tennessee\textsuperscript{70}

By 1991, the coalition that held *Booth* together in 1989 had further unraveled. Specifically, in 1990, Justice Souter replaced Justice Brennan,\textsuperscript{71} a member of Justice Powell's majority in *Booth* and the author of *Gathers*. In *Payne*, Chief Justice Rehnquist wrote for a majority of six justices.\textsuperscript{72}

At the core of the dispute about VIS is the role of harm in criminal sentencing. Chief Justice Rehnquist's opinion in *Payne* focused on the premise, central to *Booth* and *Gathers*, that victim impact evidence does not "reflect on the defendant's 'blamewor-

\textsuperscript{66}. *Gathers*, 490 U.S. at 811.
\textsuperscript{67}. *Id.* at 811-12.
\textsuperscript{68}. *Booth*, 482 U.S. at 507 n.10.
\textsuperscript{69}. *Gathers*, 490 U.S. at 811-12.
\textsuperscript{71}. Gey, supra note 65, at 70.
thiness',"  

73 and the related premise that "only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision."  

The Chief Justice relied on a number of arguments to rebut Booth's central premises. First, Rehnquist relied on an argument made in earlier dissents,  

75 that, in fact, "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment."  

He cited Justice Scalia's example in his Booth dissent,  

77 of two equally culpable bank robbers, each of whom fires a gun at a guard.  

78 If the gun fires and the guard dies, the defendant is guilty of murder and may be subject to the death penalty. If the gun misfires, the defendant is obviously not guilty of the substantive offense of murder and is not subject to the death penalty. Even absent the death penalty, jurisdictions typically punish attempts less severely than they do the completed crime.  

Chief Justice Rehnquist also provided a short history of sentencing, starting with Exodus and Lex talionis and ending with the 1987 Federal Sentencing Guidelines,  

80 to demonstrate that "[w]hatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material."  

81 Among factors relevant to sentencing is the nature of the harm.  

73.  

Id. at 2605.  

74.  

Id.  

75.  

See, e.g., Booth, 482 U.S. at 519 (Scalia, J., dissenting).  

76.  

Payne, 111 S. Ct. at 2605.  

77.  

Booth, 482 U.S. at 519 (Scalia, J., dissenting).  

78.  

Payne, 111 S. Ct. at 2605. The Chief Justice further illustrates his point by comparing two defendants: each participates in a robbery, and each acts with a reckless disregard for human life. However, one robbery results in the death of a victim which allows for the imposition of the death penalty, while the second robbery, in which no death occurs, does not.  

79.  

See, e.g., CAL. PENAL CODE § 664 (West 1988) (if the offense so attempted is punishable by imprisonment in the state prison, the person guilty of such attempt is punishable by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense so attempted); N.Y. PENAL LAW § 110.05 (McKinney 1987) (as initially enacted, all attempts were classified one grade below the classification of the crime attempted; subsequent legislation classified five attempts at the same classification as the consummated crime).  

80.  

UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.3 (Nov. 1992).  

81.  

Payne, 111 S. Ct. at 2606.  

82.  

Id.
The Chief Justice contended that Booth and Gathers misinterpreted earlier Supreme Court decisions. Prior to Booth and Gathers, the Court had held that a defendant was entitled to be treated as a “‘uniquely individual human bein[g],’”83 but that the Court had never held that a defendant was to receive “consideration wholly apart from the crime which he had committed.”84 In context, according to Payne, all that the Court meant by insisting on focusing on the individual’s uniqueness was that a defendant could not be prevented from introducing mitigating evidence. The cases relied on by Booth and Gathers had not held that a defendant could have evidence relating to the value of the victim’s life excluded from the jury’s deliberations.85

Payne characterized the Court’s precedent differently from Booth: the Court has held, in effect, that a jury is entitled to hear “relevant, unprivileged evidence,” and that a state “must allow [a jury] to consider any relevant information offered by the defendant.”86 But “beyond these limitations . . . the Court has deferred to the State’s choice of substantive factors relevant to the penalty determination.”87 Because, according to Chief Justice Rehnquist, harm is relevant “to assess meaningfully the defendant’s moral culpability and blameworthiness,”88 Booth was wrong in ruling victim impact evidence inadmissible.

The Court was also concerned about a perceived unfairness to the State. Under the Court’s earlier holdings preventing the state from barring mitigating evidence, capital defendants typically introduce evidence aimed at creating jury sympathy for the defendant.89 The Court cited a somewhat ambiguous statement by the Tennessee supreme court that in light of the “parade of witnesses [who] may praise the background, character and good deeds of Defendant . . ., without limitation as to relevancy,”90 fair-
ness required that the state be allowed to introduce evidence relating to the character of the decedents.

That left one important issue for the Court: should it overrule Booth and Gathers? And if so, what about stare decisis? The Court's discussion of an unquestionably important aspect of the decision was brief: after observing that stare decisis promotes important values, and is a "wise policy," the Court stated three propositions about stare decisis. One, the Court has never felt constrained to follow precedent when the controlling precedent is "unworkable or . . . badly reasoned." Two, adherence to precedent is least compelling in constitutional cases because "correction through legislative action is practically impossible." Three, "[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . ." by comparison to cases involving "procedural and evidentiary rules."

The Chief Justice cited thirty three cases in the past twenty terms in which the Court had overruled constitutional decisions by "[a]pplying these general principles." Without stating explicitly that Booth and Gathers had proved unworkable, the Court concluded by observing that those cases were decided by narrow margins, with "spirited" dissents that challenged the "basic underpinnings of those decisions." Further, the Court observed that Booth and Gathers "have defied consistent application by the lower courts."

relevant mitigating evidence such as the background and upbringing of the defendant); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (individualized sentencing determinations require an examination of the defendant's character and record). If the problem in Payne were the admission of irrelevant evidence, the appropriate remedy would be to exclude that evidence, not to open the Court to other irrelevant evidence. Ewing, supra note 15, at 1441.

91. Payne, 111 S. Ct. at 2609-10.

92. Id. at 2609. "[I]t promotes the even handed, predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Id.

93. Id. (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

94. Id.

95. Id. at 2610 (quoting Burnet, 285 U.S. at 407 (Brandeis, J., dissenting)).

96. Id.

97. Id.

98. Id. at 2611.

99. Id.
III. **Payne v. Tennessee and Stare Decisis**

In impressive recent articles, two commentators have argued that *Payne* represents a sea change in the conservative Court's death penalty jurisprudence. The desire to reshape the law governing the imposition of the death penalty may best explain *Payne*'s cavalier treatment of *stare decisis*. This section discusses Chief Justice Rehnquist's cursory treatment of *stare decisis* and then develops some of the values reflected in the doctrine, ignored in his haste.

A. Payne's View of Stare Decisis

In *Payne*, Chief Justice Rehnquist sets up different standards for analyzing the role of precedent in the Supreme Court. The first important distinction is whether the case before the Court involves property or contractual rights as opposed to procedural or evidentiary rules. The interests in *stare decisis* are strongest in property and contractual rights cases. The second relevant consideration is whether the case before the Court involves a constitutional question or a statutory question. In constitutional cases, according to the Chief Justice, interests in *stare decisis* are less compelling than in statutory construction cases. The Chief Justice intimates that precedent ought to be easier to overrule in close cases decided over vigorous dissents. Finally, the "Court has never felt constrained to follow precedent" if the earlier decision was badly reasoned or unworkable. While *Payne* recognizes that *stare decisis* is supported by important values and policies, it suggests that in a constitutional decision involving procedural or evidentiary rulings *stare decisis* is a matter of convenience.

The Chief Justice did not address the particularly striking feature in *Payne*, that the Court was dealing with recent precedent where the most plausible explanation for the Court's decision to overrule the case was the change in Court personnel.

100. Dubber, *supra* note 14, at 86 ("The capital sentencing hearing was originally designed to allow for an individualized sentencing determination . . . . Now the hearing appears as an officially sanctioned display of private vengeance . . . ."). Gey comments on how the *Payne* decision collapses the earlier *Gregg* decision's objective of eliminating arbitrariness in death sentencing. Gey, *supra* note 65, at 89.


103. *Id.*

104. *Id.*

105. *Id.* at 2610-11.

106. *Id.* at 2609 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).
That gave rise to Justice Marshall's powerful dissent,\textsuperscript{107} his last on the Court,\textsuperscript{108} in which he charged that the basis of the Court's decision was power, not reason.\textsuperscript{109} His dissent was undercut to some extent by Justice Scalia in his concurring opinion in which Scalia collected numerous instances in which Justice Marshall had given precedent short shrift.\textsuperscript{110} Justice Scalia was more candid than other members of the Payne majority in admitting that the decision to overrule Booth and Gathers was a result of changes in Court personnel.\textsuperscript{111}

In an exhaustive footnote, the Chief Justice listed thirty three cases over the past twenty terms of the Court in which it overruled previous constitutional decisions.\textsuperscript{112} He suggested that those thirty three decisions support the "general principles" that he identified.\textsuperscript{113}

Examination of those thirty three cases does not fully support the Chief Justice's "general principles."\textsuperscript{114} For example, none of the cited cases involves precedent as recent as two years old. Few of the cases were decided by closely divided courts and then quickly overruled after a change in Court personnel.\textsuperscript{115} But there is some support for the Court's assertion that special deference is due cases involving contract or property rights where parties may have ordered their affairs in light of previously decided cases.\textsuperscript{116} By contrast, no one can seriously argue that Pervis Payne considered the Court's holding in Booth when he chose his homicide victims. There is also support for the view that special

\begin{footnotes}
\footnotetext{107}{Id. at 2619 (Marshall, J., dissenting).}
\footnotetext{108}{Marcia Coyle & Marianne Lavells, \textit{Double Jeopardy}, NAT'L L. J., Apr. 6, 1992, at 5.}
\footnotetext{109}{\textit{Payne}, 111 S. Ct. at 2619 (Marshall, J., dissenting).}
\footnotetext{111}{\textit{Payne}, 111 S. Ct. at 2613 (Scalia, J., concurring).}
\footnotetext{112}{Id. at 2610-11 n.1.}
\footnotetext{113}{Id. at 2610.}
\footnotetext{114}{Bartlett, supra note 16, at 572.}
\footnotetext{115}{Id. at 574. The author writes that "in none of these cases did the Supreme Court overturn a two-year old decision as it did in \textit{Payne v. Tennessee}" \textit{Id}.}
\footnotetext{116}{See, e.g., Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); \textit{Burnet v. Coronado Oil & Gas Co.}, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting); \textit{Douglass v. County of Pike}, 101 U.S. 677, 687 (1879); \textit{Gelpcke v. City of Dubuque}, 68 U.S. 175 (1863); \textit{see also} Wilbur Larremore, \textit{Stare Decisis and Contractual Rights}, 22 HARV. L. REV. 182 (1908-09).}
\end{footnotes}
deference is appropriate in statutory construction cases. A lesser standard is in order in constitutional cases in light of the difficulty of the constitutional amendment process. The only effective way to remedy past mistakes is through the process of overruling an erroneous decision. But that still leaves open whether overruling Booth was warranted.

B. Stare Decisis and Institutional Values

One would have thought that stare decisis was the cornerstone of judicial restraint and that the doctrine would be enti-

117. See Frank Easterbrook, Stability and Reliability in Judicial Decisions, 75 Cornell L. Rev. 422, 426 (1988) ("Courts should attach a meaning to a statute, then let Congress act or not . . . Congress can correct mistakes"); see also Erie R. Co. v. Tompkins, 304 U.S. 64, 77 (1938) ("if only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century"); Burnet, 285 U.S. at 406 (Brandeis, J., dissenting) ("stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right . . . [t]his is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation").

118. See Knox v. Parker 79 U.S. (12 Wall.) 457, 531 (1870) (The "Legal Tender Cases") ("it must be remembered that, for weighty reasons, it has been assumed as a principle in construing constitutions . . . that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt") (quoting Commonwealth v. Smith, 4 Binn. 117, 123 (Pa. 1811)). Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344, 1349 (1990) (acknowledging that "normative critics . . . argue convincingly that stability concerns should play a role in constitutional decision making; when a judge is unsure whether precedent should be overruled, stability concerns may tip the balance").

But see D.H. Chamberlain, Decisions of Constitutional Questions, 3 Harv. L. Rev. 125, 129-30 (1889) (finding that the Knox Court did not follow precedent in making its decision); Easterbrook, supra note 117, at 427-28. The Article V Amendment process requires the concurrence of Congress and the President, keeping in mind that there is a one-house veto within Congress. Some problems arising during the amendment process could be: coalitions built to block the amendment; the priorities of Congress have changed since the law was first enacted; time constraints; trade-offs in concessions for votes on an amendment may be too high a price to pay for what was originally demanded; and a change in the composition of the Congress.

119. One of the basic elements of judicial restraint is the adherence to precedent. See J. Skelly Wright, The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges, 14 Hastings Const. L. Q. 487, 490 (1987); Justice Lewis Powell, Stare Decisis, 47 Wash. & Lee L. Rev. 281, 287-88 (1990). Justice Powell concludes that "recent challenges to traditional stare decisis . . . call for relaxation or even outright elimination of stare decisis in constitutional cases . . . this view of stare decisis also has little to commend it." Henry Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 7 (1979). Here, Monaghan finds that Justice Douglas' and others' views of stare decisis could have "destabilizing" consequences.
tled to more deference than it was accorded in Payne, suggesting that it is more a matter of convenience than principle. The Chief Justice might have cited Justice William O. Douglas’s views on *stare decisis* developed in a 1949 law review article and in his judicial opinions. For example, Douglas argued, consistent with Payne, that the difficulties involved in correcting erroneous constitutional decisions made overruling precedent more appropriate in constitutional cases. Elsewhere, the constraining effect of precedent has been under attack by various radical critics of the legal system who see the law as a vehicle to manipulate the powerless and who argue that law is based on power not principles. Those critics, like Justice Douglas, were the targets of conservatives and surely make odd bedfellows for the likes of Justice Scalia and the Chief Justice.

Well placed members of the Reagan administration did take a radical view of *stare decisis*. For example, Attorney General Meese argued that a prior case is binding only on the parties, presumably leaving the Justice Department free to retest settled case law by acting contrary to governing law. Assistant Attorney General Charles Cooper was sharper in his criticism in his ultimately cynical remarks, for example, “that *stare decisis* has always been a doctrine of convenience, to both conservatives and liberals. Its friends, for the most part, are determined by the needs of the moment.”

Payne’s treatment of *stare decisis* is no surprise to those who view law with cynicism and who contend that law is politics. But one would have expected a more conscientious defense of *stare decisis* from the Supreme Court. Payne did list the following

---

121. *Id.* at 746-47.
125. See Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 Ohio St. L. J. 411, 413 (1981). The author argues that there is a threat created when either a judicial or political body has effective power. Checks and balances were created to limit the threat of tyranny. “Once that happens, though, the distinctions between the political and judicial processes . . . begin to blur.” *Id.*
values supported by adherence to precedent: "... it 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." The Court stated that reliance and predictability are not particularly important in a case like Payne, but the Court ignored the other values.

Whether the Court harms its public image by disavowing its own precedent, especially in a case in which the change in Court personnel so readily explains the result, may be difficult to prove. But anyone who has taught in law school knows that students often express cynicism about the stability of the law and argue that decisions are nothing but individual judge's predilections, ungued by any other rule than their own personal values. Payne is hardly the first decision that has given support to that view. Dean Carrington has argued that when law professors teach that view, we are contributing to the corruption of the professional and to the disrepute of the profession. If the Supreme Court teaches the same cynicism to the bar, one would expect that the profession's disrespect would be that much greater and that the profession would communicate to the public a similar disrespect for the law.

Stare decisis is a partial rejoinder to that cynicism. The values supporting stare decisis, but glossed over by Payne, include equality before the law and the image of justice. As argued by Justice

127. See James C. Rehnquist, Note, The Power That Shall Be Vested In a Precedent: Stare Decisis, The Constitution and the Supreme Court, 66 B.U. L. Rev. 345, 355 (1986). Rehnquist argues that evidence that the Supreme Court is delegitimated when it overrules precedent would be "hard to adduce. The results of a survey of public opinion taken after an overruling, or series of overrulings, would likely depend on the popularity of the substantive change in the law." Id. Justice Antonin Scalia implied in his concurrence in Payne that the public will not mind a change in the law as long as the change is in accord with the public's sense of justice. "A decision, contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the court and for law itself." Payne, 111 S. Ct. at 2613 (Scalia, J., concurring) (quoting Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (dissenting opinion) which quotes Peter Szanton, Stare Decisis: A Dissenting View, 10 Hastings L.J. 394 (1959)).
129. Id. at 227.
Frankfurter, adherence to precedent demonstrates "the wisdom of this Court as an institution transcending the moment."\textsuperscript{131} As stated elsewhere, "stare decisis reassures the public that the Court's decisions are not arbitrary"\textsuperscript{132} and that the Court is "hedged about by precedents which are binding without regard to the personality of its members."\textsuperscript{133}

That \textit{stare decisis} is an assurance that justices are deciding cases on other than mere personal value preferences is an important point. For example, over the twenty year period during which the Supreme Court has worked out its death penalty doctrines, a significant number of judges of widely different political persuasions have come to a rough consensus on certain minimum requirements before a state can execute a criminal defendant.\textsuperscript{134} Consensus is some assurance that a justice is not simply imposing his or her own value preferences.\textsuperscript{135}

Payne's treatment of \textit{stare decisis} is ironic. The presidents who appointed members of the current conservative majority of the Court criticized the Court for judicial activism and promised to appoint judges dedicated to judicial restraint.\textsuperscript{136} At the same

\textsuperscript{131} Green v. United States, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).
\textsuperscript{132} Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344, 1349 (1990).
\textsuperscript{133} \textit{Id}.

\textsuperscript{135} See, e.g., Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344, 1349 (1990).
\textsuperscript{136} For Nixon's view on appointing members to the Court, see Tom Teepen, For GOP, Appointing Justices Became Ideological Exercise, L.A. Daily J., July 3, 1991, at 6 ("Reacting against the Warren Court's enforcement of defendant's rights at a time when he was playing law-and-order politics, Nixon set out to reverse the Court ideologically. One of his appointees, William H. Rehnquist,
time, vocal critics of the Court have urged judges to rely on the original intent of the framers of the Constitution.\textsuperscript{137} Originalism claims a number of virtues, foremost that reliance on original

now leads the reactionary majority . . . "); for Reagan's view on appointing members to the Court, see Note, \textit{Constitutional Stare Decisis}, 103 \textit{HARV. L. REV.} 1344, 1349 (1990), where the author notes that Reagan promised to appoint "judges committed to judicial restraint and a conservative view of the Constitution." For Bush's view on making Supreme Court appointments, see Tom Teepen, \textit{For GOP, Appointing Justices Became Ideological Exercise, L.A. DAILY\textit{]}}, July 3, 1991, at 6 ("Presidents Reagan and Bush perfected the process Nixon began. Potential nominees are taken apart and examined for the right reactionary attitudes.").

137. \textit{See Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment} 364 (1977) ("[w]hy is the 'original intention' so important? . . . A judicial power to review the Constitution transforms the bulwark of our liberties into a parchment barrier"); \textit{ROBERT H. BORK, The Tempting of America} 159 (1990) ("[t]he interpretation of the Constitution according to the original understanding, then, is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people"); Henry Monaghan, \textit{Our Perfect Constitution}, 56 N.Y.U. L. REV. 353, 360 (1981) ("I write from the . . . bias that original intent is the proper mode of ascertaining constitutional meaning, although important concessions must now be made to the claims of stare decisis"); Henry Monaghan, \textit{Taking Supreme Court Opinions Seriously}, 39 Md. L. REV. 1, 7 (1979) ("But what of those of us who have a relatively narrow view of judicial authority under the Constitution, particularly those of us who would assign determinative weight to original intent . . . in interpreting Constitutional provisions? Can we too ignore the claims of stare decisis? I would very much doubt that any amount of reflection will convince me to embrace such a view, for its consequences are, for me, potentially far too destabilizing."); \textit{JUSTICE ANTONIN SCALIA, Originalism: The Lesser Evil}, 57 U. CIN. L. REV. 849, 862 (1989) ("no basis for believing that supervision of the evolution would have been committed to the courts . . . originalism seems . . . more compatible with the nature and purpose of a Constitution in a democratic system").

Raoul Berger and Jefferson Powell conducted a debate on original intent through law review articles. \textit{See Raoul Berger, Original Intention in Historical Perspective}, 54 GEO. WASH. L. REV. 296, 303 (1986) ("the very materials [Powell] collates demonstrates that from earliest times when courts spoke of 'intention' they meant, as Professor Samuel Thorne concluded, 'actual intent' (quoting \textit{A Discourse Upon the Exposicion and Understanding of Statutes} (S. Thorne ed., 1942)) as a consequence of [Jefferson Powell's] \textit{The Modern Misunderstanding of Original Intent}, 54 U. CHI. L. REV. 1513 (1987) (acknowledging Berger as the "most prolific and uncompromising contemporary intentionalist writer on constitutional topics," and that Chief Justice Rehnquist and Attorney General Meese are both "public advocates of 'original intent' as the only legitimate method of constitutional interpretation."). See Raoul Berger, \textit{Reflections on Interpretivism}, 55 GEO. WASH. L. REV. 1, 5, (1986) ("my thesis was and remains that the Court is not empowered to reverse the unmistakable intention of the Framers"); Edwin Meese III, \textit{The Law of the Constitution}, 61 TUL. L. REV. 979, 986 (1987) ("The Constitution, the original document of 1787 plus its amendments, is and must be understood to be the standard against which all law, policies and interpretations must be measured.").
intent avoids the evil perceived in the idea of a living constitution. The living Constitution is illegitimate because federal judges who believe in the living Constitution engage in "the substitution of some other set of values for those which may be derived from the language and intent of the framers . . . " Nonoriginalist judges are "a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country." 

Originalism is beset with a number of problems. For example, many originalists recognize that original intent, even if identifiable, must be ignored under certain circumstances. Thus, Judge Bork argued that he would not vote to dismantle the commerce clause jurisprudence that has led to the development of the administrative state. Some cases are apparently so well established that even a "strong" originalist like Justice Scalia would not urge overruling Brown v. Board of Education and Marbury v. Madison. Examining Justice Scalia's opinions often

139. Id.
140. Id. at 698.
141. See Henry Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 7 (1979). Monaghan questions whether those who have a narrow view of judicial authority under the Constitution, particularly those who place weight on original intent, can ignore stare decisis because of the destabilizing effect of doing so. Justice Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 861 (1989). He discusses an example of a new statute providing for public lashing, which would not have been cruel and unusual punishment in 1791, and notes that he doubts whether any federal judge — even an originalist — would sustain the punishments against an Eighth Amendment challenge.
143. See Justice Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 861 (1989) ("[A]lmost every originalist would adulterate [originalism] with the doctrine of stare decisis — so that Marbury v. Madison would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong." Scalia agrees with the holders of this view of originalism.).

But see Raoul Berger, Government by the Judiciary: The Transformation of the Fourteenth Amendment 245 (1977). He states that "in Brown, Warren did not merely shape the law, he upended it; he revised the Fourteenth Amendment to mean exactly the opposite of what its framers designed it to mean, namely, to leave suffrage and segregation beyond federal control, to leave it with the States, where control over internal, domestic matters resided from the beginning." Id.
leaves one guessing when he will follow original intent and when he will modify his views consistent with intervening precedent.144

A detailed critique of originalism is beyond the scope of this paper. But originalism’s proponents have promised a great deal, notably, that it avoids the pitfalls of subjective value preferences of individual judges.145 In arguing against the proponents of a living constitution, they argue that justices who do not adhere to original intent are merely relying on their own values.

Properly understood, stare decisis serves the institutional values loudly trumpeted by advocates of originalism. What better evidence that a judge is not imposing his own values than his acquiescence in established precedent?146 What better evidence

144. See, e.g., Harmelin v. Michigan, 111 S. Ct. 2680, 2701 (1991) (Justice Scalia found that life in prison without benefit of parole does not violate the Eighth Amendment because it has no support in text and history of the Eighth Amendment. Observe though that even there, he relies on original intent but then suggests that death penalty cases may not be resolved by reference to original intent.); Burnham v. Superior Court, 495 U.S. 604 (1990) (tag rule in personal jurisdiction where Justice Scalia argues that due process analysis is different if a basis of jurisdiction is traditional or if it developed later in history; he also suggests that if an overwhelming majority of jurisdictions abandon a historical rule, then due process may disallow that form of service).

145. See RAOUl BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 290 (1977) ("judges were not left free to exercise the supreme 'legislative power' of the people, to revise the Constitution in accordance with their own predilections"); ROBERT H. BORK, THE TEMPTING OF AMERICA 160 (1990) ("without adherence to the original understanding" it could lead to the Constitution not being binding on the judges; the choice would then be to either "rule by judges according to their own desires or rule by the people according to theirs"); EDWIN MEESe III, The Law of the Constitution, 61 Tul. L. Rev. 979, 983 (1987) ("however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court" (quoting CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 470-71 (1923))); Henry Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 4-5 (1979) ("[S]tare decisis is simply an unwelcome nuisance for the commentators whose concerns center upon the outer boundaries and expanding territories of constitutional law. Because these scholars do not believe that any of their favorite constitutional edifices will be torn down, they are intent upon rationalizing the remainder of the subject according to their individual beliefs. That process necessarily involves some overruling, and these commentators are willing to abandon stare decisis for the opportunity to lodge their own constructions within the Court"); Justice Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. Rev. 849, 863 (1989) ("the main danger in judicial interpretation of the Constitution — or for that matter, in judicial interpretation of any law — is that the judges will mistake their own predilections for the law").

146. See Jerold H. Israel, Gideon v. Wainwright: The 'Art' of Overruling, 1965 Sup. Ct. Rev. 211, 216-17 ("To overcome [the] obstacle [of a potential barrier to complete acceptance of judicial review], the Court must operate
of restraint than when a judge substitutes the majority's view for his own when the majority acts consistent with an established line of cases. Proving that the public's perception of the Court is enhanced by adherence to precedent may be difficult, but lawyers can certainly understand when judges reflect deference to precedent. Restraint in practice, rather than in rhetoric, certainly educates the bar; lawyers who witness judicial restraint surely are less cynical about the rule of law and its power to guide the judiciary.

Payne failed to address the arguments in support of adherence to precedent relating to the rule of law, its demonstration that "disinterested decision-maker[s] [are] applying those fundamental values reflected in the Constitution," and ultimately, to the public's confidence in the Court's ability to do justice. Payne's cursory treatment of those institutional values is especially odd in light of the Court's subsequent division in Planned Parenthood v. Casey.

Court watchers widely assumed that Casey would be the vehicle for overturning Roe v. Wade. Over almost twelve years, the

within a framework that maintains its image as a disinterested decision-maker applying those fundamental values reflected in the Constitution. A general willingness to adhere to precedent has always been an important aspect of this framework.

Black's Law Dictionary defines judicial self-restraint as "self-imposed discipline by judges in deciding cases without permitting themselves to indulge their own personal views or ideas which may be inconsistent with existing decisional or statutory law." BLACK'S LAW DICTIONARY 849 (6th ed. 1990).

147. See Henry J. Bourguignon, The Second Mr. Justice Harlan: His Principles of Judicial Decision Making, 1979 SUP. CT. REV. 251, 279 ("Harlan's belief in the principle of stare decisis was put to the test when the prior controlling precedent was one with which he had disagreed when originally decided. He followed the precedent, but not without an audible note of displeasure.").

148. See Charles J. Cooper, Stare Decisis: Precedent and Principle in Constitutional Adjudication, 73 CORNELL L. REV. 401, 404-05 (1988). The author's two concerns with stare decisis are that (1) it is inherently subjective, and therefore easily manipulated and (2) its place is to shelter error from correction. He uses Justice Stevens' concurring opinion in Johnson v. Transportation Agency, 480 U.S. 616 (1987), as an example of the Court using stare decisis as a matter of convenience, or using it when it is incorrect to do so, by reading the holding incorrectly and thus not correctly applying it.


150. Id. at 217.


152. Roe v. Wade, 410 U.S. 113 (1972). For support of the proposition that Casey would be the vehicle for overturning Roe, see Tom Baxter, Election '92: Keeping You Up to Date Despite Drama, Abortion Battle is Far From Over, ATLANTA J. & CONST., Apr. 27, 1992, at 6 ("[t]he decision in the Pennsylvania abortion case will almost surely leave Roe v. Wade in tatters"); Elizabeth Neuffer, High Court
Reagan and Bush administrations assembled their coveted antiabortion majority. Those two administrations were rumored to have used a litmus test on the abortion question as a precondition for nomination. Yet at the moment of decision, Justices O'Connor, Kennedy and Souter, despite the sharp criticism of their colleagues, voted against their own personal values.

Although Justice O'Connor's plurality opinion attempted to distinguish *Casey* from *Payne* on the degree of reliance that had sprung up after *Roe*, the opinion was far more concerned with

---

*Hears Arguments on PA Abortion Law; Case Could Affect Roe v. Wade Ruling, Boston Globe, Apr. 23, 1992, at 1* (“the justices might not completely overrule *Roe*”).


154. Planned Parenthood v. *Casey*, 112 S. Ct. 2791, 2875 (1992) (Scalia, J., dissenting) (“[T]he emptiness of the ‘reasoned judgment’ that produced *Roe* is displayed . . . by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court . . . the best the Court can do to explain how it is that the word ‘liberty’ must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”); see *id.* at 2876 (Scalia, J., dissenting) (“It is not reasoned judgment that supports the Court’s decision; only personal predilection”); see *id.* at 2879 (Scalia, J., dissenting) (“It is difficult to maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.”); see *id.*, at 2880 (Scalia, J., dissenting) (“reason finds no refuge in this jurisprudence of confusion”); see *id.* at 2882 (Scalia, J., dissenting) (“The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges — leading a Volk who will be ‘tested by following,’ and whose very ‘belief in themselves’ is mystically bound up in their ‘understanding’ of a Court that ‘speak[s] before all other for their constitutional ideals’ — with the somewhat more modest role envisioned for these lawyers by the Founders.”).

See *id.* at 2862 (Rehnquist, C.J.), concurring in judgment and dissenting in part) (“The joint opinion thus turns to what can only be described as an unconventional — and unconvincing — notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to ‘two decades of economic and social developments’ that would be undercut if the error of *Roe* were recognized. The joint opinion’s assertion of this fact is undeveloped and totally conclusory.”).

155. *Id.* at 2809. While *Payne* considered weighing reliance heavily “in favor of following the earlier rule in the commercial context, where advance planning of great precision is most obviously a necessity,” *Payne*, 111 S. Ct. 2597,
institutional concerns reflected in *stare decisis* than in the reliance argument. It gave a far more comprehensive analysis than did *Payne* of the instances in which the Court has overruled precedent and found those grounds absent in *Casey*.

The emphasis on institutional concerns was palpable in *Casey*. For example, Justice O'Connor expressed concern that overruling *Roe* "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." She argued that the Court's power comes not from "spending money," instead, its capital comes from the "people's acceptance" that the Court is fit to declare the meaning of the law. Key to that public acceptance is the belief that the Court "speak[s] and act[s]" in a manner "grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make."

Justice O'Connor emphasized that for a court to overrule precedent too frequently "overtax[es] the country's belief in the Court's good faith." Simply arguing that the prior decision was wrong is not enough because "[t]here is a limit to the amount of error that can plausibly be imputed to prior courts." Instead, the Court would be seen as result oriented, intent upon achieving particular results "in the short term."

Commentators and, at times, Supreme Court justices have argued that the standards for principled application of *stare

---

2610 (1991), Justice O'Connor in *Casey* finds that there are high reliance interests at stake: "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives" — and surmises that "while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." *Id.*

156. *Id.* at 2814.
157. *Id.*
158. *Id.*
159. *Id.* at 2815.
160. *Id.*
161. *Id.*
162. See James C. Rehnquist, Note, *The Power That Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. Rev. 345, 358-59 (1986) (in listing eight characteristics for finding a "special burden" when the Court overrules precedent, Rehnquist noted that "most of these criteria are not as question-begging as (4)").
163. See Planned Parenthood v. *Casey*, 112 S. Ct. 2791, 2860 (1992) (Rehnquist, C.J., concurring in judgment and dissenting in part). Rehnquist complains that O'Connor's opinion contains an elaborate discussion of *stare decisis*, yet she never applies this principle in dealing with *Roe*, therefore, it must...
decis is are too vague. Ironically, while decrying the imprecision of the doctrine, some commentators seem to know when justices are cheating and not following precedent. As with almost any constitutional doctrine, there are hard cases at the margin where reasonable people disagree with whether the Court is bending the law. One federal court of appeals judge has written that “[n]o black letter guidelines determine when to follow precedent.” But certainly, Supreme Court justices and many lower federal court judges believe that they know when they are following be almost entirely dicta. He also notes that the joint opinion “follow[s] its newly-minted variation on stare decisis.” Id. at 2855.

164. See Charles J. Cooper, Stare Decisis: Precedent and Principle in Constitutional Adjudication, 73 CORNELL L. REV. 401, 404 (1988) (two weaknesses of stare decisis: “it is inherently subjective, and few judges . . . can resist the natural temptation to manipulate it . . . and its avowed office is to shelter error from correction”).

165. Judge Ruggero J. Aldisert, Precedent: What It Is and What It Isn’t; When Do We Kiss It and When Do We Kill It?, 17 PEPP. L. REV. 605, 627 (1990). Aldisert sets standards for the use of stare decisis, by distinguishing between precedent and persuasive authority.

166. See Justice Lewis Powell, Stare Decisis and Judicial Restraint, 47 WASH. & LEE L. REV. 281 (1990). Justice Powell writes that “there is no absolute rule against overruling prior decisions. . . . And where it becomes clear that a wrongly decided case does damage to the coherence of the law, overruling is proper. . . . [I]t cannot be suggested seriously that every case brought to the Court should require reexamination on the merits of every relevant precedent.” Id. at 286. Justice John P. Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U. L. REV. 1, 9 (1983). Justice Stevens believes that “the question whether a case should be overruled is not simply answered by demonstrating that the case was erroneously decided and that the Court has the power to correct its past mistakes. The doctrine of stare decisis requires a separate examination. Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law.” Id. at 9.

167. See Judge Ruggero J. Aldisert, Precedent: What Is It and What It Isn’t; When Do We Kiss It and When Do We Kill It?, 17 PEPP. L. REV. 605 (1990). Justice Aldisert writes: “If facts in the putative precedent are identical with or reasonably similar to those in the compared case, the precedent is recognized as legitimate, and it is applied . . . . [B]ut if the material facts in the compared case do not run on all fours with the putative precedent, the doctrine becomes un dragone.” Id. at 605. Judge Patrick Higginbotham, Text and Precedent in Constitutional Adjudication, 73 CORNELL L. REV. 411 (1988). He states that “it is my strong conviction that the concept of precedent has force and sufficient discipline to decide that great percentage of cases that come to our court, including constitutional issues; it is my observation that it in fact does so.” Id. at 411. Judge Stephen Reinhardt, The Conflict Between Text and Precedent in Constitutional Adjudication, 73 CORNELL L. REV. 434 (1988). Justice Reinhardt states that “every judge I have ever known is influenced by his fundamental philosophy of law and of life, by the changes that have occurred in society, by his view of his role as a judge, and his view of the legal system, as well as by stare
precedent and when they are free to abandon precedent. And despite the lengthy footnote in Payne, when judged by the total number of cases decided or reviewed by the Supreme Court, the actual instances of overruling precedent are a small percentage of the Court's total docket. Plausibly, sensitivity to institutional concerns reflected by Casey's plurality opinion explains why, contrary to popular perception, relatively few cases have been overruled during the Court's history.

C. The "Art" of Overruling Precedent

In one of the most important discussions of stare decisis, Professor Israel found in Supreme Court decisions an "art" of overruling precedent. Contrary to the assertion that stare decisis is merely a matter of convenience, Israel's analysis demonstrates that the Court has usually followed certain constraints before it has overruled precedent. The failure to do so has led to criticism of the Court for ignoring the important values underlying stare decisis.

More particularly, Israel observed that despite references to the "limited application of stare decisis in the field of constitutional law," the Court demonstrated a commitment to the image as a "disinterested decision-maker applying those fundamental values reflected in the Constitution." The choices involve personal, subjective elements, but they fit within an orderly process of reasoning, within a logical, rational process of attempting to determine the meaning of the law." Id. at 438.

See Justice Lewis Powell, Stare Decisis and Judicial Restraint, 47 WASH. & LEE L. REV. 281, 284-85 (1990). Considering the Burger and Warren Courts, he finds that "[o]n a rough average, the Court has overruled less than four cases per term . . . [b]ut when the totality of cases is considered, the general rule of stare decisis remains a fundamental component of our judicial system." Id. Jerold H. Israel, Gideon v. Wainwright: The 'Art' of Overruling, 1963 Sup. Ct. Rev. 211, 213-14. Professor Israel writes that "[f]or, despite its widespread reputation as a Court most ready to 'disregard precedent and overrule its own earlier decisions,' the Supreme Court in fact has directly overruled prior decisions on no more than a hundred occasions in over a century and a half of judicial review." Id.

See Jerold H. Israel, Gideon v. Wainwright: The 'Art' of Overruling, 1963 Sup. Ct. Rev. 211, 217. Professor Israel finds that "the importance of stare decisis in promoting an acceptable image of judicial review thus imposes a special burden upon the Court in overruling its prior decision." Id.

Jerold H. Israel, Gideon v. Wainwright: The 'Art' of Overruling, 1963 Sup. Ct. Rev. 211. Id. (The theme of the article is that Gideon failed to follow the conventions, but could have and should have.).

Id. at 214 n.21.

Id. at 217. While Professor Israel's article preceded the Burger Court, his observations about the Court's commitment to its image as a
As identified by Professor Israel, the Court employs a number of techniques in overruling precedent. First, the Court has frequently relied on changing conditions.\(^\text{174}\) Even justices most opposed to overruling constitutional decisions have acknowledged that the "law may grow to meet changing conditions"\(^\text{175}\) and that *stare decisis* should not require a "slavish adherence to authority where new conditions require new rules of conduct."\(^\text{176}\)

Second, the Court has cited the lessons of experience as commanding a decision to overrule precedent.\(^\text{177}\) That is, a prior decision may be rejected when it has failed to pass the "test of experience."\(^\text{178}\) The earlier decision may have created administrative difficulties and uneven results, or experience may have shown the erroneous nature of factual or policy assumptions upon which the original decision was based.\(^\text{179}\)

Third, overruling may be compelled by requirements of later precedent.\(^\text{180}\) Under this rationale, the Court suggests that the decision overruled was wrongly decided. But the Court does not rely simply on the error of the earlier decision. To do so would make the decision appear to turn on a mere change in court personnel. Instead, even when the Court has found the earlier decision wrongly decided, the Court has buttressed its position by demonstrating that the earlier decision had been eroded by intervening precedent. Demonstrating inconsistency between the original case and intervening decisions allows the Court to argue, in effect, that it has to overrule the earlier case to bring the current case in line with the intervening case law.\(^\text{181}\)

\[^{174}\text{disinterested decision-maker}^\text{ finds support in the go-slow approach taken by the Burger Court. The Burger Court, which included a majority of justices appointed by Republican presidents, surprised many observers by its failure to overrule significant Warren Court precedent. See also Vincent Blasi, The Burger Court: The Counterrevolution That Wasn't (1983).}\]

\[^{175}\text{Id.}\]

\[^{176}\text{Id. Compare this to Scalia's dissent in Gathers or his concurrence in Payne where he argues that older cases are entitled to greater deference. South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting); Payne v. Tennessee, 111 S. Ct. 2597, 2613-14 (1991) (Scalia, J., concurring).}\]

\[^{177}\text{Id.}\]

\[^{178}\text{id. at 223.}\]

\[^{179}\text{Id.}\]

\[^{180}\text{id. at 224. (E.g., United States v. Chicago, M. St. P. & P. R.R., 312 U.S. 592 (1941); California v. Thompson, 313 U.S. 109 (1941))}.\]
The advantage of reliance on intervening precedent is that it indicates that the Court's current decision is not simply a sudden shift, otherwise explained by a change in court personnel: "... the Court may properly emphasize that the downfall of the overruled case was not the product of a 'little coterie of like minded justices' recently appointed to the bench, but of a long line of judges who, over the years, participated in the various undermining decisions." 182

Unlike the assertion in Payne, Israel found that the Court has recognized the significance of stare decisis in constitutional cases, creating a "presumption of validity that attaches to the conclusions expressed in prior opinions." 183

Israel, like other commentators 184 and judges, 185 suggests that the art of overruling serves important institutional values. Specifically, those arguments "should be employed in the interests of both the logical persuasiveness of the Court's position and the maintenance of the profession's confidence — and through it the public's confidence — in the impersonal and principled qualities of the judicial process." 186

---


183. Id. at 227-28 (citing Green v. United States, 355 U.S. 184, 192 (1957); DiSanto v. Pennsylvania, 273 U.S. 34, 42 (1927)).

184. See Herbert C. Kaufman, A Defense of Stare Decisis, 10 HASTINGS L.J. 283, 287 (1959) (Professor Kaufman contends that once the Court has interpreted a provision of the Constitution, their jurisdiction over the matter is ended. If it is later thought to be wrong, it should be changed by amendment.); E.M. Wise, The Doctrine of Stare Decisis, 21 WAYNE L. REV. 1043, 1057 (1975) ("[A] system of case law will be too fluid and lacking in cohesiveness, not so much unpredictable as discontinuous, without the strong cement provided by the doctrine of stare decisis.").

185. See Justice Lewis F. Powell, Stare Decisis and Judicial Restraint, 47 WASH. & LEE L. REV. 281, 286 (1990) (Powell gives three reasons for adhering to precedent: it makes judges' work easier; it enhances stability in the law; and it gives the law public legitimacy); Justice John P. Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U. L. REV. 1, 2 (1983) ("[A] rule that orders judges to decide like cases in the same way increases the likelihood that judges will in fact administer justice impartially . . . .").

186. Jerold J. Israel, Gideon v. Wainwright: The 'Art' of Overruling, 1963 SUP. CT. REV. 211, 229; see also Judge Ruggero J. Aldisert, Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It, 17 PEPP. L. REV. 605, 629 (1990) (Aldisert summarizes the various reasons for a Court's overruling of earlier decisions: because of intervening developments in the law; because precedent suffers from inherent confusion and would be a detriment to consistency in the law; or because a precedent becomes outdated by changing social mores).
As discussed above, Justices O'Connor, Kennedy and Souter appear to have adopted a similar view in Casey. In light of their sensitivity to institutional concerns in a case as controversial as Casey, it is unclear why they were not similarly motivated in Payne. The next section of this article examines Payne in light of the art of overruling to demonstrate that under none of the traditional arguments should the Court have overruled its recent precedent. Hence the result can only be explained by the change in Court personnel, leaving the Court open to justified criticism for acting without restraint.

D. Payne and Artless Overruling

One commentator has documented the Court's "comedy of errors" in its efforts to overrule Booth, including pressing the parties to brief an issue that they had not asked the Court to address. Payne's treatment of stare decisis demonstrates a degree of activism unusual by any measure. This section considers how a less activist Court might have dealt with Payne and how wanting the Court's analysis was in light of traditional grounds for overruling precedent.

As a matter of strategy, Payne's facts aided the decision to uphold the imposition of the death penalty. The murders were brutal, unprovoked, with two entirely helpless children among the victims. But in light of those facts, one might spec-

187. See discussion supra notes 151-69.
189. To Justice Marshall's charge that "[p]ower, not reason is the new currency of this Court's decisionmaking," Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting), Scalia responded that "what would enshrine power as the governing principle of this Court is the notion that an important Constitutional decision ... be left in place for the sole reason that it attracted five votes." Id. at 2613 (Scalia, J., concurring).
190. See Jerold H. Israel, Gideon v. Wainwright: The 'Art' of Overruling, 1963 Sup. Ct. Rev. 211, 269-70. Professor Israel points out that although the decision of Gideon to overrule Betts would have probably been attacked regardless of the methodology employed, had Justice Black utilized "the Art of Overruling," he would have provided a foundation by which supporters could answer such criticisms.
191. Steven G. Gey, Justice Scalia's Death Penalty, 20 Fla. St. U. L. Rev. 67, 70 n.14 (1992). In its frenzy to reconsider Booth, the Court directed counsel to brief the issue of Booth's constitutionality. Unfortunately, amidst all the sabre rattling, the two issues which had prompted the parties to petition the Court in the first place, were not even noted. Id. at 70 n.14.
192. See Justice Robert Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations, 37 A.B.A. J. 801, 803 (1951) ("a large part of the time of conference is given to discussion of facts").
ulate whether the prosecutor needed the victim impact evidence to convince a jury to impose the death penalty. Payne expressed concern about leveling the playing field to assure that the state could effectively counter the defendant's mitigating evidence, allowing the state to counter Payne's assertion that he was a worthy human being with evidence about his victims and their family.\(^{194}\) But the state had ample and obviously relevant evidence to counter Payne's mitigating evidence.

Payne's defense was weak. His girlfriend testified about his kindness towards her children and asserted that Payne did not use drugs or alcohol.\(^{195}\) His parents also testified that he did not have a history of drug or alcohol abuse.\(^{196}\) In light of the overwhelming evidence to the contrary, those witnesses' testimony must have been completely discredited.\(^{197}\)

A psychologist testified that Payne was mentally handicapped and that he was an extremely polite prisoner.\(^{198}\) The prisoner's good behavior is frail evidence. A prosecutor can easily diminish its significance by arguing that he did not demonstrate good manners when he was not forcibly confined by the state. The more telling evidence is that of mental handicap, but it certainly cuts both ways. It reduces culpability insofar as retardation may limit a person's ability to act with a fully functioning will and with limited insight into moral choices.\(^{199}\) But the Supreme Court has upheld state statutes making future dangerousness a circumstance justifying the imposition of the death penalty.\(^{200}\) Mental incapacity may limit a person's ability to control himself in the future.\(^{201}\)

\(^{194}\) Id. at 2608-09.

\(^{195}\) Id. at 2602.

\(^{196}\) Id. at 2603.

\(^{197}\) Payne passed the morning and early afternoon injecting cocaine and drinking beer, Payne v. Tennessee, 111 S. Ct. 2597, 2601 (1991); three cans of malt liquor bearing Payne's fingerprints were found on a table near the body of Lacie, and a fourth empty can was found on the landing outside the apartment, \textit{Id.} at 2602; a search of his pockets revealed a packet containing cocaine residue, a hypodermic syringe wrapper, \textit{Id.}; defendant was shown to have purchased Colt 45 malt liquor earlier in the day, State v. Payne, 791 S.W.2d 10, 13 (Tenn. 1990).


\(^{199}\) See Peter Arenella, Diminished Capacity, in \textit{ENCYCLOPEDIA OF CRIME AND JUSTICE} 612 (Sanford Kadish ed., 1983).


\(^{201}\) Concern about an impaired person's future dangerousness explains why society incapacitates the defendant even upon a finding of not guilty by reason of insanity. See, e.g., \textit{MODEL PENAL CODE} § 4.01 cmt. 1 (1985).
In context, the victim impact evidence in *Payne* was overkill. Indeed, the Tennessee supreme court found as an alternative ground to uphold the death sentence that admission of the victim impact evidence was harmless in light of the overwhelming evidence of aggravating circumstances. That suggests the first possible basis upon which a less activist Court might have reached the same result in *Payne* without overruling such recent precedent.

The Supreme Court has applied harmless error analysis in cases in which the state has imposed the death penalty. In closely analogous instances, the Court has found that the death penalty could be upheld based on a finding that admission of otherwise inadmissible evidence during the death penalty phase of the trial amounted to harmless error. *Payne* appears consistent with that line of cases applying harmless error analysis.

Even if the Court did not find admission of VIS evidence harmless, it might nonetheless have resolved the case narrowly. *Gathers* and *Booth* indicated that an offender's knowledge of the victim's personal qualities might be relevant. *Gathers* rejected the state's argument that the content of Haynes' personal papers was relevant because the prosecutor did not prove that Gathers was

---


204. *See, e.g.*, *Sochor v. Florida*, 112 S. Ct. 2114 (1992) (remanded to state court for determination whether erroneous consideration of "coldness" of the killing amounted to harmless error); *Dawson v. Delaware*, 112 S. Ct. 1093 (1992) (remanded to state court for determination whether improper admission of evidence relating to membership in Aryan Brotherhood amounted to harmless error); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (remanded to state court to determine whether introduction of unconstitutionally vague evidence amounted to harmless error). By contrast, the Court has held on occasion that a constitutional error requires relief without further inquiry into whether the error was harmless. *See, e.g.*, *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993) (erroneous instruction on meaning of "beyond a reasonable doubt" was not subject to harmless error analysis). The Court's analysis in *Sullivan* suggested that its scope is quite narrow: "[In Sullivan] there has been no jury verdict within the meaning of the Sixth Amendment . . . . There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have rendered absent the constitutional error is entirely meaningless." *Id.* at 2082.

205. *Cf.* *Arizona v. Fulminante*, 111 S. Ct. 1246, 1252-54 (distinguishing between structural defects defying harmless error analysis and trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented").
aware of their contents.\textsuperscript{206} Had Gathers read the Game Guy's Prayer, his knowledge concerning his victim's character would have related to the circumstances of the crime making the evidence relevant.\textsuperscript{207}

\textit{Gathers} did not resolve whether knowledge of the content of Haynes' papers would have been sufficient or whether, in addition, the prosecutor would have to show that Gathers killed Haynes because he was religious or carried a voters registration card.\textsuperscript{208} Nor did \textit{Booth} clarify whether it would be enough if Booth knew that the elderly couple had children who cared about them or whether the defendant had to intend to cause the children pain by killing their parents.\textsuperscript{209}

\textit{Payne} might have resolved that question. The record suggests that the defendant knew the Christophers.\textsuperscript{210} The prosecutor may have been able to establish that the defendant knew not just the victims but also the extended family. The Court might then have resolved whether knowledge that his act would cause the additional suffering was sufficient, or whether the defendant had to act with purpose or intent to cause the additional suffering. The criminal law does not usually distinguish between knowledge and purpose, with knowledge sufficient in most instances.\textsuperscript{211} Even when the line is drawn, it is not a clear one. For example, the Model Penal Code makes knowledge of attendant circumstances sufficient to meet the definition of purpose.\textsuperscript{212} Thus, if charged with an offense requiring purposeful conduct, an offender must desire to bring about a particular result, but must only know of the attendant circumstances. Had the Court adopted that distinction, the prosecutor may have prevailed in \textit{Payne}, because the defendant may have known the victim's family

\begin{itemize}
\item \textsuperscript{206} South Carolina v. Gathers, 490 U.S. 805, 811 (1990).
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.} at 812.
\item \textsuperscript{209} Booth v. Maryland, 482 U.S. 496, 504 (1987).
\item \textsuperscript{210} State v. Payne, 791 S.W.2d 10, 14 (Tenn. 1990) (defendant stated "it had been almost a year off and on [in seeing the victim] in the backyard because her kids had played with Bobbie's kids").
\item \textsuperscript{211} \textsc{Model Penal Code} § 2.02 cmt. 2 (1985).
\item \textsuperscript{212} "A person acts purposely with respect to a material element of an offense when:

\begin{enumerate}
\item if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
\item if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist." \textsc{Model Penal Code} § 2.02(2)(a) (1985).
\end{enumerate}
and the effect that the killings would have on the family members.

Had Payne relied on a narrow basis to affirm the death sentence, it could have left intact recent precedent. That becomes important when one considers that the arguments supporting overruling Booth were so frail.

Judged by the traditional arguments for overruling precedent, Payne comes up wanting. The first criterion identified by Professor Israel, changed conditions,219 is obviously inapplicable to precedent only two years old. Similarly, the third criterion, that overruling is compelled by the requirements of intervening precedent (the process of erosion),214 is inapplicable for the same reason: apart from Booth's dissenters' attempt to reexamine the question,215 the Court had not eroded Booth. To the contrary, even with a change in Court personnel,216 the Court reaffirmed Booth in Gathers.

The second criterion, the lesson of experience,217 was not met, also in light of the short time span. Payne made a half hearted effort to rely on that argument, specifically citing the following argument: "[Booth and Gathers] have been questioned by members of the Court in later decisions, and have defied consistent application by the lower courts."218 That statement is misleading. First, Booth and Gathers were not questioned in "later decisions," but only in later dissenting opinions.219 Thus, the statement amounts to little more than the obvious: the dissenting justices continued to disagree with Booth's holding. The second part of the statement is also misleading. It cited only one lower court decision to demonstrate that Booth and Gathers have defied consistent application.220 On its face, the argument seems frivolous — one divided lower court does not support the proposition that lower courts have reached inconsistent results.

213. See discussion supra notes 174-76.
214. See discussion supra notes 180-81.
Payne did not cite additional cases cited by Justice O'Connor in her dissenting opinion in Gathers.\textsuperscript{221} But even expanding inquiry to other cases decided between Booth and Payne does not support the Court's conclusion concerning the kind of inconsistent application that made necessary the decision to overrule Booth.

Justice O'Connor cited four cases to demonstrate the "considerable confusion" caused by Booth. She cited disagreement between the South Carolina supreme court that read Booth broadly and three courts that had read Booth more narrowly.\textsuperscript{222} One of those decisions is so cursory in its treatment of the issue that one cannot tell whether the evidence may have been relevant, for example, to the "circumstances of the crime."\textsuperscript{223}

A second case, Daniels v. State, also offers cursory facts concerning the contested evidence.\textsuperscript{224} That makes difficult an assessment, for example, whether the remarks were harmless error. During the sentencing phase, the prosecutor relied on evidence from the guilt phase concerning the victim's relationship with members of his family, information that the defendant probably did not know.\textsuperscript{225} Hence, Daniels and Gathers did present a conflict. In both cases, the prosecutor based an argument during the penalty phase on evidence admitted during the guilt phase of the trial, information unknown to the defendant at the time of the murder. A third case, People v. Rich,\textsuperscript{226} was largely consistent with Daniels.

\begin{itemize}
\item 222. The South Carolina Supreme Court read Booth broadly in State v. Gathers, 369 S.E.2d 140, 144 (S.C. 1988). The three courts O'Connor cited as reading Booth narrowly are: the Indiana Supreme Court (Daniels v. State, 528 N.E.2d 775, 782 (Ind. 1988)); the Georgia Supreme Court (Moon v. State, 375 S.E.2d 442, 450 (Ga. 1988)); and the California Supreme Court (People v. Rich, 755 P.2d 960, 993-94 (Cal. 1988), and People v. Ghent, 739 P.2d 1250, 1271 (Cal. 1987)).
\item 225. Daniels v. State, 528 N.E.2d 775, 782 (Ind. 1988) ("Trial testimony, relevant to guilt or innocence, may necessarily also reflect the nature of personal relationships between parties. . . . The prosecutor tied the evidence together in such a way as to give the jury an impression of the victim's life.")
\item Given that Daniels was on a robbery spree, he almost certainly did not know his victims, thereby suggesting that he would not have been aware of the personal relationships between the victim and his family. Id. at 777.
\end{itemize}
Confusion, as a basis of overruling precedent, is no doubt malleable. How much confusion justifies abandoning precedent is a matter of degree.\textsuperscript{227} A closely related problem is whether a case like Booth created confusion or was simply resisted by lower courts. Lower court's distaste for a decision may lead to unsympathetic interpretation, not reasonably supported by the original Supreme Court decision. It would be ironic to allow judicial civil disobedience to lead to abandoning otherwise defensible precedent.

Viewed with that caution, a reader would be hard pressed to find fatal confusion in Booth. Booth rested on the premise that the death sentence should be reserved for the most culpable offenders and that the jury should not consider information unknown by the offender.\textsuperscript{228} Given Booth's holding, Rich and Daniels were wrongly decided. Evidence admissible for one purpose does not justify otherwise impermissible argument.\textsuperscript{229} And, of course, by the time Payne was decided, that apparent conflict or confusion had been resolved by the Court's discussion of the issue in Gathers.

The only other decision cited by Justice O'Connor raised the question whether the inappropriate reference to victim

\textsuperscript{227} See Judge Ruggero J. Aldisert, Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?, 17 PEPP. L. REV. 605 (1990). Aldisert states that "[n]o black letter guidelines determine when to follow precedent. . . . It must be remembered that a judicial precedent may reflect as little as 51 percent of the opinion writer's point of view at the time of authorship." Id. at 627, 629. Judge Patrick Higginbotham, Text and Precedent in Constitutional Adjudication, 73 CORNELL L. REV. 411 (1988). Higginbotham explains that "[t]here is a baseline and it is that point at which facile restatements of prior holdings, restatements of cases and discovery of underlying principles, become dissembling; but between blind adherence and dishonest statement lies a sometimes significant area that does seem to reward the creative jurists with the opportunity to impose their will." Id. at 413. Judge Stephen Reinhardt, The Conflict Between Text and Precedent in Constitutional Adjudication, 73 CORNELL L. REV. 434 (1988). Reinhardt questions "under what circumstances should he [the judge] vote to overrule precedent? . . . I believe we must give weight in varying degrees to a number of factors . . . ." Id. at 439.

\textsuperscript{228} Booth v. Maryland, 482 U.S. 496, 504-05 (1987).

\textsuperscript{229} For example, evidence of prior criminal activity is universally inadmissible to prove a person's propensity to commit a crime. Fed. R. Evid. 404(b). Prior crimes evidence has a number of permissible uses — as when it relates to motive, intent or plan, or when it may be used to impeach a defendant's credibility. Fed. R. Evid. 404(b). See, e.g., United States v. Ricardo, 619 F.2d 1124, 1131 (5th Cir.), cert. denied, 449 U.S. 1063 (1980). That the prior crimes' evidence is admissible for one purpose does not allow the prosecutor to argue that it establishes the defendant's propensity to commit a crime. Fed. R. Evid. 404(b). See, e.g., United States v. Bowman, 720 F.2d 1103, 1105 (1983).
impact evidence amounted to harmless error.230 There are two issues involved. First is whether harmless error applies at all.231 The second is whether, in a given case, the error was harmless beyond a reasonable doubt.232 Confusion surrounding whether to apply harmless error analysis applied to a violation of Booth would last only as long as it took the Court to resolve the question in the first instance. Whether error is harmless in any given case inevitably requires subtle assessments of the entire trial record. Uncertainty in deciding whether a constitutional error is harmless is hardly unique to Booth.233 Further, Payne does not eliminate or clarify the harmless error question. That is, under post-Payne case law, (insofar as Payne recognizes that in some cases impact evidence will be sufficiently inflammatory to be inadmissible),234 courts will have to engage in harmless error analysis. Thus, confusion over whether erroneous admission of victim impact evidence is harmless is hardly sufficient to support the sweeping assertion by Justice O'Connor or the Payne majority that Booth produced inconsistent lower court results.

Nor does the only decision cited by Payne support that assertion. In Huertas, the defendant was involved in a love triangle

---


Cf. cases in which harmless error analysis is applicable: see, e.g., Clemons v. Mississippi, 494 U.S. 738 (1990); Satterwaite v. Texas, 486 U.S. 249 (1989).

232. See, e.g., Sochor v. Florida, 112 S. Ct. 2114 (1992) (case remanded to reweigh the constitutionally acceptable aggravating and mitigating circumstances or to engage in harmless error analysis); Stringer v. Black, 112 S. Ct. 1130 (1992) (case remanded for reweighing of aggravating and mitigating evidence or engaging in harmless error analysis); Parker v. Dugger, 111 S. Ct. 731 (1991) (reviewing court has option of reweighing remaining evidence or engage in harmless error analysis; case remanded); Clemons v. Mississippi, 494 U.S. 738 (1990) (unclear whether error was harmless or whether Court correctly weighed aggravating and mitigating factors, therefore remanded to state court for determination).

233. See, e.g., Dobbs v. Zant, 113 S. Ct. 835, 836 n.1 (1993): “We see no reason to depart here from our normal practice of allowing courts more familiar with a case to conduct their own harmless error analyses.” Because harmless error analysis is so fact sensitive and requires the review of the entire record, the Supreme Court demonstrates great deference to the lower court which has more experience working with the record. For example, in Dobbs, one question presented to the Supreme Court was whether the Eleventh Circuit Court of Appeals erred when it refused to consider the full sentencing transcript. Although the Court found that the Court of Appeals had erred, it remanded the case for harmless error analysis, because it had not been asked and did not engage in its own harmless error analysis.

with his on-again off-again woman friend Elba Ortiz and his high school friend Ralph Harris, Jr. When Huertas learned that Ortiz was involved with Harris, Huertas warned Harris to stay away from Ortiz. After a long evening of alcohol and drug abuse, Huertas broke into Ortiz’s apartment and stabbed Harris.

The Ohio supreme court vacated the sentence of death because the state introduced a VIS during the sentencing phase of Huertas’ trial. The report contained statements by the victim’s parents, including the victim’s father’s view that Huertas should receive the death sentence. The victim’s parents testified at trial, the father repeating his view about the appropriate sentence and the mother testifying concerning her sense of loss and the effect on the victim’s son.

Although the state attempted to distinguish Booth on several grounds, the “confusion” referred to by Payne was the difference of opinion between the majority and two dissenting justices. The chief justice concurred, urging the Supreme Court to reconsider Booth and Gathers, stating that “[t]he fact that the majority and two dissenters in this case all interpret the opinions and footnotes in Booth and Gathers differently demonstrates the uncertainty of the law in this area.”

Ohio Supreme Court Justice Douglas argued in dissent that “Booth stands for the proposition that the use of victim impact evidence in the sentencing phase of a capital trial is constitutionally impermissible only when that evidence creates a substantial risk that the sentencing decision will be based upon arbitrary and

236. Id. at 1061.
237. Id. at 1065.
238. Id. at 1062.
239. Distinctions between Booth and Huertas:
   (1) an Ohio jury's recommendation of death is not binding on the trial judge, while a Maryland jury makes the final determination of sentence, State v. Huertas, 553 N.E.2d 1058, 1063 (Ohio 1990); (2) the admission of the victim impact statement was harmless in Huertas because it was much shorter than the one at issue in Booth, id. at 1063; and (3) the defendant was acquainted with the victim and his family in Huertas, and not necessarily so in Booth, id. at 1064.
241. See State v. Huertas, 553 N.E.2d 1058, 1070 (Ohio 1990) (Moyer, C.J., concurring) (“The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in Booth and Gathers differently demonstrates the uncertainty of the law in this area.”).
irrelevant considerations." He found support for that conclusion in footnote 10 in Booth.243

Footnote 10 raised the possibility that impact evidence would be admissible if relevant because the evidence related to the circumstances of the crime.244 In other words, a defendant might have been aware of the impact that the killing would have on the victim. Second, the note made reference to the fact that Booth's holding had special application in capital cases.245 Finally, the Court suggested that the victim's character would still be relevant under traditionally recognized exceptions, like that found in Federal Rules of Evidence 404,246 allowing evidence of the victim's peaceable nature to rebut the defendant's claim that the victim was the aggressor in a case of self defense.247

Justice Douglas misread the last sentence in the footnote. Booth observed that "[t]he trial judge . . . continues to have the primary responsibility for deciding when this information is sufficiently relevant to some legitimate consideration to be admissible, and when its probative value outweighs any prejudicial effect."248 In context, the last sentence cannot mean that in death penalty litigation generally, the judge must do a case by case analysis of relevance. That would undercut the explicit

243. Id. at 1070.
244. Booth v. Maryland, 482 U.S. 496, 507-08 n.10 (1987) ("similar types of information may well be admissible because they relate directly to the circumstances of the crime").
245. Booth v. Maryland, 482 U.S. 496, 507-08 n.10 (1987) ("Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. . . . Facts about the victim and family also may be relevant in a non-capital criminal trial.").
246. See Fed. R. Evid. 404(a)(2): "Character of victim: Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor [is admissible]."
247. Booth v. Maryland, 482 U.S. 496, 507-08 n.10 (1987) ("Moreover, there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant.") See, e.g., Fed. R. Evid. 404(a)(2) (prosecution may show peaceable nature of victim to rebut charge that victim was aggressor). The trial judge, of course, continues to have the primary responsibility for deciding when this information is sufficiently relevant to have some legitimate consideration to be admissible, and when its probative value outweighs any prejudicial effect. Cf. Fed. R. Evid. 403.
The reference to "this information" is narrower. It refers to the information discussed in the footnote. That is, even though under the three circumstances identified in the note victim impact evidence may be relevant, for example, in a noncapital sentencing hearing, it may nonetheless be inadmissible under the traditional balance of probative and prejudicial value. That is hardly a startling conclusion; that is why the information is tucked away in a footnote, rather than in the body of the opinion. The note restates an obvious point of law, rather than undercutting the specific holding of the case. An unsympathetic or careless reading of a Supreme Court decision is hardly evidence that the case caused confusion.

Booth was cited in numerous cases in addition to the small handful cited by Payne and the dissent in Gathers. But those cases hardly support the Court's sweeping conclusion that Booth proved unworkable. The cases fall into a few categories. A significant number of cases analyzed whether improper admission of victim impact evidence amounted to harmless error, an issue discussed above. A number of cases questioned whether a litigant was entitled to retroactive application of Booth. Any habeas corpus litigant is aware of the confusion in deciding the retroactivity question, but no one can seriously claim that problem derives from Booth. As recognized by members of the

249. "[T]he introduction of a VIS at the sentencing phase of a capital murder trial violates the Eighth Amendment." Booth v. Maryland, 482 U.S. 496, 509 (1987). That Justice Douglas was simply wrong in his reading of Booth is supported by Payne's discussion of Booth. It rejected Booth in part because it set up a per se rule of exclusion of VIS. Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) ("We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar.").

250. FED. R. EVID. 403.

251. See Judge Patrick Higginbotham, Text and Precedent in Constitutional Adjudication, 73 CORNELL L. REV. 411, 415-16 (1988). Judge Higginbotham discusses how the duty of obedience owed by the lower courts to the Supreme Court's decisions "is defined in substantial part by the accepted manner of treating precedent, and presumably no other branch of government owes decisions of the Court any greater duty of obedience than is owed by the lower courts."


254. See discussion supra notes 202-05, 230-34.

255. See, e.g., Washington v. Murray, 952 F.2d 1472, 1480 (11th Cir. 1991); Evans v. Cabana, 821 F.2d 1065 (5th Cir. 1987).
Supreme Court, the Court ushered in confusion in *Teague v. Lane* in its effort to narrow relief for habeas petitioners.

The only other significant issue that arose post-Booth was whether Booth applied only when sentencing was done by a jury or whether it also applied when the sentence was imposed by the court. Booth stated that the issue was "whether the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence." The Eleventh Circuit, for example, focused on that statement in *Lightbourne v. Dugger* and held that Booth was inapplicable when the death sentence was imposed by the judge on the recommendation of the jury. By contrast, the Illinois supreme court found that Booth applied to a sentencing judge who stated in a written explanation of the sentence that he considered the victim impact statement.

The conflict between the Eleventh Circuit and the Illinois supreme court may be overstated. In *Lightbourne v. Dugger*, the court had an alternative basis of its holding, specifically, that the error was harmless. But a holding that a judge may impose the death penalty based on the impact on the family and the loss to society misses the point of Booth which announced a substantive rule that harm, unknown to the perpetrator, is irrelevant and, therefore, inadmissible.

Thus, Payne's strongest argument in support of overruling recent precedent, that Booth created administrative problems, is

---


262. See *Booth v. Maryland*, 482 U.S. 496, 505 (1987) ("Allowing the jury to rely on a VIS 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."); see also Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLa. St. U. L. Rev. 67, 74 (1992) ("It is essential to understand that the holdings of *Booth, Gathers*, and *Payne*, do not pertain to all victim impact evidence. The rules established in those cases apply only to victim impact evidence about which the defendant was ignorant at the time of the crime."); R. P. Peerenboom, *Victim Harm, Retributivism and Capital Punishment: A Philosophical Critique of Payne v. Tennessee*, 20 PEPP. L. REV. 25, 40 (1993) ("The Booth majority seeks to limit the scope of desert by imposing a mens rea requirement. . . . One does not deserve to be punished for acts or consequences for which one does not possess the proper mens rea.").
weak. The few inconsistent applications of Booth could have been remedied (as the Court did in Gathers) by a clear holding by the Court. Any student of constitutional law knows that Supreme Court cases frequently require refinement and often produce inconsistent results among lower courts.\textsuperscript{263} Indeed, a conflict among lower courts is one of the bases for the grant of the writ of certiorari.\textsuperscript{264} Confusion, without more, seems a frail basis for overruling precedent. No one would seriously argue that the conflict among courts about the meaning of a Supreme Court decision should be a sufficient condition to justify its overruling.

Insofar as Payne rests on conflict among lower courts for its hasty overruling of precedent, there appears a special irony: Booth announced a brightline rule.\textsuperscript{265} A judge did not have to balance probative and prejudicial value of the VIS on a case by case basis.\textsuperscript{266} As with almost any brightline rule,\textsuperscript{267} the Court recognized exceptions where the evidence might be admissible, for example, if the evidence related to the circumstances of the crime.\textsuperscript{268} But Payne abandoned the brightline rule and had to recognize that VIS may be inadmissible in any given case, if the VIS was so inflammatory that it rendered the sentencing hearing fundamentally unfair.\textsuperscript{269} If overruling Booth rested on any argu-

---

\textsuperscript{263} See, e.g., Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990) (result in a given case is not dictated by precedent also if "reasonable jurists may disagree"); Wright v. West, 112 S. Ct. 2482, 2501 (1992) (Souter, J., concurring) ("To survive Teague, [the rule] must be ‘old’ enough to have predated the finality of the prisoner’s convictions, and specific enough to dictate the rule on which the conviction may be held to be unlawful."); Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990) (redefined "new rule" from Teague. result is not dictated by precedent if it is "suspectable to debate among reasonable minds"); Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (Supreme Court refines Teague by applying its holding to a capital case).


\textsuperscript{265} See Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) (Payne holds that "[i]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar.").

\textsuperscript{266} See Payne v. Tennessee, 111 S. Ct. 2597, 2608 (1991) ("In the event that 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.").

\textsuperscript{267} See, e.g., New York v. Belton, 453 U.S. 454 (1981) (creating a brightline rule allowing the police to search the entire passenger compartment when making a search incident to a lawful arrest of the driver of an automobile). The Court specifically noted that its holding did not extend to the vehicle's trunk. Id. at 460 n.4.

\textsuperscript{268} See Booth v. Maryland, 482 U.S. 496, 507 n.10 (1987).

ment other than simple disagreement with its holding, it was that Booth proved unworkably confusing. And yet, as developed more completely below, the Court substituted a rule that will produce far more uncertainty.

Payne obviously attacked the soundness of Booth's analysis. Disagreement with precedent alone has seldom provided a sufficient justification to overrule precedent. In the plurality opinion in Casey, Justice O'Connor argued against overruling precedent based only on disagreement with the earlier decision: "There is a limit to the amount of error that can plausibly be imputed to prior courts." Disagreement without more indicates that the only explanation of the changed result was the change in court personnel, eroding the public and profession's confidence that the case was decided on "impersonal and principled qualities of the judicial process."

IV. OVERRULING PAYNE v. TENNESSEE

Payne did not make a convincing case for overruling Booth and Gathers. Payne can only be explained by the change in Court personnel and represents a clear departure from the rule of law.

This section of the article argues that Payne will be short lived. President Clinton has already made one appointment to the Supreme Court and has prospects for additional appointments. While the President favors the death penalty, he is

270. See discussion supra notes 218-62.
271. See discussion infra notes 380-412.
273. See Jerold H. Israel, Gideon v. Wainwright: The 'Art' of Overruling, 1963 Sup. Ct. Rev. 211, 235. (The author remarks that the "dominant characteristic of overruling opinions has been, however, the Court's consistent reliance upon more than just the alleged superiority of the view of its present membership as the basis for rejecting a precedent.").
276. See discussion supra notes 213-75.
277. See John M. Broder, Ginsburg Takes Oath for Supreme Court, L.A. TIMES, Aug. 11, 1993, at A5 (noting that Ruth Bader Ginsburg was sworn in as the 107th Supreme Court Justice and President Clinton's first nominee).
278. Ted Gest, et al., Now, the Clinton Court, U.S. NEWS & WORLD REPORT, Mar. 29, 1993, at 30 (intimating O'Connor, Stevens and Rehnquist, all of whom have been ill, may be retiring soon). See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2854-55 (1992) (in which Justice Blackmun, then 83-years-old, stated he "could not remain on [the] Court forever"); see also Tony Mauro, Looking Forward, LEGAL TIMES, Apr. 12, 1993, at 14.
unlikely to appoint conservatives with settled hostility to the expanded role of the Bill of Rights over the past forty years.\footnote{280} New justices will not be as hostile as the current majority is to the use of the Eighth Amendment to hedge the imposition of the death penalty.

In light of what I have argued concerning the virtue of stability, one might question how I can predict and urge that \textit{Payne} be overruled.\footnote{281} My argument is two fold. First, this section addresses the merits of the dispute whether \textit{Payne} or \textit{Booth} was correctly decided. \textit{Payne}’s majority opinion\footnote{282} and Justice Scalia’s concurring opinion\footnote{283} roundly denounced \textit{Booth}. But apart from their vituperative language, \textit{Booth} was well reasoned and consistent with moral principles of just desert.\footnote{284}

Second, \textit{Payne} asserted that \textit{Booth} proved unworkable, an argument that did not bear close scrutiny.\footnote{285} By contrast, \textit{Payne} will create administrative difficulties as predicted by \textit{Booth},\footnote{286} leading to minitrials on the value of victims’ lives. \textit{Payne} will exacerbate disparities in the imposition of the death penalty that deeply divided the Court in \textit{McCleskey v. Kemp}.\footnote{287} \textit{Payne}’s assertion that harm, without more, is relevant to an offender’s moral culpability will not withstand analysis; it will invite reexamination

\footnote{280} See Terry Eastlund, \textit{Column Right}, L.A. TIMES, Mar. 25, 1993, at B7 (“Clinton judges, he has said, would believe in what he calls ‘an expansive view of the Constitution’ and ‘the constitutional right of privacy.’”); see also Irritable Panel Ends Hearings on Ginsburg, S.F. CHRONICLE, July 23, 1993, at A26 (noting the Judge Ginsburg “declined to reveal her thinking on such deep and difficult matters as the death penalty, which she said she had not fully considered”).

\footnote{281} See discussion \textit{supra} notes 119-35.

\footnote{282} Payne v. Tennessee, 111 S. Ct. 2597, 2608 (1991) (“\textit{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.”).

\footnote{283} Payne v. Tennessee, 111 S. Ct. 2597, 2613 (1991) (Scalia, J., concurring) (“\textit{Booth}’s stunning \textit{ipse dixit}, that a crime’s unanticipated consequence must be deemed ‘irrelevant’ to the sentence [citation omitted] conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victim rights’ movement.”).

\footnote{284} See Markus D. Dubber, \textit{Regulating the Tender Heart When the Axe is Ready to Strike}, 41 BUFF. L. REV. 85, 135-36 (1993) (The \textit{Booth} Court recognized “that the details of a crime do not affect retributive desert in the capital sentencing context because retributive theory, as applied to the death penalty, recognizes only one type of harm, the qualitatively unique taking of human life.”); R.P. Peerenboom, \textit{Victim Harm, Retributivism and Capital Punishment: A Philosophical Critique} of \textit{Payne} v. Tennessee, 20 PEPP. L. REV. 25, 30 (1992) (“The \textit{Booth} Court embraced a mens rea retributive theory of culpability[.]”).

\footnote{285} See discussion \textit{supra} notes 218-62.


because it is so out of line with major premises of the criminal law. Finally, while the Supreme Court’s death penalty case law has not followed a smooth course, Booth was consistent with one important line of precedent that limited the death penalty to the most heinous and culpable offenders. Payne is an aberration when it is examined in light of twenty years of case law, a “sport” in the law. Over the next several years, the Court will have to reexamine hard cases in Payne’s wake, and, in light of its flaws, the Court will have the opportunity to revisit admissibility of VIS.

A. Payne’s Attack on Booth

Payne characterized Booth and Gathers as resting on two premises: one that a VIS does not (necessarily) relate the defendant’s culpability and two that the focus at the sentencing phase should only be on the defendant’s blameworthiness, making other evidence inadmissible. Payne countered that harm has always “understandably” been an important concern of the criminal law. The Court cited Justice Scalia’s example from his dissent in Booth: “If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not.” The hypothetical robbers’ culpability is identical. Despite that, the law treats one offender as a murderer, with the possibility of the death penalty; in the other instance, the person may be guilty of attempted murder and typically will be subject to considerably less severe punishment. From that example, the Court argues that the criminal law treats equally culpable offenders differently. That, according to the Court, demonstrates that something more than culpability is relevant to punishment; the additional factor is the nature of the harm caused by the offender.

The Court also argued that harm has been relevant throughout history. Despite different principles that have guided criminal sentencing over time, harm has remained a predominant concern. Justice Scalia’s concurring opinion underscored that point where he criticized Booth’s holding that “unanticipated
consequences must be deemed 'irrelevant' to the sentence" to be a "stunning ipse dixit".296

B. Payne: Overstating the Role of Harm

The criminal law does consider harm relevant to both the substantive definition of a particular offense and to punishment.297 There has been an active debate within the scholarly literature whether that ought to be the case.298

This article does not revisit the debate whether the criminal law ought to consider factors other than culpability to assess criminality and punishment. It does focus on how Payne contends that harm is relevant. Payne set up a simple syllogism: the criminal law considers harm relevant to punishment; VIS relate to harm; therefore, VIS are relevant to punishment.299 But whether harm is relevant to punishment was not the issue in Payne.

Payne casually asserted that the criminal law has made harm relevant.300 Conceding that the criminal law has considered harm relevant does not end the inquiry. Booth and Gathers recognized that harm matters, but only if the defendant was aware of the harm.301 Insofar as criminal law tradition was relevant in Payne, the Court should have focused on the relationship

296. Id. at 2613 (Scalia, J., concurring).
298. See Arnold H. Loewy, Culpability, Dangerousness and Harm: Balancing the Factors On Which Criminal Law is Predicated, 66 N.C. L. Rev. 283, 289-90 (1988) (Loewy's only rationale for the retention of harm as a relevant factor is that it mirrors life: similar conduct begets different consequences.) He also points out that when punishing for the harm caused can be grounded in the concept of societal compensation which focuses on the criminal's debt to society. Id. at 310. See also Stephen J. Schulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law, 122 U. Pa. L. Rev. 1497, 1499 (1974) (he argues that the explanation for the role of harm is a hold over from outmoded notions of vengeance).
299. Payne v. Tennessee, 111 S. Ct. 2597, 2605-06 (1991) ("[T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment . . . . Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. The evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect was much the same as if it had been.").
300. Id. at 2605.
between mens rea and the resulting harm. And here the law is far more complicated than suggested by Payne.

Payne’s brief history of the relevance of harm begins with Lex talionis, “[a]n eye for an eye, a tooth for a tooth.” In context, the Court treats that as an example where harm is everything, a strict liability system without regard to any culpability of the offender, vengeance where the avenger is entitled to take a pound of flesh without regard to the intent of the accused, a system where the offender is put in the same state as his victim.

Biblical scholars disagree whether lex talionis was strictly applied. Historical evidence suggests that some Jewish sects rejected oral law interpretations that deviated from the literal language of the Scripture. But other historians have argued that within the orthodox tradition, lex talionis was strictly applied only to intentional killing, i.e., to murder.

That the Biblical injunction to take an eye for an eye was not to be taken literally is supported by another rendition of the eye for an eye edict. Deuteronomy includes a “rule concerning the man who kills another and flees to save his life.” It directs the Hebrews to create three centrally located cities “so that anyone who kills a man may flee there.” Deuteronomy distinguished between murder and accidental killing. The text offers the example where “a man may go into the forest with his neighbor to cut wood, and as he swings his ax to fell a tree, the head may fly off and hit his neighbor and kill him.” That person was entitled to safety in one of the three cities that the text directed to be created.

By contrast to the accidental killer, “... if a man hates his neighbor and lies in wait for him, assaults and kills him, and then flees to one of these cities, the elders of his town shall send for him, bring him back to the city, and hand him over to the

303. See Myer Galinski, Pursue Justice: The Administration of Justice in Ancient Israel 97 n.81 (1983) (proposing that the Sadducees rejected the Oral Law as taught by the Pharisees and rigidly applied lex talionis); Haim H. Cohn, Penology of the Talmud, in Jewish Law in Ancient and Modern Israel 75 (Haim H. Cohn ed., 1971) (stating that “it was commonly assumed that the Sadduces and the Karaites interpreted lex talionis literally since they rejected “oral law” interpretations which deviated from the literal and grammatical sense of the words employed by Scripture”).
avenger of blood to die.”309 Chapter 19 ends with a passage similar to that found in Exodus: “And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”310 Whatever ambiguity exists in Exodus is clarified in Deuteronomy. Harm matters, but punishment is not appropriate unless mens rea exists, here, unless the person intended the harm. The simplistic formulation must be refined: a life for a life is appropriate only if the killer intended the harm. Desert turns on more than the harm caused.

That should not be surprising to the student of the criminal law. Typically, common law crimes required a showing that the offender had acted in a malicious manner,311 as reflected in the classic maxim that “an unwarrantable act without a vicious will is no crime at all.”312 That required more than a showing that the offender did a wicked act. For example, in what amounts to a textbook example, a sailor, intent on stealing rum from a ship’s hold, ignited the ship when he lit a match in order to see in the dark hold. The Court of Crown Cases found that the sailor was not guilty of a violation of the Malicious Damage Act absent proof that he intended to burn the vessel.313 Harm alone is insufficient to create criminality; some mens rea must run to the harm.

The criminal law recognizes some instances to the contrary in which an offender who is unaware of the harm may be guilty. Those cases are the exception to the rule and usually involved especially strong policy considerations.314 The exceptions often

---

313. Regina v. Faulkner, 15 Cox C.C. 550 (Ir. Cr. Res. 1877) (Eng.).
314. See Joshua Dressler, Understanding the Criminal Law § 11.03(A), at 119-20 (1989) (Dressler justifies strict liability as a utilitarian impulse in which society balances the competing interests of fairness to the innocent wrongdoer against the interests of society in deterring social harm differently with public welfare offenses. In common law offenses greater weight is accorded to the individual, whereas in public welfare offenses, the scales come down on the side of society’s interests.); Arnold H. Loewy, Culpability, Dangerousness and Harm: Balancing the Factors on Which Our Criminal Law is Predicated, 66 N.C. L. REV. 283, 285 (1988) (One exception is what is commonly called a public welfare offense such as marketing impure food and drugs. It is reasoned that the lack of culpability is of no great import because of the great harm these substances can cause, and because relatively minor penalties are imposed.); see also Model Penal Code § 213.6 cmt. 2 (1980) (The Model Penal Code accepts a standard of strict liability for statutory rape when the victim is
rest on the argument that the underlying conduct, even if the facts were as believed by the actor, was immoral. The obvious example is statutory rape in which strict liability has been imposed with regard to the age of the victim.

During the nineteenth century, legislatures adopted various measures in which the offender's culpability was irrelevant or in which the prosecutor only had to show that the offender was negligent. In Morissette v. United States, the Supreme Court created a strong presumption that a federal court should read a mens rea into a statute when the crime has common law origins. In assessing whether a crime involved conduct malum in se or malum prohibitum, the Court found that strict liability offenses typically do not involve severe penalties. Decisions subsequent to Morissette have arguably narrowed the instances in which the Court will presume that Congress intended an offense to be strict liability.

under the age of 10. It justifies its position by stating "no credible error regarding the age of a child in fact less than 10 years old would render the actor's conduct anything less than a dramatic departure from societal norms.

315. See, e.g., Regina v. Prince, L.R.-2 Cr. Cas. Res. 154 (1875) (Eng.) (In response to whether it was necessary to read in a requirement of mens rea, the court replied, "I am of the opinion that we are not . . . and for the following reasons: The act forbidden is wrong in itself, if without lawful cause; I do not say illegal but wrong."); White v. State, 185 N.E.64, 65 (Ohio Ct. App. 1933) ("The sound doctrine underlying the rule that guilty knowledge is not required to accomplish the crime of rape with consent is that the act of the accused is at best an immoral one, and that he cannot enter upon the accomplishment of an admittedly immoral act except at his peril . . . "); cf. United States v. Feola, 420 U.S. 671, 685 (1975) (During an undercover narcotics sting operation, federal agents were attacked by their quarry. In deciding the issue of whether knowledge of the federal officers' identity was requisite for the charge of conspiracy under 18 U.S.C. § 371, the Court said no scienter was necessary, and though the defendant "may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset his planned course of conduct is wrongful.

316. See Joshua Dressler, Understanding the Criminal Law § 11.02 (B), at 119; Arnold H. Loewy, Culpability, Dangerousness and Harm: Balancing the Factors on Which Our Criminal Law is Predicated, 66 N.C. L. Rev. 283, 286 (1986); see, e.g., People v. Ratz, 46 P. 915 (Cal. 1896); Heath v. State, 90 N.E.310 (Ind. 1910); Commonwealth v. Murphy, 42 N.E.504 (Mass. 1896); State v. Houx, 19 S.W. 35 (Mo. 1892).


319. Id. at 256 (1952).

320. See, e.g., United States v. Liparota, 471 U.S. 419, 433 (1985) (The Court characterized public welfare offenses in which no mens rea is required as those offenses which detail the type of conduct which is potentially dangerous
The Model Penal Code created a general culpability provision.\footnote{Model Penal Code § 2.02 (1985).} Under § 2.02(3), the Code provides that if an offense has no mens rea term, the court should read in a minimum of recklessness.\footnote{Model Penal Code § 2.02(3) (1985) ("When the culpability sufficient to establish a material element of an offense is not proscribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto.").} Recklessness under the Code requires actual awareness of the risk. The drafters divided over extending liability to an actor based only on negligence. But § 2.02(3) states the Code's belief that the State must demonstrate an actor's culpability in order to criminalize the action. \textit{Id.} at § 2.02 cmt. 1.

The effect of the Code is to impose a general requirement, at a minimum, of subjective awareness of the risk that the offender has created and of awareness not just of the act, but of other material elements of the offense.\footnote{Model Penal Code § 2.02(4) (1985).} That becomes especially important in cases in which punishment increases based on different degrees of harm. For example, many jurisdictions punish assault and battery of an officer more severely than assault to the public welfare, and requires stringent public regulation: such as possession of unregistered hand grenades, or the shipment of adulterated drugs. The Court argued that dealing with dangerous items should alert a reasonable person to the probability that regulatory measures are in place.). See also United States v. Freed, 401 U.S. 601 (1971).

\footnote{Model Penal Code § 2.02 (1985).}

\footnote{Model Penal Code § 2.02(3) (1985) ("When the culpability sufficient to establish a material element of an offense is not proscribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto.").} Recklessness under the Code requires actual awareness of the risk. The drafters divided over extending liability to an actor based only on negligence. But § 2.02(3) states the Code's belief that the State must demonstrate an actor's culpability in order to criminalize the action. \textit{Id.} at § 2.02 cmt. 1.

\footnote{Model Penal Code § 2.02(4) (1985).}

The Model Penal Code requires "that unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained." \textit{Model Penal Code} § 2.02 cmt. 1 (1985). The Code provides that if the statute which sets forth the elements of the crime is silent as to mens rea then a minimum of recklessness will suffice. \textit{Id.} at § 2.02(3). The Code defines "recklessness" as similar to acting knowingly "in that a state of awareness is involved, but the awareness is of risk, that is of a probability less than substantial certainty." \textit{Id.} at § 2.02 cmt. 3. As to negligence, the Code does not wholly reject it as a ground of culpability but urges that it "not generally be deemed sufficient in the definition of specific crimes." \textit{Id.} at § 2.02 cmt. 4. The Code points out that when people know that a criminal conviction may ensue from negligent conduct they are motivated to take additional care. \textit{Id.} at § 2.02 cmt. 4.
and battery on a fellow citizen. Under the culpability provisions of the Code, the actor would not be held responsible for the added harm, impairing an officer in his duties, unless he had some awareness of status of the officer. Greater harm, without more, is irrelevant; harm that bears on culpability is relevant.

Thus, the Court’s assertion in Payne that harm matters is only half the story. True, harm is relevant in defining the substantive criminal law. For example, a person is guilty of an offense if one harm results and a more serious offense if an additional harm takes place. But typically, the criminal law requires culpability with regard to the aggravating circumstance.

Apart from defining crime, harm also matters in assessing the sentence. That is uncontestably true in any death penalty case: at a minimum, in capital cases, a death must have resulted. But again, the Court overstates the role of harm. As early as 1794, legislatures began dividing murder into first and second degree, a division that at one point was followed in the vast majority of American jurisdictions. That reform, an effort to limit the death penalty, was intended to preserve the death penalty for the most heinous offenders. It was not enough to


327. For example, if the relevant statute were to provide that “[a] person is guilty of assault on an officer if . . . [h]e . . . knowingly . . . causes bodily injury to a law enforcement officer while the officer is in the performance of his duties,” the effect of MODEL PENAL CODE § 2.02(4) (1985) would be that the mens rea term of “knowingly” would run to all material elements. Given that the evil that the statute seeks to prevent is harm to police in the performance of their official duties, the status of the victim and the performance of official duties would be material elements under § 1.13(10). Cf. United States v. Feola, 420 U.S. 672, 672-84 (1975) (holding that knowledge concerning the identity of a federal officer is not requisite for the crime of conspiracy under 18 U.S.C. § 371, because the primary function of the statute was to protect both federal officers and federal functions and no mens rea need attach to what the Court deemed a jurisdictional element). But see United States v. Feola, 420 U.S. 672, 696-99 (1975) (Stewart, J., dissenting) (Stewart argued that the federal statute mirrored state statutes which provide an aggravated penalty for assaults upon state law enforcement officers. “Where an assailant had no such knowledge [that his victim had official status], he could not of course be deterred by the statutory threat of enhanced punishment . . . .”).

328. See, e.g., Edmund v. Florida, 458 U.S. 782 (1982) (Eight Amendment prohibits the imposition of the death penalty on a defendant “who does not kill, attempt to kill or intend that a killing take place or that lethal force will be employed.” (Edmund at 797.)); Coker v. Georgia, 433 U.S. 584 (1977).


330. MODEL PENAL CODE § 210.2 cmt. 2 (1980). The Pennsylvania reform in 1794 seems to have limited the availability of the death penalty in felony murder, making the offender subject to the death penalty only if a murder took
kill or even to kill intentionally; it had to occur along with some additional aggravating feature. Harm alone was not enough; the actor had to reflect upon and intend the harm. 331

Voluntary manslaughter represents another instance in which even intentional killing was not punishable by death even before the Supreme Court began limiting the availability of the death penalty. 332 Different rationales have been offered for why provocation reduces the grade of the homicide from murder to manslaughter. 333 Supporters of the different rationales have support in the case law that has not always grasped the subtle distinction between whether provocation is a partial justification or partial excuse. 334 Some cases suggest that provocation is a partial justification — the provoking actor has forfeited the full protection of the law by committing the provoking act. 335 In lay terms, the victim had it coming to him. Other cases 336 and scholars 337 suggest that provocation is a partial excuse. It is a concession to

place during the commission of the felony, and unavailable if the death was accidental.

331. See 18 PA. CONS. STAT. ANN. § 2502(a) (1983) (The statute provides that "a criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." "Intentional killing" is defined as "killing by means of position, or by lying in wait, or any other kind of wilful, deliberate and premeditated killing."). The 1794 statute provided that "all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree." 1794 PA. LAWS, ch 257, §§ 1, 2.

332. See, e.g., MODEL PENAL CODE § 210.3 cmt. 1 (1980). The Code's comment states that "early statutes sought to differentiate among criminal homicides for the purpose of withdrawing benefit of clergy from the more heinous killings. This initiative led to the division of criminal homicides into murder, which retained its status as a capital crime, and the lesser offense of manslaughter." Id.


336. See, e.g., Fisher, 8 Car. & P. 182 (1837); Rex v. Mouers, 57 D.L.R. 569 (1921) (Can.).

337. See, e.g., Dressler, supra note 334; R.S. O'Regan, Indirect Provocation and Misdirected Retaliation, 1968 CRIM. L. REV. 319.
the "frailty of human nature," that is, a person whose "reason has been dethroned . . . cannot be expected . . . 'to guide his anger with judgment.'\(^{339}\)

Whether provocation is partial justification or excuse, the harm is same as in murder; the victim is dead. Further, under either explanation for the partial defense, the actor must actually have been provoked.\(^{340}\) Even if provocation is a partial justification and thus the decedent had it coming to him, a defendant could not claim that while he did not know that his wife was having an affair with the decedent, had he known, he would have been entitled to a partial justification. The harm in both cases is the same, a person who was not entitled to full protection of the law has died. But in my hypothetical example, the defendant could not interpose a claim of provocation if he was not provoked. Harm matters, but only when the actor had the appropriate mental state.

Payne makes a great deal of the fact that a person who attempts to kill but who fails receives a less severe punishment than one who succeeds.\(^{341}\) It then concludes that harm matters. That has not been contested. Instead, while harm matters, the Court ignores the fact that typically the criminal law requires some mens rea to attach to the harm. One more example will demonstrate that the Court's insistence that harm matters is overstated. A person guilty of murder may receive the death penalty or life in prison;\(^{342}\) a person guilty of attempted murder may receive a term of years.\(^{343}\) Under the Model Penal Code,\(^{344}\) for

---

339. O'Regan, supra note 337, at 323.
340. See WAYNE LAFAVE & AUSTIN SCOTT, JR., CRIMINAL LAW § 7.10(b), at 654-55 (2d ed. 1986). In order to use provocation as justification, the provocation must be such to cause a reasonable man to kill, to lose his normal self-control. Some examples where it has been held that a reasonable man may be provoked into passion: when he or a close relative is hurt by violent physical blows; when he is unlawfully arrested; or when he discovers his spouse in the act of adultery. But the defendant must have been actually provoked, to the standard of a reasonable man, in order to use this as a partial defense.
341. Payne, 111 S. Ct. at 2605.
342. See, e.g., CAL. PENAL CODE § 190 (West 1990); FLA. STAT. ANN. § 782.04(1)(b) (West 1992); OHIO REV. CODE ANN. § 2929.02 (Page 1993).
343. See, e.g., CAL. PENAL CODE § 664(1) (West 1992); FLA. STAT. ANN. § 777.04(4)(a) (West 1992) (if offense attempted is a capital felony, then attempt is a felony of the first degree); FLA. STAT. ANN. § 775.082(3)(b) (West 1992) (penalty for felony of first degree is a term of imprisonment not to exceed 30 years or not to exceed life imprisonment); OHIO REV. CODE ANN. § 2923.02 (Page 1953) (an attempt to murder is an aggravated felony of the first degree); OHIO REV. CODE ANN. § 2929.11 (Page 1953) (whoever is guilty of a
murder, an offender would be guilty of a first degree felony with a possible maximum sentence of twenty years or life imprisonment, but a person guilty of an attempted murder would be guilty of a second degree felony, with a maximum penalty of ten years imprisonment. But another example demonstrates that harm in the abstract is not what matters, but harm in light of the offender’s mens rea. Typically, negligent homicide and involuntary manslaughter have punishments less severe than attempted murder. For example, under the Model Penal Code, negligent homicide is a felony of the third degree, with a maximum penalty of five years. Contrary to the Court’s suggestion in Payne, harm is not independently relevant in assessing punishment. It becomes relevant only in light of the offender’s mental state.

The law of homicide recognizes two exceptions to this rule, the unlawful act or misdemeanor manslaughter doctrine and felony murder. Under the unlawful act doctrine, a person may be guilty of manslaughter if a death results from the actor’s violation of a misdemeanor or a felony not sufficiently dangerous to qualify for the felony murder rule. As administered by some

felony other than murder or aggravated murder shall be imprisoned for an indefinite term).
courts, an offender may be strictly liable. The underlying offense may require no mens rea. Even if it does, the offender may be guilty of homicide without awareness of the risk of death.

That doctrine has been limited by the courts in many jurisdictions, for example, by requiring some showing of culpability on the part of the offender or by stringently applying notions of causation. Other jurisdictions have abandoned it outright. Some courts have suggested that liability without fault, at least leading to incarceration, may be unconstitutional, either as a violation of due process or Eighth Amendment proportionality. The drafters of the Model Penal Code unequivocally rejected the doctrine because it "dispenses with proof of culpability and imposes liability for a serious crime without reference to the actor's state of mind."

Like misdemeanor manslaughter, felony murder in its broad application holds a felon strictly liable for a death resulting during the commission of the felony. The felony murder rule has been limited in part by legislative reform. Courts have frequently criticized the rule and have devised a variety of doctrines...


354. See, e.g., MODEL PENAL CODE § 210.3 cmt. 7 (1980). The Code finds that the misdemeanor-manslaughter rule "dispenses with proof of culpability and imposes liability for a serious crime without reference to the actor's state of mind." Id.

355. MODEL PENAL CODE § 210.3 cmt. 7 (1980).

356. MODEL PENAL CODE § 210.3 cmt. 7 (1980).

357. See, e.g., State v. Guminga, 395 N.W.2d 344 (Minn. 1986); State v. Akers, 400 A.2d 38 (N.H. 1979); LAFAVE AND SCOTT, supra note 340, § 2.12(a), at 156.


359. MODEL PENAL CODE § 210.3 cmt. 7 (1980).

360. MODEL PENAL CODE § 210.2 cmt. 6 (1980).

361. See, e.g., MODEL PENAL CODE § 210.2 cmt. 6 n.78 (1980) (noting that thirty-six jurisdictions have limited the felony-murder rule by dividing felony-homicides into two or more grades, by lowering the degree of murder for felony homicide, or by outright abandoning it); N.Y. PENAL LAw § 125.25(3)(a)-(d) (McKinney 1987):

A person is guilty of murder in the second degree when: Acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants, except that in any prosecution under this subdivision, in which the defendant was...
that have held it in check.\textsuperscript{362} The Comments to the Model Penal Code suggest that some courts have imposed "covert" limitations on the doctrine, for example, "the use of especially demanding interpretations of legal or proximate causation."\textsuperscript{363} Other "overt" limitations include the merger doctrine\textsuperscript{364} and the requirement that the underlying felony be one inherently dangerous in the abstract.\textsuperscript{365} Courts have also developed various rules to limit felony murder when the killing is done by other not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

\textit{Id.}

\textsuperscript{362}. See, \textit{e.g.}, United States v. Heinlein, 490 F.2d 725 (D.C. Cir. 1973) (the Court found that unanticipated actions of a felon not in furtherance of the common purpose could no more be attributed to other felons than the actions of a policeman or victim could be attributed to them); People v. Satchell, 489 P.2d 1361 (Cal. 1972) (in determining whether a felony is inherently dangerous for purposes of the felony murder rule, the California Supreme Court determined that they should assess that felony in the abstract; they do not look to the specific facts of the case to determine whether the felony was inherently dangerous); People v. Phillips, 414 P.2d 353 (Cal. 1966) (only such felonies as are in themselves inherently dangerous to human life can support the application of the felony-murder rule); People v. Aaron, 299 N.W.2d 304 (Mich. 1980) (Michigan Supreme Court held that in order to convict a defendant of murder \textit{under the felony murder rule}, it "must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or to inflict great bodily harm."); State v. Canola, 374 A.2d 20 (N.J. 1977) (This opinion outlines two theories of felony murder: agency and proximate cause. The opinion also limits extending the felony murder rule beyond acts by the felon and his accomplice to lethal acts of third persons not in furtherance of the felonious scheme.).

\textsuperscript{363}. \texttt{MODEL PENAL CODE § 210.2 cmt. 6 (1980)}.

\textsuperscript{364}. \texttt{See MODEL PENAL CODE § 210.2 cmt. 6 (1980); see, \textit{e.g.}, People v. Smith, 678 P.2d 886 (Cal. 1984); People v. Wilson, 462 P.2d 22 (Cal. 1969)}.

\textsuperscript{365}. \texttt{See MODEL PENAL CODE § 210.2 cmt. 6 (1980); see, \textit{e.g.}, People v. Henderson, 560 P.2d 1180 (Cal. 1977); People v. Satchell, 489 P.2d 1361 (Cal. 1972); People v. Phillips, 414 P.2d 353 (Cal. 1966); .}
than one of the participants or when the victim is one of the co-
felons.\textsuperscript{366}

The existence of the felony murder rule may allow punish-
ment based on harm without proportional fault.\textsuperscript{367} But it hardly
supports the Supreme Court's cavalier statement that harm mat-
ters. Quite the contrary, the felony murder rule has been subject
to an enormous amount of criticism because it does produce
unfair and anomalous results.\textsuperscript{368} It is the odd and striking except-
tion to the general rule of culpability. The idea in \textit{Payne} that
harm independent of fault or mens rea is relevant to punishment
is on poor footing if the Court has in mind a doctrine like the
felony murder rule. The Supreme Court has recognized the crit-
icism of the rule and held that states cannot impose the death
penalty on a felon under the felony murder theory absent some
showing of individual culpability.\textsuperscript{369}

Justice Scalia characterized \textit{Booth} as follows: it imposed a
constitutional rule with "absolutely no basis in the constitutional
text, in historical practice, or in logic."\textsuperscript{370} He found its holding
that "a crime's unanticipated consequences must be deemed
'irrelevant' to the sentence" to be a "stunning ipse dixit,"\textsuperscript{371} that
"conflicts with a public sense of justice keen enough that it has
found voice in a nationwide 'victim's rights' movement."\textsuperscript{372}
Finally, he described \textit{Booth} as "egregiously wrong."\textsuperscript{373} While
Chief Justice used less flamboyant language, the majority opinion

\begin{itemize}
\item \textsuperscript{366} See, e.g., \textit{People v. Hickman}, 297 N.E.2d 582 (Ill. 1973), \textit{aff'd} 319
N.E.2d 511 (Ill. 1974); \textit{People v. Austin}, 120 N.W.2d 766 (Mich. 1963); \textit{State v.
1958).
\item \textsuperscript{367} See, e.g., \textit{State v. Canola}, 374 A.2d 20, 30 (N.J. 1977) (The New Jersey
Supreme Court struck down the felony murder conviction of the appellant,
finding that "[i]t appears regressive . . . to extend the application of the felony
murder rule beyond its classic common-law limitation to lethal acts of third
persons not in furtherance of the felonious scheme. Gradations of criminal
liability should accord with [the] degree of moral culpability for the actor's
conduct.").
\item \textsuperscript{368} See, e.g., \textit{United States v. Heinlein}, 490 F.2d 725 (D.C. Cir. 1973);
(Cal. 1966); \textit{People v. Aaron}, 299 N.W.2d 304 (Mich. 1980); \textit{State v. Canola}, 374
A.2d 20 (N.J. 1977); \textit{Joshua Dressler}, \textit{supra} note 316, § 31.07, at 464-65 (1987);
T.B. Macaulay, \textit{A Penal Code Prepared by the Indian Law Commissioners}, Note M, 64-
65 (1837); \textit{cf.} David Crump and Susan W. Crump, \textit{In Defense of the Felony Murder
\item \textsuperscript{369} \textit{Enmund v. Florida}, 458 U.S. 782 (1982).
\item \textsuperscript{370} \textit{Payne v. Tennessee}, 111 S. Ct. 2597, 2613 (1991) ( Scalia, J.,
concurring).
\item \textsuperscript{371} \textit{Id.}
\item \textsuperscript{372} \textit{Id.}
\item \textsuperscript{373} \textit{Id.}
\end{itemize}
takes a largely similar view of Booth. He asserted that, contrary to Booth's central premise, "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law." That has been the case both in defining the substantive offense and the relevant punishment.

This section of the article demonstrates how wrong Payne was. Booth did not hold that harm was irrelevant. Instead, it found that harm was irrelevant if the offender was unaware of the harm. In other words, some mens rea had to run to the harm. Rather than being "egregiously wrong" and a "stunning ipse dixit," Booth's holding is consistent with core assumptions of the criminal law. Only by setting up a strawman (that Booth made harm irrelevant in all cases) could the Court challenge Booth. Payne's central premise that harm matters independently of an offender's awareness of the harm is the anomaly, resting only on the exceptions to the general assumptions of the criminal law.

C. Overruling Payne

This article has argued that stare decisis reflects important institutional values. Especially in the context of controversial constitutional law cases, stare decisis upholds the ideal of a rule of law and lessens the effect of personal value judgments of individual justices. Hence, absent the traditional bases of an "artful" overruling, this article concluded that Payne was unwarranted.

This section argues that the Court will overrule Payne. That will be possible because of changes in court personnel and, perhaps, because of the increased sensitivity to institutional values demonstrated by Casey's plurality opinion. Unlike Payne's treatment of Booth, this section argues that by the time the Court is ready to reexamine Payne, it will have a principled basis upon which to overrule that decision on grounds in addition to simple disagreement with the Court's reasoning and result.

374. Id.
375. Id.
376. Id., at 2605-06.
378. See supra text accompanying notes 311-15.
379. See supra text accompanying notes 213-75.
380. See supra text accompanying notes 151-69.
381. See supra text accompanying notes 73-99.
382. See supra text accompanying notes 272-75.
Payne suggested unconvincingly that Booth had proved unworkable. That argument is especially ironic when one compares the potential confusion that flows from Payne's holding. This section reviews some of the confusion that will follow Payne and discusses some of the questionable results that are foreshadowed by the Court's decision.

Some states allow evidence not only about the emotional impact of the offense, but also about the family members' view about whether the death penalty should be imposed. Payne left open whether opinion evidence is consistent with the Eighth Amendment.

That question has already produced difficult litigation in lower courts. Prior to Payne, the Tenth Circuit upheld a trial court's refusal to allow relatives of a murder victim to testify against the imposition of the death penalty. The court did so on a number of grounds, including, most importantly, the argument that the evidence was irrelevant to the moral culpability of the offender. The court reexamined the issue after the Supreme Court handed down Payne.

The Tenth Circuit affirmed its earlier decision, upholding the judgment of sentence. It noted that the Supreme Court specifically reserved the question whether opinion evidence from family members was admissible. It argued plausibly that the contested evidence did not "relate to the harm caused by the defendant."

Robison demonstrates Payne's capacity to generate controversial issues that the Supreme Court will have to resolve. And while Robison's conclusion is defensible, it suggests issues not so easily resolved after Payne. For example, Robison's counsel might have attempted to introduce testimony that the execution of the defendant would not ease the pain of family members, but would

---

383. See supra text accompanying notes 217-64.
384. See infra text accompanying notes 382-420.
387. Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987).
388. Id. 1504-05.
390. Id. 1218.
391. Robison may be read narrowly as holding only that opinion evidence — either that death or life is appropriate — is irrelevant. Opinion evidence would appear unrelated to harm and so be inadmissible under Payne or to culpability and so be inadmissible under Booth.
increase their suffering. 392 If applied consistently, Payne would make that evidence admissible in light of its express statement that evidence "about the impact of the murder on the victim's family is relevant to the jury's decision . . . ." 393 Robison suggests other possible cases. For example, one can imagine cases in which a murder victim has abused his family and rather than causing profound grief, the death has freed the family. 394 If the victim's family members were willing to admit that, Payne makes that evidence admissible. But if imposition of the death penalty turns on something as unpredictable as whether family members are particularly forgiving or vengeful, Payne invites another random or arbitrary basis upon which the death penalty may be imposed. 395

Payne creates other anomalous results. For example, in the state's case-in-chief, rules of evidence typically prevent a prosecutor from putting into issue the character of the victim. 396 Unless the defendant puts in evidence relating to the victim's propensity for violence, character evidence may be irrelevant. 397 But even when relevant, the rule making victim character evidence inadmissible without more reflects courts' and legislatures' recognition that on balance, character evidence is too prejudicial. 398 Further, a defendant cannot introduce evidence of the victim's

392. If as in Payne, the prosecutor may argue that the death penalty will ease the victim's family's suffering because that is a measure of the harm caused by the defendant, a defendant would almost certainly be allowed to argue the reverse because that too would be related to the harm caused by the defendant. 393. Payne, 111 S. Ct. at 2609.

394. Take, for example, the story of Diane, whose husband had beaten her severely in the past and was molesting Diane's ten-year-old daughter. After Diane's brother learned of the abuse, he and his friends took Diane's husband for a car ride and bludgeoned him to death. "[Judges] do not understand that by the time actual murder has occurred in a violent family, the surviving family members may simply be so emotionally exhausted that all they are immediately capable of feeling, or of expressing, is relief that the abuse and terror have finally ceased." Lenore E. Walker, Terrifying Love: Why Battered Women Kill and How Society Responds 160-61 (1989). Another example is the story of Joyce Hawthorne. She and her children suffered 15 years of abuse at the hands of her husband who molested their daughter, repeatedly beat Joyce, night after night forced Joyce at gunpoint to have intercourse, and shot the children's dog. This violence escalated until Joyce shot him 9 times. Id. at 16-23. See also Jahnke v. State, 682 P.2d 991 (Wyo. 1984) (abused son killed father).

395. Booth, 482 U.S. at 505.

396. Fed. R. Evid. 404(a). Cf. Michelson v. U.S., 335 U.S. 469 (1948) (allowing the defendant to put his character at issue, but not allowing the prosecutor to do so until the defendant had opened the door).


character unless he contends that he was aware of the relevant propensity.\textsuperscript{399} One of the legitimate fears in cases involving provocation, is that the victim will be put on trial and that the jury will decide the case based on prejudice.\textsuperscript{400}

\textit{Payne} rejects the traditional insight that victim character evidence is too prejudicial to allow case by case balancing.\textsuperscript{401} Instead, \textit{Payne} stated that \textit{Booth}'s per se rule was unnecessary but recognized that in a given case, VIS may be "so unduly prejudicial that it renders the trial fundamentally unfair,"\textsuperscript{402} in violation of fourteenth amendment due process. Not surprisingly, post-\textit{Payne} litigants have raised due process challenges with some frequency.\textsuperscript{403} Fundamental fairness, however, invites confusion. Reliance on fundamental fairness as a measure of due process has often invited criticism of the Court precisely because the test is so vague and invites imposition of arbitrary subjective value judgments of individual justices.\textsuperscript{404} In the late 1930s through the

\textsuperscript{399} See \textsc{David W. Louise\textsc{l}l & Christopher B. Mueller}, \textsc{Federal Evidence} § 135 (1985).

\textsuperscript{400} \textit{Jahnke}, 682 P.2d at 1010 (Brown, J., specially concurring) ("In his defense, appellant employed the oldest, most common and most successful tactic in homicide cases. He put the deceased on trial.").

\textsuperscript{401} \textit{Payne}, 111 S. Ct. at 2609. (The Court states that the Eighth Amendment erects no per se bar to admission of victim impact evidence, but leaves it to the States' discretion whether or not to allow admission of victim impact evidence.)

\textsuperscript{402} \textit{Id.} at 2608.

\textsuperscript{403} See, e.g., People v. Stansbury, 4 Cal. 4th 1017 (1993) (defendant raised due process claim when there was a relitigation during the penalty phase of facts underlying defendant's prior convictions); People v. Raley, 2 Cal. 4th 870 (1992), \textit{cert. denied}, 113 S. Ct. 1352 (1993) (defendant argues that admission of certain evidence violated his due process rights because the jury was incapable of evaluating this evidence fairly, since this evidence had already convicted him of murder); People v. Clair, 2 Cal. 4th 629 (1992) (defendant raised a due process claim when the trial court refused to exclude certain evidence).

\textsuperscript{404} See, e.g., \textit{Rochin v. California}, 342 U.S. 165, 175 (1951) ("What the majority hold [sic] is that the Due Process Clause empowers this Court to nullify any state law if its application 'shocks the conscience,' offends 'a sense of justice,' or runs counter to the 'decencies of civilized conduct.' The majority emphasize [sic] that these statements do not refer to their own consciences or to their sense of justice and decency."); \textit{Adamson v. California}, 332 U.S. 46, 89-90 (1946) (Black, J., dissenting) ("I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing the Bill of Rights . . . . To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution. . . . But this formula [of natural-law-due-process] also has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at
mid-1960s, the Supreme Court relied on a similar test in assessing due process voluntariness claims in confession cases.\textsuperscript{405} The confusion and lack of guidance offered to lower courts moved the Court to adopt \textit{Miranda}'s prophylactic warnings.\textsuperscript{406} There is no reason to think that a fundamental fairness "analysis" will fare better in this context. Whatever confusion \textit{Booth} caused will be tame by comparison to \textit{Payne}'s invitation to examine VIS in light of a fundamental fairness argument.

Other anomalies inhere in \textit{Payne}'s holding: most commentators who have criticized \textit{Payne} have pointed to the arbitrary and unequal results that flow from \textit{Payne}'s holding.\textsuperscript{407} Despite the

\textsuperscript{405} See, e.g., Anthony G. Amsterdam, \textit{The Supreme Court and the Rights of Suspects in Criminal Cases}, 45 N.Y.U. L. Rev. 785, 805-06 (1970) (\textit{Brown v. Mississippi} held that defendant had been denied due process of law when he was "strung up" to obtain his "voluntary" confession. "Admittedly, there was no very obvious theoretical ground for this holding. . . . In 1936, it was far from evident why the due process clause [sic] required anything more of state criminal proceedings than a regular and fair trial, giving the defendant a regular and fair opportunity to contest his guilt under state evidentiary rules . . . ."") Amsterdam notes that the incorporation of the Fifth Amendment (forbidding compulsory self-incrimination, applied only to federal criminal proceedings) into the Due Process Clause of the Fourteenth Amendment (requiring that state courts exclude evidence obtained unconstitutionally) were products of a much later era. In addition, Amsterdam suggests that because the whole "voluntary" confession procedure in \textit{Brown} was so shocking, the Supreme Court reversed convictions based on these issues, since such a conviction was "revolting to the sense of justice." \textit{Id.} at 806); Geoffrey R. Stone, \textit{The Miranda Doctrine in the Burger Court}, 1977 Sup. Ct. Rev. 99, 168-69 (Decisions made after \textit{Miranda} "do not appear to rest upon any unifying, coherent principle other than a fundamental rejection of the premises of \textit{Miranda} and an apparent desire to return, ultimately, to the 'voluntariness' standard. . . . From the standpoint of candor and craftsmanship, however, the opinions, taken as a whole, are highly unsatisfactory. In its unyielding determination to reach the desired result, the Court has too often resorted to distortion of the record, disregard of the precedents, and an unwillingness honestly to explain or to justify its conclusions.")


\textsuperscript{407} See, e.g., Vivian Berger, \textit{Payne and Suffering - A Personal Reflection and a Victim-Centered Critique}, 20 Fla. St. U. L. Rev. 21 (1992) (Berger suggests that because of Payne's holding, unexpressed biases, such as race, can and will be expressed and exploited.); Markus D. Dubber, \textit{Regulating the Tender Heart When the Axe is Ready to Strike}, 41 Buff. L. Rev. 85 (1993) (explaining that the "newly created paradigm of \textit{Payne} has discarded accuracy of capital sentencing and
Court's insistence to the contrary, defendants are more likely to be subject to the death penalty because of factors that are unquestionably impermissible. For example, in ruling in McCleskey v. Kemp that the death penalty is not unconstitutional despite evidence that race of the victim and of the offender are factors in its imposition, the Court insisted that basing a decision on race is impermissible. But juries will be invited to assess the status of the victim; insofar as race also correlates with wealth and access to other social benefits, Payne will increase the skewing already found in the Baldus study, demonstrating that the race of the victim and the perpetrator did correlate with the imposition of the death penalty.

If taken at face value, Payne has opened up another new procedural nightmare for courts trying death penalty cases. Payne holds, after all, that the character of the victim is relevant in assessing the harm to society. The logical extension is that a defendant, even without the prosecutor putting in issue the character of the victim, can introduce evidence (without regard to provocation or self defense) about the bad character of the vic-

408. See Payne, 111 S. Ct. at 2607 (Rehnquist argues that admitting victim impact evidence will not lead to “comparative judgments” of victims based on whether the jury finds them to be “assets to their community or not.”).


410. See, e.g., David R. Dow, When Law Bows to Politics: Explaining Payne v. Tennessee, 26 U.C. Davis L. Rev. 157, 175 n.78 (1992) (The author suggests that a defendant may try to use the rule of Payne, and might want to suggest, "probably by indirection, that the victim of his crime was vermin. Payne seems to require that such a proffer be admissible.").

411. See, e.g., Census Says Minorities Trail Whites in Homeownership, L.A. Times, June 22, 1993, at D2 (Census figures show that the median income of black households was $18,807 in 1991, compared to $31,569 for white households. The median income for Latinos was $22,691.).


413. Payne v. Tennessee, 111 S. Ct. 2597, 2607 (1991) (The Court states that victim impact statements are designed 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.).
tim, again without any showing that the defendant considered the victim’s poor character. Faced with the death penalty, and with the Court’s view that harm to society is relevant in deciding whether the defendant should die, a defendant ought to engage in character assassination.

Booth suggested that counsel will hesitate to challenge positive victim impact evidence. After Payne, one wonders whether counsel has a choice. In addition, Booth’s assumption that counsel is hesitant to put a crime victim on trial is open to serious question. For example, in rape prosecutions and in homicide cases involving self defense and provocation, attorneys have not been shy about placing victims on trial. In defending Bernard Goetz, for example, Barry Slotnick cast the victims as a “gang of four,” “savages” and “predators.” In cases involving provocation, counsel routinely put the victim on trial. In rape prosecutions, women routinely felt victimized a second time on cross

414. Compare Booth with Payne. i.e., Booth required a showing that the victim’s character related to the circumstances of the crime that a defendant knew of them. Payne rejects that.

415. See David R. Dow, When Law Bows to Politics: Explaining Payne v. Tennessee, 26 U.C. DAVIS L. REV. 157, 175 n.78 (1992) (“A defendant might want to suggest, probably by indirectness, that the victim of his crime was vermin.” Dow expresses dismay that the new rule handed down by Payne, if it is retroactively applied, enables the “defendant [to] raise the new rule in collateral proceedings.”).


417. See Huffman v. State, 301 So. 2d 815, 816 (Fla. Dist. Ct. App. 1974) (defense counsel probed victim regarding her past sexual conduct); State v. Pace, 456 P.2d 197, 202-03 (N.M. 1969) (introducing by prosecution of testimony as to the good character of the victim was admissible because defense had testified that the deceased had made homosexual advances before the killing, thereby opening the door to rebuttal); State v. Griffin, 529 P.2d 399, 404 (Or. Ct. App. 1974) (“A defendant claiming self-defense ought to be able to present evidence of the violent character of deceased when intoxicated when there is evidence supporting such a position.”); Jahnke v. State, 682 P.2d 991, 1010 (Wyo. 1984) (Brown, J., concurring) (The defendant was a boy who had shot and killed his father. The cornerstone of his defense was that he and his family had been brutalized by his father, and that the killing was carried out to end this abuse. “Defense witnesses had a motive to make deceased look like a bad man; they wanted to make the jury believe that appellant’s father deserved to be executed.”); Vivian Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1, 32 (1977) (because of defense counsel’s propensity to attack the chastity of rape victims, states have enacted rape shield laws which have curbed the use of evidence respecting the rape victim’s sexual history).


419. See, e.g., Willard Gaylin, The Killing of Bonnie Garland 206-07 (1982) (The defendant killed his girlfriend with a hammer. Of the trial, defense counsel stated, “It was important to taint a little bit.”)
examination, at least part of the motivation for wide adoption of Rape Shield laws. That is, defense attorneys know how to sully the victim.

*Payne* invites prosecutors to offer glowing accounts of homicide victims. The logical way in which to rebut that evidence is to attempt to demonstrate that the victim was not a worthy person. Many commentators have argued that the victim is not given a voice in the criminal trial, that no one speaks for the victim. In part, the capitulation to victims' rights advocates explains the result in *Payne*. But the cost of that victory is that the victim will be on trial at the sentencing phase if the accused hopes to rebut the glowing portrayal offered by the state.

*Payne* has the potential to create confusion because of its invitation to challenge VIS on a case by case basis. It may exacerbate the unequal distribution of the imposition of the death penalty along racial and economic grounds. It implicitly invites defense counsel to engage in character assassination of the deceased, contrary to the original hopes of victims' rights groups. Those issues will invite the Court to begin eroding *Payne*’s foundation almost immediately.

Once *Payne* has been weakened by its own incoherence, the Court will have the opportunity to revisit whether *Payne* or *Booth* was an aberration, an unwarranted departure from a consistent line of precedent. As argued earlier, *Booth* was consistent with the general premises of the criminal law. Harm matters, but


422. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2627 & n.1 (1991) (Stevens, J., dissenting) ("In his concurring opinion today [*see ante* at 2613], Justice Scalia again relies on the popular opinion that has 'found voice in a nationwide "victim's rights" movement.'"); David R. Dow, *When Law Bows to Politics: Explaining Payne v. Tennessee*, 26 U.C. Davis L. Rev. 157, 169 (1992) (noting how Scalia has succumbed to political concerns — especially the victim rights movement).


424. Cf. Jerold H. Israel, *Gideon v. Wainwright: The 'Art' of Overruling*, 1963 Sup. Ct. Rev. 211, 222-23 ("[T]he result of applying a particular doctrine has been exactly the opposite of that intended by the earlier Court and that the achievement of this original objective can in fact be accomplished only through reversal of the original decision itself."); (citing Fay v. Noor, 372 U.S. 391, 437 (1963) (non-constitutional overruling)); Id. at 224-25 (discussing erosion).

425. See *supra* text accompanying notes 310-74.
not as an independent condition; harm relates to desert when an offender is aware of or intends the harm.\textsuperscript{426}

Further, assessing whether \textit{Payne} or \textit{Booth} was aberrational will require reexamination of the Supreme Court's death penalty jurisprudence. No commentator would be willing to argue that the Supreme Court's death penalty case law runs a smooth and consistent course.\textsuperscript{427} But the Court has developed important themes\textsuperscript{428} in its different lines of precedent. As discussed below, Booth followed directly from one important line of precedent.\textsuperscript{429}

In \textit{Furman v. Georgia}, the Court appeared concerned primarily with the arbitrary imposition of the death penalty.\textsuperscript{430} As stated in a later plurality opinion, the Court is concerned when there is

\begin{footnotesize}
\begin{enumerate}
\item[426.] See, e.g., Markus D. Dubber, \textit{Regulating the Tender Heart When the Axe is Ready to Strike}, 41 Biff. L. Rev. 85, 132 (1993) ("According to the standard retributive theory underlying the Court's capital jurisprudence, retributive desert falls into two components: moral culpability and harm."); R.P. Peerenboom, \textit{Victim Harm, Retributivism and Capital Punishment: A Philosophical Critique of Payne v. Tennessee}, 20 Pepp. L. Rev. 25, 71 (1992) (arguing that "fixing punishment in accordance with the harm caused is not objectionable where the actor possesses the requisite mens rea with respect to that harm").

\item[427.] See Steven G. Gey, \textit{Justice Scalia's Death Penalty}, 20 Fla. St. U. L. Rev. 67, 81 (1999) (Gey describes the tension between the Court's two irreconcilable objectives in sentencing: that is the elimination of discretion while preserving individualized sentencing. In each successive case, the Court has veered to one side or the other. Because of these different approaches, Gey laments, "[I]t is futile even to pretend that the system can work fairly or systematically." (Id. at 132)).

\item[428.] See Steven G. Gey, \textit{Justice Scalia's Death Penalty}, 20 Fla. St. U. L. Rev. 67, 81 (1999) (Two important, but inconsistently applied objectives of the Court in its capital punishment decisions have been the elimination of discretion in capital sentencing and the preservation of individualized sentencing in death penalty cases. A third objective has been the use of aggravating circumstances, the treatment of which "has been guided by the goal of eliminating discretion and thereby [theoretically] eliminating arbitrariness." (Id. at 87)).

\item[429.] See infra text accompanying notes 433-35.

\item[430.] Furman v. Georgia, 408 U.S. 238, 255-56 (1972) (Douglas, J., concurring) ("We have, I fear, taken in practice the same position [where punishment increased in severity as social status diminished] partially as a result of making the death penalty discretionary."); \textit{id.} at 274, 277 (Brennan, J., concurring) ("[W]e are aided . . . by a second principle inherent in the [Cruel and Unusual Punishments] Clause — that the State must not arbitrarily inflict a severe punishment . . . The more significant function of the Clause, therefore, is to protect against the danger of their arbitrary infliction."); \textit{id.} at 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); \textit{id.} at 364 (Marshall, J., concurring) ("Capital punishment is imposed discriminatorily against certain identifiable classes of people.").
\end{enumerate}
\end{footnotesize}
"no principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not." 431

Without always acknowledging the potential inconsistency, the Court has also held that a state must allow a defendant wide latitude in introducing mitigating evidence during the sentencing phase. 432 Those cases, in effect, gave rise to the problem as seen by the Payne majority. Counsel will typically marshall evidence of difficult conditions surrounding the defendant’s childhood and of any kindness shown by the defendant. 433 The evidence is allowed to show that the defendant is a "uniquely individual human being." 434

The perceived inconsistency between those two lines of cases is that focusing on unique characteristics of the defendant seems to invite arbitrariness. For example, a statute that makes the death penalty mandatory for anyone convicted of murder would avoid the concern about its imposition being unpredictable. One would know, unless juries arbitrarily refused to find a defendant guilty of murder, in advance whether the death penalty would be imposed. But in such a system, there would be no room for evidence of the defendant’s uniqueness. 435


433. See, e.g., Payne v. Tennessee, 111 S. Ct. 2597, 2602 (1991) (evidence that Payne was a very caring person who did not use drugs or drink, that he was mentally handicapped, and that he was “the most polite prisoner” offered in mitigation); Eddings v. Oklahoma, 455 U.S. 104 (1982) (evidence of turbulent family history, of beatings by a harsh father, and of serious emotional disturbance offered in mitigation).


Revisiting *Payne* would allow the Court an opportunity to clarify the law and to deal with apparent inconsistencies within its death penalty case law. In fact, the Court may be able to explain both its concern about equality of treatment, that is, avoiding arbitrariness, and about the uniqueness of the individual. In a number of post-*Furman* cases and in *Booth*, the Court imposed substantive limitations on the imposition of the death penalty. Initially, an offender’s conduct had to result in a death — that is, sufficient harm had to result. But once a death has occurred, the death penalty must be reserved for the most culpable offenders based on the principle of proportionality. For example, in *Enmund v. Florida*, the Court found that a defendant could not be put to death if he “does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.” The principle of proportionality focuses most importantly on the offender’s moral culpability.

The Court has never fully developed its view of the moral justification for the imposition of the death penalty. But cases like *Enmund* and *Coker v. Georgia* strongly suggest that the Court rejects a utilitarian deterrence rationale and, along with prevailing philosophical discussions of punishment, believes that the death penalty is justified based on the offender’s just deserts. In the scenario that I have posed whereby the Court reexamines *Payne*, the Court would have the opportunity to clarify the philosophical justification(s) for the death penalty. The Court would

436. *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (determining that imposing the death penalty in a case of rape is in violation of the Eighth Amendment even if surrounded by aggravating circumstances).


438. See R.P. Peerenboom, *Victim Harm, Retributivism and Capital Punishment: A Philosophical Critique of Payne v. Tennessee*, 20 Pepper. L. Rev. 25, 39 (1992) (Professor Peerenboom points out that if capital punishment jurisprudence propounds to impose the death penalty based upon “rational criteria” and proportionate to the offense, then if victim impact statements are morally irrelevant to culpability, it can hardly provide a rational and proportionate basis for capital punishment. (quoting McCleskey v. Kemp 481 U.S. 279, 305-06 (1987))).

439. See Steve G. Gey, *Justice Scalia’s Death Penalty*, 20 Fla. St. U. L. Rev. 67, 103-04 (1992) (“Starting with *Gregg* and the other 1976 cases, the justices focused their attention almost exclusively on the minutiae of capital sentencing while ignoring the larger issues of constitutional justification for the death penalty.”).

440. *Id.* at 112-13. The author argues that the Court has rejected the utilitarian deterrence rationale for applying the death penalty, because the Court could not justify imposing it as punishment for crimes other than those involving the “unjustified taking of human life” (quoting *Coker v. Georgia*, 433 U.S. 584, 598 (1977)) *Id.*
be justified in limiting the death penalty by reference to an offender's just deserts.441

Insofar as the Court adopts the view that the death penalty is reserved for the most culpable offenders, the two lines of cases, one limiting its arbitrary imposition and two requiring guided discretion and admission into evidence of mitigating circumstances, can be lined up. Whether a decision is arbitrary or unequal cannot be resolved until one knows the relevant criteria upon which to judge rationality or equality.442 A mandatory death sentence would be arbitrary and might result in unequal treatment because offenders whose moral culpability might readily be distinguished would be treated in the same way. Sentencing to death a person who carries out a loved one's wishes and is guilty of mercy killing and a mass murderer who tortured his victims would not be equal treatment if moral blame is the relevant standard.

Clarifying that just deserts is the underlying moral justification for the death penalty would allow the Court to make coherent two lines of precedent. A third line of precedent would still need to be addressed. The Court has upheld various state statutes that allow the imposition of the death penalty based on the state's showing of aggravating circumstances.443 In some instances, aggravating circumstances relate to the offender's culpability. An offender who tortures his victim or otherwise commits a murder in a cruel manner demonstrates a kind of

441. At this late date, and given explicit reference to capital punishment, for example, in the Fifth Amendment, one cannot seriously contend that the Court will abrogate the death penalty. Instead, it will seek rational limitations on its imposition. Basing death eligibility on the actor's just deserts is morally defensible. See Steven G. Gey, Justice Scalia's Death Penalty, 20 FLA. ST. U. L. REV. 67, 118 (1992) (arguing that a retributivist could justify the death penalty along lines of just desert).

442. See Michael Vitiello, Reconsidering Rehabilitation, 65 TUL. L. REV. 1011, 1051-53 (1991) (determining the equality of punishment makes sense only when we know the relevant criteria).

viciousness that increases his culpability.444 But predictions of future dangerousness do not relate to the offender's culpability.445 The offender who kills quickly even before allowing his victim to become aware of the impending death nonetheless may be so psychopathic to represent a continuing threat.

That line of cases, especially in light of grave doubts about the accuracy of such predictions446 and available security measures that may reduce future dangerousness,447 might be reexamined by the Court. If the Court were to articulate a clear justification for the death penalty, it might have to overturn those cases that allow factors unrelated to the offender's culpability. Limiting the death sentence to the most culpable offenders would undercut Payne's central premise, that harm without reference to blame is relevant to punishment.

The critical point though in terms of Booth is this: a dominant theme in the Court's death penalty case law has focused on the core question of an offender's culpability.448 Insofar as the death penalty is available, it should single out the most heinous offenders — guided discretion that does so is not arbitrary.449 The result in Booth flowed naturally from that line of precedent.

444. Model Penal Code § 210.6 cmt. 6 (1980) (The Model Penal Code recognizes that the "style of killing [is] indicative of utter depravity that imposition of the ultimate sanction should be considered.").

445. See Steven G. Gey, Justice Scalia's Death Penalty, 20 Fla. St. U. L. Rev. 67, 118 (1992) ("A retributivist justifies punishment only as a response to a defendant's past immoral conduct. Whether the defendant is likely to do harm to unknown people in the future is irrelevant to a retributivist's determination of the defendant's just deserts.").


But see Steven G. Gey, Justice Scalia's Death Penalty, 20 Fla. St. U. L. Rev. 67, 118 n.216 (1992) (However, in Texas, Dr. Grigson, AKA “Dr. Death,” is known "for his highly effective testimony that defendants he never met are sociopaths who will certainly commit future acts of criminal violence if permitted to live.").


448. See Peerenboom, supra note 435.

449. See Ronald J. Mann, The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment, 29 Hous. L. Rev. 493, 516 (1992). The author suggests that the Gregg statute (which called for the presentation of any ten statutory aggravating circumstances or any mitigating circumstances at the penalty phase; the sentencer has the discretion not to impose the death penalty even if aggravating circumstances are found) is acceptable because it "provides for an individualized consideration of the defendant." Id.
If an offender is unaware of the harm caused by his conduct, the harm is irrelevant to the key question of culpability.

V. CONCLUSION

Payne represents a benchmark of the activism of the Rehnquist Court. The Court reached out to decide a constitutional question not pursued by the litigants.\(^\text{450}\) The Court did not make a plausible case for overruling recent precedent.\(^\text{451}\) Chief Justice Rehnquist treated stare decisis as a matter of convenience, rather than principle, and suggested, somewhat misleadingly,\(^\text{452}\) that the "Court has never felt constrained to follow precedent" if the previous decision was badly reasoned or proved unworkable.\(^\text{453}\)

Payne ignored the significant institutional values reflected in the doctrine of stare decisis.\(^\text{454}\) Ironically, justices in the Payne majority were appointed with fanfare and promises that they would not substitute their own value preferences in deciding cases. But stare decisis, the doctrine treated so cavalierly in Payne, does restrain judges from imposing their own value preferences.\(^\text{455}\) Payne was a victory for its majority at the expense of the rule of law.\(^\text{456}\)

Despite Payne's statement that the Court has not been constrained by stare decisis in certain cases, the Court has traditionally developed an "art" of overruling precedent. It has looked to changed circumstances, the lessons of experience, and erosion of earlier precedent to justify decisions to overrule precedent.\(^\text{457}\) As this article demonstrates, Payne made no such case against Booth and indeed could not, given its recent vintage. At most, Payne demonstrated that its new majority disagreed with the result in Booth, hardly a principled or sufficient reason to overrule recent precedent.\(^\text{458}\) That is especially true in light of what this article has argued: Payne's emphasis on the role of harm in the criminal law is at odds with the bulk of criminal law doctrine, both the insistence of culpability (mens rea) necessary to define criminal-

\(^{451}\) See supra text accompanying notes 192-275.
\(^{452}\) See supra text accompanying notes 107-18.
\(^{454}\) See supra text accompanying notes 119-35.
\(^{455}\) See supra text accompanying notes 156-49.
\(^{456}\) See supra text accompanying notes 119-35, 170-90.
\(^{457}\) See supra text accompanying notes 170-90.
\(^{458}\) See supra text accompanying notes 191-275.
ity in the first instance and the relevance of culpability in determining an offender's sentence. Seldom is harm without more sufficient to justify punishment or criminalizing the underlying conduct.459

This article argued that a new majority will be able to overrule Payne in a principled manner. Payne contains the source of its own unravelling; it invites results that are almost universally deemed unacceptable.460 Putting the decedent on trial will make all but the most callous balk. Payne invites litigation that will lead to its erosion. Consistent with traditional criteria for overruling precedent, the Court will have to reexamine Payne and will bring the use of VIS back in line with traditional concepts of the criminal law461 and will allow their use only consistent with notions of the offender’s just desert.462

459. See supra text accompanying notes 290-375.
460. See supra text accompanying notes 388-419.
461. See supra text accompanying notes 296-375.
462. See supra text accompanying notes 424-46.