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JUSTICE SCALIA'S DEATH PENALTY

STEVEN G. GEY*

THE death penalty has plagued the United States Supreme Court ever since 1976, when the Court ended a four-year hiatus on the imposition of death as a criminal punishment. The Court struck down all existing death penalty statutes in 1972 on the ground that they were unconstitutionally arbitrary.¹ In Justice Stewart's colorful phrase, the Court found that the death penalty as applied in 1972 was "cruel and unusual in the same way that being struck by lightning is cruel and unusual."² Individuals executed under that system constituted "a capriciously selected random handful,"³ whose cases could not be distinguished logically from the far larger number of murder cases in which the death penalty had not been imposed.

The Court approved a new generation of death penalty statutes in 1976.⁴ These statutes included provisions specifying the aggravating circumstances that justified the application of the death penalty. The Court held that by guiding the discretion of the sentencer at capital trials in this way, these new statutes cured the arbitrariness that had characterized the statutes struck down in *Furman v. Georgia*.⁵ Since 1976, the Court has been inundated with appeals from capital defendants asserting that the new capital punishment system contains myriad constitutional flaws. To fulfill its 1976 promise to eradicate the arbitrary nature of the death penalty's earlier incarnation, the Court has been forced to immerse itself in the details of the new system it helped create.

Despite the deluge of litigation since the 1976 decisions, certain aspects of death penalty law remain unresolved. Arguably the most important issue that remains unresolved is also the most basic: What is the constitutionally approved purpose of the death penalty? The Court has avoided answering this question, choosing instead to defer to state judgments about justification, while addressing the constitu-

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1. *Furman v. Georgia*, 408 U.S. 238 (1972).
2. *Id.* at 309 (Stewart, J., concurring).
3. *Id.* at 309-10. (Stewart, J., concurring).
4. See, e.g., *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).
5. 408 U.S. 238 (1972).

tional problems surrounding the death penalty in purely procedural terms. The Court has treated the "arbitrariness" factor as a mechanical matter having to do only with the exactitude of the fit between the statutorily defined aggravating factors and the particular facts of cases prosecuted under the system. Thus, the Court has spent copious amounts of time and energy fine-tuning the process. At the same time, the Court has avoided addressing the more fundamental aspect of arbitrariness: The states imposing the death penalty have never been able to articulate a rational justification for the death penalty.

The Court's many attempts to fine-tune the mechanics of the capital punishment process are incoherent because there is no constitutionally approved guiding objective for the death penalty. The Court has never specified what the capital punishment process is intended to achieve. Thus, no matter how precisely the Court defines the characteristics that identify who may be put to death, the deaths themselves have no legitimate purpose and are therefore unconstitutionally arbitrary.

Three recent cases regarding the use of victim impact statements during the penalty phase of capital trials illustrate the Court's continuing dilemma concerning the death penalty.⁶ These cases are unusual in that several justices use the victim impact statement issue as an opportunity to discuss their views on the purposes of capital punishment. This Article examines the views expressed in these cases, focusing especially on those of Justice Scalia. In *Booth v. Maryland*, the first victim-impact case, Justice Powell wrote that such statements should not be introduced at the penalty phase of capital trials because they are irrelevant to the defendant's moral blameworthiness.⁷ Justice Scalia, on the other hand, argued that the death penalty is not intended solely to punish moral blameworthiness. Rather, he argued that another major objective of the death penalty is to sanction actions relating to the defendant's "personal responsibility."⁸ In other words, in Scalia's view, death penalty statutes are intended to inflict punishment commensurate with the degree of harm which may be considered independent of the defendant's moral blameworthiness.

I will argue in this Article that there are two major problems with Scalia's proposal. First, justifying the death penalty as punishment for personal responsibility, as Scalia recommends, in effect permits the state to punish a defendant more severely because he or she killed a

6. See *Payne v. Tennessee*, 111 S. Ct. 2597 (1991); *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

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

8. *Id.* at 519 (Scalia, J., dissenting).

well-known or well-regarded victim. Leaving aside the inegalitarian (and possibly racial) overtones of this recommendation, Justice Scalia's suggested objective cannot be supported by an analysis of the factors in most death penalty statutes. I will argue that the factors in these statutes indicate a much more elemental rationale for the death penalty than the desire to punish either moral blameworthiness or personal responsibility. In short, a single theme seems to motivate death penalty statutes: fear of the incorrigible murderer. I will argue that this motivation is an improper basis for punishment, insofar as it is based on unprovable conjecture about the defendant's future conduct, and because it apportions punishment based on society's own insecure group psychology rather than on the nature and degree of the defendant's guilt.

Second, I will argue that Justice Scalia's focus on popular outrage as a justification for the introduction of victim impact statements in capital trials suggests an even more unsavory rationale for the death penalty: undifferentiated vengeance. Justice Scalia implies that the potential for injustice regarding a particular capital defendant is outweighed by society's need to use capital trials to purge its collective anger and moral outrage at violent crime. By permitting victim impact evidence to be used in capital sentencing, Justice Scalia suggests that the Constitution permits individual justice to be sacrificed for the needs of society at large. Under Justice Scalia's system, capital murder trials may be used to vent society's collective outrage, and individual capital defendants may be used as agents of this psychic purgation. This use of capital punishment as a collective moral palliative moves beyond traditional arguments based on moral retribution into the realm of amoral vengeance. I will argue in the concluding section that this move represents the final defeat of the Court's stated goal of removing arbitrariness from individual capital trials.

I. THE TWISTED PATH OF THE VICTIM IMPACT STATEMENT IN DEATH PENALTY CASES

The United States Supreme Court has issued three opinions over a period of only five years addressing the use of victim impact statements at the penalty phase of death penalty trials.⁹ On its face, this narrow and technical evidentiary issue hardly seems worth so much of the Court's time and energy. Yet this issue also has produced some of the Court's more caustic recent dissents, several unusual procedural snafus by the Court's conservative majority, and an unseemly scram-

9. See cases cited *supra* note 6.

ble to ensure that the Court's early decisions in favor of defendants were reversed during the very first term after Justice Souter's appointment shifted the Court's majority on this issue in favor of the state.¹⁰

Apart from providing entertaining judicial theater, these cases also illustrate the central problem that has characterized death penalty jurisprudence since the Court once again permitted executions in 1976. Like most death penalty issues that come before the Court, the Court treated the victim impact statement issue as a practical question of procedural justice. Both opponents and proponents of victim impact evidence couched the issue in terms of how such evidence factors into the elaborate system of guided discretion that distinguishes modern capital sentencing schemes. Although the debate over victim impact evidence thus was cast in traditional evidentiary terms of relevance, this "relevance" debate was carried on within the Byzantine constitutional framework of capital punishment law, in which certain types of evidence are relevant for mitigating a sentence but not for aggravating a sentence. The conservatives on the Court used the victim impact statement issue to attack the constitutional framework itself, arguing that the discretionary premises now built into the system should be modified to offer more sentencing discretion in favor of the prosecutor and less in favor of the defense.

A. *The Cases*

The Court has issued a new victim impact statement opinion every other year since 1987. In the first two cases, *Booth v. Maryland*¹¹ in 1987 and *South Carolina v. Gathers*¹² in 1989, the Court voted 5-4 to preclude victim impact statements at the penalty phase of a death penalty trial. In the third case, *Payne v. Tennessee*,¹³ a Court free of Justice Brennan's vote and influence voted 6-3 to overrule both earlier cases, thus permitting the introduction of these statements.¹⁴

10. See *infra* note 14.

11. 482 U.S. 496 (1987).

12. 490 U.S. 805 (1989).

13. 111 S. Ct. 2597 (1991).

14. The *Booth* majority actually lost its crucial fifth vote when Justice Powell retired in 1988. In theory, *Gathers* should have been the case that overruled the *Booth* rule, but Justice O'Connor chose to write a narrow dissent in *Gathers*. *South Carolina v. Gathers*, 490 U.S. 805, 812 (1989) (O'Connor, J., dissenting). She asserted that although she remained ready to overrule *Booth*, *Booth* did not apply to the statements the prosecutor made in *Gathers*. *Id.* at 813-14 (O'Connor, J., dissenting). O'Connor's attempt to distinguish between prosecutorial statements about the murder victim and statements about the murder victim's family split hairs too finely for Justice White, who dissented in *Booth*. White noted curtly that "[u]nless *Booth* is to be overruled, the judgment below must be affirmed," *Gathers*, 490 U.S. at 812 (White, J., concurring) (citation omitted), thus providing Justice Brennan with the fifth vote to keep *Booth* alive

Relevant factual differences in the cases are minor. In *Booth* the Court prohibited the application in death penalty cases of a Maryland

for another few years.

After Justice Brennan's retirement in July 1990, the Court's conservatives once again took aim at *Booth*. However, the conservatives' haste to overrule *Booth* and *Gathers* at times made them resemble the gang that couldn't shoot straight. The Court granted certiorari on a case containing *Booth* issues on the first day of its 1990-91 term, *Ohio v. Huertas*, 111 S. Ct. 39 (1990), which was the Court's first day of business following Justice Brennan's resignation. Unfortunately, the Ohio Supreme Court's decision overturning the death sentence in *Huertas* relied explicitly on state evidentiary law, not on the federal constitutional rule articulated in *Booth*. See *State v. Huertas*, 553 N.E.2d 1058 (Ohio 1990). According to the adequate and independent state grounds doctrine, any ruling from the United States Supreme Court would be an advisory opinion and therefore a violation of the Court's authority under Article III. *Huertas*' counsel pointed this out to the Court in her initial papers opposing certiorari, and reminded the Court again in a motion to dismiss certiorari as improvidently granted. Even the State of Ohio was sheepish about the relevance of *Booth* and *Gathers* to the *Huertas* case. The State did not even argue in its brief to the Supreme Court that *Booth* and *Gathers* applied; this contention was merely included in its request for relief. See Brief for Appellant, *Ohio v. Huertas*, 111 S. Ct. 805 (1991) (No. 89-1944).

The Court denied *Huertas*' motion to dismiss certiorari as improvidently granted, 111 S. Ct. 383 (1990), and held oral argument on January 16, 1991. To no one's great surprise, the oral argument in *Huertas* revolved largely around the state-law basis of the Ohio Supreme Court's ruling. Six days after oral argument, the Court issued a one-sentence order dismissing certiorari as improvidently granted. *Ohio v. Huertas*, 111 S. Ct. 805 (1991).

Although the 1990-91 Term was nearly half over, the Court's conservative majority was not ready to let *Booth* and *Gathers* survive another year. On February 15, 1991, the Court granted certiorari on another *Booth/Gathers* case. See *Payne v. Tennessee*, 111 S. Ct. 1031 (1991). The Court's new majority eventually used *Payne* as a vehicle for overruling the two prior cases. Once again, the Court's unseemly haste to overrule *Booth* and *Gathers* raised questions about its judgment and its technical competence. First, the Tennessee Supreme Court had ruled that even if there was a *Booth* error, the error was harmless beyond a reasonable doubt. See *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990). Thus, the constitutionality of *Booth* was not even an issue in the case. Both parties recognized this. Neither party in the case had asked the Court to reconsider the constitutionality of *Booth*. So the Supreme Court's order included not just the standard sentence granting certiorari, but also a directive to the parties instructing them to brief an issue that they had not even raised. See *Payne v. Tennessee*, 111 S. Ct. 1031 (1991). There are indications that the Court was almost beside itself in its haste to bury *Booth* and *Gathers*. Monday, February 15, 1991, was a federal holiday. The Court usually issues orders on the Tuesday following a federal holiday that falls on a Monday, but the order granting certiorari in *Payne* was issued on the holiday itself. See Stephen Wermiel, *Supreme Court's Conservative Majority Again Stumbles on Victim-Rights Issue*, WALL ST. J., Feb. 25, 1991, at 7B. In addition, the Court had to confront another obstacle in the form of its own rules. February 15 was so late in the Supreme Court's term that the parties could not observe the regular briefing schedule and still argue the case in time for the Court to issue an opinion before its summer recess. The Court dispensed with this minor obstacle by expediting the briefing schedule and setting oral argument for the following April. *Id.*

The Court's comedy of errors did not stop there. In its rush to decide an issue the parties hadn't asked the Court to address, the Supreme Court neglected to note that the parties had asked the Court to decide two other issues. See Petition for Certiorari, *Payne v. Tennessee*, 111 S. Ct. 1031 (1991) (No. 90-5721). So after issuing its extraordinary order on a holiday (presumably to permit the parties to start as soon as possible on their briefs, which were now subject to a highly abbreviated briefing schedule), the Court had to issue an amended certiorari order on February 19 to make it clear that the justices were only interested in the *Booth/Gathers* issue and

statute requiring the introduction of a victim impact statement. The statute allowed the prosecutor either to read the statement to the jury or to call the victim's family members to testify about such things as the economic loss suffered because of the victim's death, the change in the family's personal welfare and relationships, and the family members' psychological injury.¹⁵ In response to a motion by Booth's attorney, the prosecutor at Booth's trial simply read the statements to the jury rather than put the family members on the stand.¹⁶ In *Gathers* the prosecutor made statements to the jury about the victim's personal characteristics, but did not introduce statements made by the victim's family.¹⁷ *Payne* involved both family and prosecutorial statements about the victims, and included personal testimony by the mother and grandmother of two victims.¹⁸

The victim impact statements introduced at the three trials differed in scope and length, but the nature of the evidence in each case was similar. The statements in *Booth* illustrate the potential breadth of victim impact statements. As the *Booth* statement indicates, there are three types of victim impact evidence: testimony relating the positive characteristics of the victim or victims, testimony concerning the psychological and behavioral effects on survivors resulting from the victims' deaths, and testimony relating survivors' opinions about the defendant.¹⁹

There was extensive testimony of all three types in *Booth*, which involved a robbery-murder of a husband and wife, both of whom were in their 70s. The victim impact statement included comments from the victims' son, daughter, son-in-law, and granddaughter describing the victims' outstanding personal qualities, their long, happy marriage, and their active life in retirement.²⁰ The statement contained descriptions of the victims' funeral as "the largest in the history of the Levinson Funeral Home."²¹ Several surviving family members described the psychological impact of the crime on the remaining members of the family, including depression and lack of sleep.²² One family member stated that she could not even "look at kitchen knives

had not intended to grant certiorari on any of the other issues. *Payne v. Tennessee*, 111 S. Ct. 1407 (1991). After all this, there was (to put it mildly) little doubt about how the Court would finally rule in *Payne*.

15. MD. ANN. CODE art. 41, § 4-609(c)(3) (1986).

16. *Booth v. Maryland*, 482 U.S. 496, 500-01 (1987).

17. *South Carolina v. Gathers*, 490 U.S. 805, 807 (1989).

18. *Payne v. Tennessee*, 111 S. Ct. 2597, 2603 (1991).

19. *Booth*, 482 U.S. at 510-15.

20. *Id.* at 499 n.3.

21. *Id.*

22. *Id.* at 499-500.

without being reminded of the murder."²³ Finally, the statement included an assertion by the victims' daughter that she could not forgive the murderer and that "such a person could '[n]ever be rehabilitated.'"²⁴ The victim impact statements introduced in *Gathers* and *Payne* were less extensive than the statement in *Booth*, but they included similar evidence.²⁵

B. *Victim Impact Statements and the Discretionary Sentencing Issue*

The debate within the Court in the victim impact statement cases largely revolves around whether any evidence typically contained in a victim impact statement is relevant to the application of the death penalty. The justices voting in favor of the defendants in these cases describe the issue as whether this evidence relates to "the character of the individual and the circumstances of the crime."²⁶

The requirement that evidence in the penalty phase of a capital case relate either to the defendant's character or to the circumstances of the crime is derived from language in the Court's 1976 decisions permitting states to impose the death penalty. Two of the five cases in 1976 overturned state statutes imposing death as a mandatory sentence for the commission of particular categories of capital murder.²⁷ The plurality's rationale for overturning these mandatory death statutes was that the statutes did not provide the "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."²⁸ In later years, in cases including *Lockett v. Ohio*²⁹ and *Edwards v. Oklahoma*,³⁰ the Court transformed this rationale for prohibiting mandatory death sentences into a generalized requirement that the sentencer in a capital case be given unlimited discretion to avoid a death sentence based on factors related to any aspect of the defendant's character or crime.

23. *Id.* at 500.

24. *Id.* (citation omitted).

25. In *Gathers* the prosecutor made extensive remarks about the character of the victim, including the statement that he was a "religious person." *South Carolina v. Gathers*, 490 U.S. 805, 808 (1989). The prosecutor then read a prayer written on a card found in the victim's personal effects. *Id.* at 808-09. In *Payne* the prosecutor and one victim's mother testified about the effects on the victim's son. *Payne v. Tennessee*, 111 S. Ct. 2597, 2603 (1991).

26. *Booth v. Maryland*, 482 U.S. 496, 502 (1987) (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

27. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

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

29. 438 U.S. 586 (1978).

30. 455 U.S. 104 (1982).

The justices who voted to exclude victim impact statements in *Booth*, *Gathers*, and *Payne* argued that such evidence is irrelevant under this standard. The three types of victim impact evidence—testimony about the character of the victim, the effects on survivors resulting from the victim's death, and the survivors' opinions about the defendant—do not relate to the defendant's character or to the circumstances of the crime. Moreover, all three types of evidence share an important characteristic: they involve information that the defendant did not know before or during the crime, which therefore could not have affected the defendant's actions during the crime.

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. If the victim impact information was known to the defendant at the time of the crime, such evidence would almost always be relevant to the defendant's criminal actions or motives and therefore would be introduced during the guilt phase of the trial. For example, if the impact on the victim occurred during the commission of the crime, evidence of the impact would be presented as part of the description of the crime at the guilt phase of the trial. Conversely, if the victim impact evidence is being introduced only at the penalty phase of the trial as part of a victim impact statement, then the evidence almost by definition does not relate in any way to the circumstances of or motivation for the murder because prosecutors logically would introduce during the guilt phase of the trial all salient evidence regarding the elements of the crime.³¹

31. Justice Souter's *Payne* concurrence indicates that he misunderstood the distinction between "victim impact evidence" broadly defined as evidence incidental to describing the actual circumstances of the crime and "victim impact evidence" narrowly defined as evidence relating only to the subsequent effect of the crime on those not present during the commission of the crime and which has no bearing on the facts surrounding the crime. *Payne v. Tennessee*, 111 S. Ct. 2597, 2616-17 (1991) (Souter, J., concurring). Souter argued that because the rules of evidence permit prosecutors to introduce at the guilt phase of a capital trial "victim impact evidence" broadly defined (for example, in situations where a witness to the crime may also be personally affected by the crime), the Constitution should also permit prosecutors to introduce "victim impact evidence" narrowly defined at the penalty phase. *Id.* at 2618-19 (Souter, J., concurring).

Justice Stevens pointed out one fallacy of Souter's assumption. Stevens noted that under traditional evidentiary rules, material that is irrelevant for one purpose may be introduced if it is relevant for another purpose. *Id.* at 2630 (Stevens, J., dissenting) (citing JOHN H. WIGMORE, EVIDENCE § 13 (P. Tillers rev. 1983)). Moreover, Justice Souter exaggerated the extent to which even broadly defined victim impact evidence will be relevant at the guilt phase of a capital trial. He offered this example: A minister is murdered, and the minister's wife and child witness the murder. The defendant does not know that the victim is a minister or that the victim's family has

Except in exceptional circumstances,³² victim impact statements also do not relate to the specific aggravating factors in death penalty statutes, which are intended to guide the sentencer's discretion during the penalty phase of a capital trial. Those factors, which are discussed in Section IV,³³ all relate to the defendant's character and background and to the circumstances of the crime. They do not relate to the sorts of evidence typically contained in victim impact statements.³⁴

seen the crime. Souter notes, correctly, that both the wife and the child will be permitted to testify about the circumstances of the crime and that to put that testimony into context the jury may be informed "that the victim was a minister, with a wife and child, on an errand to his church." *Payne*, 111 S. Ct. at 2617 (Souter, J., concurring). The fact that this testimony contains some basic information about the victims leads Justice Souter to the extravagant conclusion that "*Booth's* objective will not be attained without requiring a separate sentencing jury to be empaneled." *Id.*

Justice Souter is mistaken because the type of evidence that would be introduced during the guilt phase of his hypothetical trial (assuming that both the judge and the defense lawyer are on their toes) would not be "victim impact evidence" as defined in *Booth*. *Booth* specifically permits testimony about the circumstances of the crime, including testimony from family members who witnessed the crime. What *Booth* would not permit is testimony of the sort introduced in *Booth* itself—that the family members had to undergo therapy in the months following the crime, that one victim was a man of God and a good husband, and that his wife believed the defendant should be put to death. Testimony of this sort would never be introduced at the guilt phase of Justice Souter's hypothetical trial because it would not relate in any way to the elements of the crime with which the defendant is charged. Thus, contrary to Justice Souter's assertion, *Booth* could be respected without either "seriously reduc[ing] the comprehensibility of most trials," or requiring a "separate sentencing jury to be empaneled." *Id.*

32. See *infra* note 34.

33. See *infra* notes 209-13 and accompanying text.

34. It is difficult to imagine a scenario in which victim impact evidence would relate to one of these factors. Justice Souter describes a situation in which a minister is killed in front of his wife and daughter. *Payne v. Tennessee*, 111 S. Ct. 2597, 2616-17 (1991) (Souter, J., concurring). As Justice Souter says, the wife and daughter would be permitted to testify about what they saw at the guilt phase of the trial. Also, Justice Souter correctly notes that the jury will be told the identity of the witnesses to give the fact-finder "enough information about surrounding circumstances to let them make sense of the narrowly material facts." *Id.* at 2617 (Souter, J., concurring). Thus, "[t]he jury will not be kept from knowing that the victim was a minister, with a wife and child, on an errand to his church." *Id.* Finally, I agree with Souter's observation that "if these facts are not kept from the jury at the guilt stage, they will be in the jurors' minds at the sentencing stage." *Id.* Although this rendition of this testimony's likely consequences is probably accurate, it does not justify Justice Souter's conclusion that the *Booth* rule should be overturned and victim impact statements of every sort should be permitted in every trial. *Id.* at 2617-19 (Souter, J., concurring). Justice Souter's conclusion misses the point of the modern penalty phase structure. The facts in his hypothetical may be "in the jurors' minds at the sentencing stage," but the jury would be hard-pressed to use Justice Souter's facts to support any of the aggravating factors found in the typical death penalty statute. See *infra* notes 209-13 and accompanying text. Thus, if no other evidence was introduced at the penalty phase in Justice Souter's hypothetical, the judge would have to rule as a matter of law that the death penalty was unjustified because no statutory aggravating factor had been proven. It would be different if the wife and daughter witnessed the murderer torturing the minister before killing him. In that case the witness's testimony would be directly relevant to the "heinous, atrocious, and cruel" aggravat-

If victim impact statements are irrelevant to any element of the capital murder crime and to any legitimate aggravating factor enumerated in death penalty statutes, they can have only one purpose: to inflame and prejudice the jury. Indeed, as Justice Powell noted in *Booth*, not only is victim impact evidence irrelevant to the defendant's character and crime, it is actually intended to "divert [the jury] from deciding the case on the relevant evidence concerning the crime and the defendant"³⁵ by focusing the jury on the suffering of the victim's survivors. This, in turn, introduces factors that may lead to arbitrary and even invidious sentencing decisions. Focusing attention on the victims invites the jury to make distinctions between different categories of victims, "identify[ing] some victims as more worthy of protection than others."³⁶ In particular, victim impact evidence could exacerbate existing tendencies to mete out death sentences more frequently to killers of whites than to killers of blacks.³⁷

The dissenters in *Booth* and *Gathers*, who formed the core of the *Payne* majority, do not seriously attempt to argue that victim impact statements conform to the requirement that sentencing evidence relate only to the defendant's character or circumstances of the crime. Instead, the proponents of victim impact statements take two completely different approaches. The first approach is to attack the premises of

ing circumstance that is found in many death penalty statutes. *See infra* note 213.

This is one of the few circumstances in which I can conceive of victim impact evidence being relevant to one of the statutory aggravating circumstances that are considered at the penalty phase of a capital trial. In my modification of Justice Souter's hypothetical, the victim's testimony would be permitted because it is directly relevant to the primary issue at the proceeding, just as the testimony in the hypothetical would be permitted at the guilt phase as proof that the defendant actually committed the murder. The *Booth* rule would not prohibit the introduction of victim impact evidence in either case. *Booth* held only that victim impact evidence cannot be introduced if it does not provide proof either that the defendant committed first-degree murder or that the defendant met one of the statutory aggravating circumstances.

35. *Booth v. Maryland*, 482 U.S. 496, 508 (1987).

36. *Payne v. Tennessee*, 111 S. Ct. 2597, 2631 (1991) (Stevens, J., dissenting).

37. *See* DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990). The authors studied the operation of Georgia's death sentencing system pre- and post-*Furman*. Their study indicates that there is a significant bias in murder trials in the Georgia system based on the race of the victim. For example, the authors report that "a logistic-regression analysis estimated that defendants with white victims face average odds of receiving a death sentence that are 4.3 times larger than those faced by similarly situated defendants with black victims." *Id.* at 401. The post-*Gregg* pattern identified by the researchers continues the discriminatory pattern of Georgia death sentencing prior to *Furman*. *Id.* This evidence was presented to the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987). The five-member majority held that although it was willing to assume the study was valid statistically, the study was irrelevant to any individual defendant's case. According to the Court, the study "[a]t most . . . indicat[ed] a discrepancy that appears to correlate with race," and given the importance of preserving the sentencer's discretion in capital cases, "we decline to assume that what is unexplained is invidious." *Id.* at 312-13.

the *Lockett* and *Eddings* decisions, which established the sentencing standards relied upon by the *Booth/Gathers* majority and the *Payne* dissenters. The second approach is to argue that introduction of victim impact statements conforms to traditional standards relating to the imposition of death sentences because the statements relate to the defendant's personal responsibility and moral blameworthiness.

The next section will discuss the first approach—attacking the premises of *Lockett* and *Eddings*—to justifying the introduction of victim impact statements in capital trials. It will put the victim impact statement cases in context as part of the ongoing debate within the Court over the proper mix of state guidance and sentencer discretion in death penalty cases. As this discussion will demonstrate, the practical debate about sentencing discretion provides an unsatisfactory resolution to the debate over capital sentencing. That debate can only be resolved by reference to broader issues concerning the legitimacy of the state interest in executing certain criminals, which are implicit in Chief Justice Rehnquist's references in *Payne* to the defendant's personal responsibility and moral blameworthiness. The third section will describe Justice Scalia's much more explicit rendition of this argument.

II. THE SUPREME COURT'S UNHAPPY MARRIAGE OF GUIDANCE AND DISCRETION IN DEATH PENALTY SENTENCING

As noted above, the dissenters in *Payne* argued that victim impact statements should be excluded from the penalty phase of death penalty trials because such statements do not comply with requirements imposed in cases such as *Lockett v. Ohio* and *Eddings v. Oklahoma*.³⁸ The *Payne* dissenters read these cases to require that evidence at the penalty phase should relate only to the character of the defendant or the circumstances of the defendant's crime. The conservatives who formed the *Payne* majority not only reject the dissenters' interpretation of the *Lockett/Eddings* standard, the conservatives implicitly (and in Scalia's case, explicitly) reject the standard itself. No member of the *Payne* majority has been as clearly antagonistic toward *Lockett* and *Eddings* as Justice Scalia, who has said outright that *Lockett* and *Eddings* should be overruled.³⁹ However, the implications of the majority opinion in *Payne* and the dissents in the prior victim impact statement cases cast considerable doubt on the continued viability of the *Lockett/Eddings* standard.

38. See *supra* notes 29-31 and accompanying text.

39. *Walton v. Arizona*, 110 S. Ct. 3047, 3063 (1990) (Scalia, J., concurring in part and concurring in judgment). See also *infra* notes 99-123 and accompanying text.

In his *Payne* majority opinion, Chief Justice Rehnquist made only the narrow argument that the *Booth* and *Gathers* majorities had “misread” the individualized sentencing language of *Woodson v. North Carolina* from which the Court derived the *Lockett/Eddings* standard.⁴⁰ Rehnquist argued that the language in *Woodson*, *Lockett*, and *Eddings* did not restrict the introduction of evidence at the penalty phase as severely as the *Payne* dissenters contended.⁴¹ Moreover, according to Rehnquist, the dissenters’ “misreading” of *Woodson*’s individualized sentencing requirement “unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the state is barred [from offering similar evidence about the victim].”⁴² Rehnquist contended that the *Payne* majority was doing nothing more than correcting this evidentiary imbalance. He also contended that the only practical result of the majority opinion in *Payne* would be to give sentencers at capital trials more information with which to do their jobs.⁴³ The Chief Justice even quoted the plurality opinion in *Gregg v. Georgia*, which was signed by the author of the *Booth* majority opinion and a *Payne* dissenter, as support for his “more information is good” theory of capital sentencing.⁴⁴

In a narrow sense, Chief Justice Rehnquist is correct. The majority in *Booth* and *Gathers* misread the individualized sentencing language of *Woodson*, *Lockett*, and *Eddings* to the extent that they used the holdings of those cases to limit prosecution-favorable evidence such as victim impact statements. Properly understood, the logic of the individualized sentencing requirement stated in *Woodson* and subsequent cases does not even apply to evidence that provides the jury with reasons supporting a sentence of death. The liberal evidentiary standard of *Lockett* and *Eddings* logically should apply only to evidence that tends to mitigate a death sentence. After all, the origin of the standard was the Court’s recognition that every capital trial may provide “compassionate or mitigating factors stemming from the diverse frailties of humankind.”⁴⁵ In other words, the individualized sentencing require-

40. *Payne v. Tennessee*, 111 S. Ct. 2597, 2607 (1991).

41. *Id.* at 2600.

42. *Id.* at 2607.

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

44. *Id.* at 2606 (quoting *Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (“We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.”)).

45. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

ment incorporates into death penalty jurisprudence the humanist recognition that the quality of mercy should be present in every trial where someone's life is at stake. *Lockett* and *Eddings* require that the sentencer *always* have the opportunity to avoid a death sentence based on *any* evidence the defendant chooses to introduce.⁴⁶

In contrast to the broad range of evidence the Court has permitted sentencers to consider in mitigation of a death sentence, evidence supporting a death sentence—such as victim impact evidence—is governed by a completely different and far more restrictive standard. Under most death penalty statutes, evidence supporting a death sentence must relate to specific, statutory aggravating factors.⁴⁷ The Court emphasized the importance of these specific statutory factors repeatedly in its 1976 decisions.⁴⁸

Before *Payne*, the closest a majority of the Court had come to endorsing Rehnquist's "more information is good" position regarding prosecution-favorable evidence was in approving the Georgia death penalty statute.⁴⁹ The Georgia statute permits jurors to consider evidence at the penalty phase that does not relate to the specific statutory aggravating circumstances.⁵⁰ Although the Court upheld the Georgia statute, it conditioned its approval in several different ways.⁵¹ Most importantly, the Court used the individualized sentencing language

46. See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

47. For a discussion of one typical statute, see *infra* notes 209-13 and accompanying text.

48. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 193-98 (1976) (Georgia statute) and *Proffitt v. Florida*, 428 U.S. 242, 247-53 (1976) (Florida statute). In addition, the Court approved the Texas statute only after noting that the Texas system "serves much the same purpose" as the enumerated factors in the Georgia and Florida statutes. *Jurek v. Texas*, 428 U.S. 262, 270 (1976). Also, the Texas murder statute used factors similar to the Georgia and Florida aggravating circumstances to define capital murder. "Thus, in essence, the Texas statute requires that the jury find the existence of statutory aggravating circumstances before the death penalty may be imposed." *Id.*

49. See *Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg*, 428 U.S. at 153.

50. GA. CODE ANN. § 27-2534.1(b) (1978).

51. The Court emphasized that the Georgia statute, like those in other states, attempted to channel the jury's sentencing discretion through the use of specific statutory aggravating factors. *Gregg*, 428 U.S. at 196-97 (plurality opinion). Under the Georgia statute, the jury was required to find at least one statutory aggravating factor before it could sentence a defendant to death. The primary difference in the Georgia scheme was that it permitted the jury to go beyond the statutory factors once the jury found at least one statutory factor. Thus, although non-statutory aggravating evidence could be considered by the jury, such evidence could not be the sole basis for a death sentence. Under the Georgia statute, non-statutory evidence could only augment evidence that was relevant to the specific statutory factors. If no evidence was introduced to support a statutory factor, the non-statutory evidence would be irrelevant in the jury's decision regarding the death sentence. Thus, contrary to Chief Justice Rehnquist's implication in *Payne*, see *Payne v. Tennessee*, 111 S. Ct. 2597, 2606 (1991), the Court's opinion in *Gregg* did not envision a wide-open penalty phase in which any evidence the prosecutor wanted to introduce would be relevant to the sentence.

from *Lockett* and *Eddings* to limit the aggravating evidence that could legitimately be introduced at the penalty phase of a capital murder trial: "What is important at the selection stage, is an individualized determination on the basis of the character of the individual and the circumstances of the crime."⁵² This is the same language later used by the *Booth* and *Gathers* majority to prohibit the use of victim impact statements in capital trials.⁵³ Thus, Rehnquist himself misreads the relevant precedents when he asserts that prior to the victim impact statement cases the Court always permitted the introduction of any evidence either side wants to introduce at the penalty phase.⁵⁴ In fact, the system established in 1976 limited the sentencer's access to information supporting a death sentence that did not conform to the defendant's character or crime.

A. Discretion and Guidance: The Broader Debate

In a sense, the whole debate in *Payne* over the scope of *Woodson*, *Lockett*, and *Eddings* is beside the point. This debate is really only a prelude to another, much broader debate over the use of discretion by sentencers in death penalty cases. The conservative justices' rejection of the limitations imposed in *Booth* and *Gathers* prepares the way for a wholesale attack on the more basic notion that the U.S. Constitution imposes *any* significant limitation on the extent to which the states may dictate the breadth of capital sentencing proceedings. More specifically, the conservatives on the Court seem prepared to abandon the requirement that states strictly guide the capital sentencer's consideration of aggravating circumstances at the penalty phase of capital trials. This requirement was the focal point of the 1976 cases that reintroduced the death penalty to the American criminal justice system and has been the lodestar of the Court's capital punishment jurisprudence ever since. Simultaneously, the Court seems willing to permit

52. *Zant*, 462 U.S. at 879. It is unfortunate that the majority in *Zant* used the *Lockett/Eddings* language to limit the jury's consideration of non-statutory aggravating factors. This removed the *Lockett/Eddings* standard from its original context and severed it from its original justification—to give the jury the traditional right to exercise mercy in favor of the defendant. This, in turn, gave ammunition to the Court's conservatives, who now argue that the spirit of the *Lockett/Eddings* standard supports sentencer consideration of other types of aggravating evidence at the penalty phase of capital trials. The conservatives argue that if (as the *Zant* majority implied) the *Lockett/Eddings* standard applies to aggravating evidence as well as mitigating evidence, the same general objective should apply to both types of evidence (i.e., in a penalty phase proceeding, more evidence is always better). The far better approach for the *Zant* majority would have been to retract its approval of the Georgia statute granted in *Gregg v. Georgia*, and to hold instead that only evidence relating to a specific statutory aggravating factor may be considered at the penalty phase of a capital trial.

53. See *supra* notes 28-31 and accompanying text.

54. See *Payne*, 111 S. Ct. at 2606-07.

the states much greater leeway to tighten restrictions on the introduction of mitigating evidence. The system seems headed in the direction of permitting sentencers to exercise more discretion in imposing a death sentence and less discretion in avoiding a death sentence.

A final, conclusive battle over the proper extent of discretion in capital cases is inevitable. For two decades the Supreme Court has vacillated between two inconsistent objectives in its capital punishment decisions. The Court's first objective is the elimination of discretion in capital sentencing. This objective is based on the Court's conclusion that unfettered discretion leads to arbitrary and unpredictable imposition of the death penalty.⁵⁵ The second objective is the preservation of individualized sentencing in death penalty cases. As noted above,⁵⁶ this objective is rooted in the Court's insistence that the sentencer recognize the unique nature of each individual crime and defendant; it is also rooted in the Court's unwillingness to foreclose the possibility of mercy in a capital trial.

The problem the Court has faced since it approved the new generation of capital punishment statutes in 1976 is that these two objectives are ultimately inconsistent. The first objective requires the states to guide the sentencer in a capital trial by expressly articulating the circumstances in which a death sentence may be imposed. Conversely, the second objective prohibits the sentencer from channeling the discretion of a capital sentencer. Thus, the Court has produced a system concisely described by the oxymoron "guided discretion."

Most of the time and effort spent by the Court on death penalty issues since 1976 has been directed toward finding some satisfactory middle ground that would permit the sentencer in a capital case to exercise some, but not too much, discretion. The Court has never found that middle ground. In each successive case the Court veered to either the discretion side or the guidance side of the capital punishment equation. Often the Court would contradict itself by veering back in the other direction only a year or two later. This process can be seen in microcosm in the victim impact statement cases. In *Booth* and *Gathers*, the Court's majority outlined a position of strict guidance, prohibiting the sentencer from hearing or seeing victim impact evidence.⁵⁷ In *Payne*, the new conservative majority reverses field and endorses a standard permitting broad jury discretion.⁵⁸

55. The excess of discretion allowed under the prior generation of death penalty statutes was the stated reason for the Court's striking down those statutes in 1972. See *Furman v. Georgia*, 408 U.S. 238 (1972).

56. See *supra* notes 28-30 and accompanying text.

57. See *South Carolina v. Gathers*, 492 U.S. 938 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

58. See *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

The broader significance of the Court's shift in *Payne* is discussed by the Court only indirectly, in the guise of Justice Stevens' objection that a victim impact statement "distracts the sentencer from the proper focus of sentencing and encourages reliance on emotion and other arbitrary factors."⁵⁹ The broader problem to which Justice Stevens implicitly refers is the problem of widespread arbitrariness in the imposition of the death penalty. This is what caused the Court to overturn all existing death penalty statutes in 1972, and is the problem that the system of "guided discretion" was intended to redress. *Payne* is a precursor of the Court's surrender to the insuperable problem of arbitrariness. Having tried for fifteen years to eliminate that problem, the Court is now preparing to simply give up the effort in favor of wholesale deference to state legislative choices concerning the mechanics of capital sentencing. To understand the significance of this decision, one must revisit briefly the beginnings of the system.

B. "[C]ruel and unusual in the same way that being struck by lightning is cruel and unusual."⁶⁰

In *Furman v. Georgia*,⁶¹ the Supreme Court struck down the Georgia and Texas capital punishment statutes in a broad opinion that effectively invalidated all existing examples of the death penalty. Justice White summarized the constitutional problem with the statutes on the books as of 1972 as follows: "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."⁶² In short, the death penalty was a purely arbitrary punishment that violated the Eighth Amendment; it was cruel and unusual, as Justice Stewart's memorable phrase put it, "in the same way that being struck by lightning is cruel and unusual."⁶³

However, just one year before *Furman*, the Court ruled in *McGautha v. California*⁶⁴ that discretion—and thus a certain degree of arbitrariness—is an unavoidable characteristic of every death penalty sentencing scheme. According to Justice Harlan's majority opinion, "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly under-

59. *Id.* at 2629 (Stevens, J., dissenting).

60. *Furman v. Georgia*, 408 U.S. 238, 309 (1972).

61. 408 U.S. 238 (1972).

62. *Id.* at 313 (White, J., concurring).

63. *Id.* at 309 (Stewart, J., concurring).

64. 402 U.S. 183 (1971).

stood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."⁶⁵ In particular, Justice Harlan derided the system of capital sentencing set forth in the Model Penal Code, which proposed a bifurcated trial including a guilt phase and a penalty phase.⁶⁶ Under this bifurcated system, the penalty phase would be conducted under the guidance of specific aggravating factors set forth in the Code. According to Justice Harlan, the Model Penal Code approach solved none of the due process problems asserted by the *McGautha* petitioner:

It is apparent that such criteria [as those in the Model Penal Code] do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. . . . And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. In short, they do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of "standards" which the history of capital punishment has from the beginning reflected.⁶⁷

It is impossible to reconcile the Court's approach in *McGautha* with its approach one year later in *Furman*. The formal explanation for the differences is that *McGautha* dealt with the problem of procedural due process in capital cases and *Furman* dealt with the altogether different standards of the Eighth Amendment's cruel and unusual punishment clause. But this explanation does not explain the very different tone and focus in the opinions. As Robert Weisberg has written, *McGautha* is characterized by the Court's criticism of the death penalty opponents' "romantic utopianism" and "failure to achieve tragic wisdom" with regard to the inherently arbitrary nature of all criminal sentencing.⁶⁸ By contrast, most of the opinions in *Furman* contain the implicit mandate that if the capital punishment system could not be made to operate objectively and predictably, such that specific reasons could be identified to separate those who got the death penalty from those who did not, then the system should cease to operate at all.

65. *Id.* at 204.

66. *Id.* at 205-07.

67. *Id.* at 207.

68. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 310.

At the time, many observers of the Court believed, along with several justices, that no system could meet the seemingly rigorous requirements of *Furman*.⁶⁹ Yet a mere four years after *Furman* the Court once again gave the states permission to sentence capital defendants to death, in a collection of opinions that attempted to meld the two contrasting attitudes of *McGautha* and *Furman*.

C. *Gregg v. Georgia: Reconciling the Irreconcilable*

In July 1976, the Court ruled on the constitutionality of five death penalty statutes that had been enacted in response to *Furman*. Two of the statutes, from North Carolina and Louisiana, represented a ham-fisted mandatory sentencing approach to the arbitrariness of the pre-*Furman* death penalty.⁷⁰ These statutes mandated a death penalty for all defendants convicted of first-degree murder. Two more statutes, from Georgia and Florida, used a modified Model Penal Code approach to the arbitrariness problem.⁷¹ These statutes established a bifurcated system of capital trials, including a separate penalty phase at which the defendant was permitted to introduce evidence in mitigation of the sentence and the sentencer's discretion was guided by specific statutory aggravating and mitigating factors. The final statute was an idiosyncratic effort by Texas.⁷² Like the Model Penal Code approach, the Texas statute used a bifurcated trial system with a separate penalty phase. However, the Texas penalty phase did not employ the typical Model Penal Code set of aggravating and mitigating factors. Instead, Texas sentencing juries were asked three questions: whether the murder was committed "deliberately," with the reasonable expectation that death would result; whether the killing was unreasonable in response to any provocation by the victim; and—most importantly—"whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."⁷³

The Court's approach to the statutory fallout from *Furman* was almost as diverse as the statutes themselves. The Court could not produce a majority opinion on the statutes. Two justices, Brennan and

69. The authors of *The Brethren* attribute to Chief Justice Burger the conclusion shared by many that "[t]here will never be another execution in this country." See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 219 (1979).

70. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

71. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

72. *Jurek v. Texas*, 428 U.S. 262 (1976).

73. TEX. CODE CRIM. PROC. art. 37.071(b) (Supp. 1975-76), quoted in *Jurek*, 428 U.S. at 269.

Marshall, voted to strike down all five statutes. Four justices, Burger, Rehnquist, White, and Blackmun, voted to uphold all five statutes. This left three justices, Stewart, Stevens, and Powell, willing to uphold the flexible approaches of the Florida, Georgia, and Texas statutes, but unwilling to approve the mandatory approach taken by North Carolina and Louisiana. The plurality opinions produced by these three justices set in motion the new system of capital punishment in America. The internal contradictions in the plurality opinions issued in these five cases are responsible for much of the conceptual disorder in the Court's subsequent death penalty decisions.

The plurality's approach in these cases attempted to split the difference between the *McGautha* decision's acceptance of unfettered sentencing discretion and the *Furman* decision's rejection of the arbitrariness that pre-*Furman* sentencing discretion produced. The plurality opinions discussing the Georgia and Florida statutes emphasized that the Model Penal Code approach adopted in modified form by those states "provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary."⁷⁴ Appellate review of the sentencer's application of these factors further assured that the pre-*Furman* situation would not be repeated. The plurality's *Jurek v. Texas* opinion emphasized that the Texas approach similarly "provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law."⁷⁵

When considering the mandatory death penalty approaches of North Carolina and Louisiana, however, the plurality found that too much rationality and consistency obscured the subjective human reality represented by every defendant. Death, the plurality noted, is qualitatively different from every other form of punishment.⁷⁶ This difference creates a "need for reliability in the determination that death is the appropriate punishment in a specific case."⁷⁷ Therefore, a death penalty statute must permit consideration of a defendant's character, the circumstances of the crime, and "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."⁷⁸

I have already noted how this language became a subject for dispute in the victim impact statement cases.⁷⁹ But the conceptual flaw that led

74. *Gregg*, 428 U.S. at 194-95 (footnote omitted).

75. *Jurek*, 428 U.S. at 276.

76. *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976).

77. *Id.*

78. *Id.* at 304.

79. *See supra* notes 38-44 and accompanying text.

to this later dispute was evident in the 1976 plurality opinions. The logical flaw in the 1976 mandatory death penalty decisions is that the "need for reliability" in capital sentencing is irreconcilable with the requirement that the jury consider any and all "compassionate or mitigating factors." The plurality opinion in *Woodson* asserts that the mandatory death penalty statutes failed to solve the primary problem identified in *Furman*: the arbitrary use of jury discretion to sentence some defendants to death while refusing to impose the death sentence on other, equally culpable defendants.⁸⁰ According to the plurality, many juries operating under a mandatory statute would refuse to convict rather than subject the defendant to a mandatory death sentence.⁸¹ The plurality found these arbitrary, unpredictable acquittals indistinguishable from the arbitrary death sentences disavowed in *Furman*.⁸²

But as Justice Rehnquist pointed out in dissent, the same sort of arbitrariness characterizes the Model Penal Code-derived statutes.⁸³ Under the Model Penal Code statutes a jury may also arbitrarily "acquit" a defendant of a death sentence by assigning unjustifiable significance to mitigating factors in the penalty phase of a capital trial. In other words, both the mandatory and Model Penal Code systems permit juries to ignore their charge and unjustifiably favor some defendants with something less than a death sentence. "To conclude that the North Carolina system is bad because juror nullification may permit jury discretion while concluding that the Georgia and Florida systems are sound because they *require* this same discretion, is, as the plurality opinion demonstrates, inexplicable."⁸⁴ The potential for sentencing arbitrariness rises in direct proportion to the degree of the sentencer's discretion. Therefore, if the Court was right in *Furman* about the evil of arbitrariness, then the plurality was wrong in *Woodson* about the need for subjectivity and discretion. Conversely, if the plurality was right in *Woodson* about the need for discretion and subjectivity in capital sentencing, then it was wrong in *Gregg* about the need to channel the sentencer's discretion strictly with regard to aggravating circumstances. All of modern death penalty law is built upon the thin reed of this irreconcilable contradiction.

D. *Lockett v. Ohio: Building Upon the Contradiction*

In the years following *Gregg* and *Woodson*, the contradictions in those 1976 decisions have defined every aspect of the constitutional

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

81. *Id.* at 302.

82. *Id.* at 303.

83. *Id.* at 315 (Rehnquist, J., dissenting).

84. *Id.*

landscape surrounding capital punishment. Most of the confusion in the post-*Gregg* cases can be traced back to the *Gregg* plurality's refusal to choose between two contradictory objectives: the elimination of arbitrariness and the need to provide individualized consideration of a defendant's personal characteristics before imposing a death sentence.

As noted above,⁸⁵ the differential treatment of aggravating and mitigating factors in the Court's post-*Gregg* opinions is one of the more important manifestations of the Court's indecisiveness. The treatment of aggravating factors has been guided by the goal of eliminating discretion and thereby (theoretically) eliminating arbitrariness. The requirement that a state's statute clearly define the relevant aggravating circumstances is intended both to guide the sentencer at trial and to enable the state's supreme court to review each death sentence to ensure that death sentences throughout the state are being imposed rationally and proportionately. According to the Court, statutory aggravating circumstances "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."⁸⁶

Based on this principle, the Court has invalidated broad, open-ended aggravating circumstances that do not adequately channel jury discretion,⁸⁷ prohibited the prosecutor or judge from minimizing the jury's sense of responsibility in sentencing,⁸⁸ and (for a few years, anyway) restricted the use of victim impact statements at the penalty phase of a capital trial.⁸⁹ Despite some hedging,⁹⁰ until recently the

85. See *supra* notes 38-84 and accompanying text.

86. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

87. See *Maynard v. Cartwright*, 486 U.S. 356 (1988) (holding unconstitutionally vague Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance) and *Godfrey v. Georgia*, 446 U.S. 420 (1980) (holding unconstitutionally vague Georgia's statutory aggravating factor permitting the imposition of the death penalty if the jury finds the defendant's crime "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim").

88. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

89. *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987). *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), overruled *Booth* and *Gathers*.

90. As with every other aspect of the Court's death penalty jurisprudence, the Court has created large loopholes that sharply reduce the effectiveness of the general rule. See, e.g., *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990) (facially vague statutory aggravating circumstance nevertheless satisfies constitutional requirement of channeling sentencer's discretion if state courts adopt and apply a narrowing construction of statutory language); *Walton v. Arizona*, 110 S. Ct. 3047 (1990) (defendants may be forced to bear the burden of proving by a preponderance of the evidence the existence of any mitigating circumstances and the sentencer may be told that he or she "shall" impose a death sentence if the sentencer finds at least one aggravating circumstance

principal holding of *Gregg* has survived intact: at least one, ostensibly narrow, statutory aggravating circumstance is necessary to justify a death sentence.⁹¹

When the Court has considered mitigating factors, on the other hand, it has been guided by the *Woodson* goal of sentencer discretion. *Lockett* was the first indication of this strain of death penalty jurisprudence.⁹² In *Lockett* the three members of the *Gregg* plurality, joined by Chief Justice Burger, enlarged upon the *Woodson* individualized sentencing principle to hold that sentencers "[could] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁹³ Five years later, in *Eddings v. Oklahoma*,⁹⁴ the Court removed whatever residual doubts existed about the strength of the *Lockett* rule. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."⁹⁵

After *Lockett* and *Eddings*, factual relevance is the only remaining limitation on the consideration of mitigating evidence at a capital trial. But *Lockett* and *Eddings* are premised on the notion that *everything* about the defendant's character or background is relevant to mitigation, which makes *every* piece of evidence the defendant seeks to introduce at the penalty phase relevant to the sentencer's decision. As a practical matter, therefore, *Lockett* and *Eddings* removed all limitations on the introduction and consideration of mitigating evidence and subordinated the value of consistency to the value of mercy (or at least the chance for mercy). As the Court explained in *Eddings*,

and does not find any offsetting mitigating circumstances); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (state appellate court may reweigh evidence introduced at trial in order to uphold death penalty based in part on unconstitutional aggravating circumstance); *Pulley v. Harris*, 465 U.S. 37 (1984) (state appellate courts are not required to conduct comparative proportionality review of each death sentence to ensure that similarly situated defendants receive similar sentences); *Zant v. Stephens*, 462 U.S. 862 (1983) (under Georgia statute, death sentence may be upheld despite state court ruling holding unconstitutional one of the three aggravating circumstances on which the sentence was imposed by jury).

91. *Gregg v. Georgia*, 428 U.S. 153 (1976).

92. *Lockett v. Ohio*, 438 U.S. 586 (1978).

93. *Id.* at 604 (emphasis omitted). The Court left open the possibility that such evidence could be barred under a statute providing for mandatory death sentences in situations where a murder is committed by a prisoner or escapee serving a life sentence. In 1987 the Court held that even these narrow mandatory death penalty statutes violated the *Woodson* principles and were therefore unconstitutional. See *Sumner v. Shuman*, 483 U.S. 66 (1987).

94. 455 U.S. 104 (1982).

95. *Id.* at 114 (emphasis omitted).

“By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.”⁹⁶ But if a system counter to *Lockett* would provide a false consistency, the system under *Lockett* denies even the pretense of consistency.

The contradictions in the 1976 plurality opinions provided the Court's conservatives with a ready-made framework for attacking *Gregg* and the system it established. In *Lockett*, for example, then-Justice Rehnquist argued in dissent that *Gregg*'s objective of eliminating arbitrariness and making death sentences predictable was inconsistent with permitting sentencers to consider “anything under the sun as a ‘mitigating circumstance.’”⁹⁷ Then, in *Payne*, Chief Justice Rehnquist uses the *Lockett/Eddings* principle of broad sentencing discretion as his rationale for overturning *Booth*'s limitations on the use of evidence unrelated to statutory aggravating circumstances.⁹⁸

It is significant that Rehnquist was the lone dissenter in *Lockett*, while he wrote the majority opinion in *Payne*. Now that the conservatives have a firm majority on the Court, the *Gregg* system will quickly collapse on itself. *Payne* may represent the beginning of that process. If that is the case, then Justice Scalia has written the blueprint for the new system. In the next section, I will describe Justice Scalia's proposed brave new world of death penalty jurisprudence.

III. JUSTICE SCALIA'S DEATH PENALTY, PART I

Two years ago, Justice Scalia wrote a long opinion outlining a position on *Lockett* that I suspect several other conservative justices also silently endorse.⁹⁹ In Scalia's concurring opinion in *Walton v. Arizona*,¹⁰⁰ he argued that the Court should allow states to limit consideration of mitigating evidence in death penalty trials. Three years before *Walton*, Justice Scalia wrote a short dissent in *Booth* that attacked the premises of the Court's restrictions on consideration of aggravating evidence.¹⁰¹ This position was later incorporated into Chief Justice

96. *Id.* at 112.

97. *Lockett v. Ohio*, 438 U.S. 586, 631 (1978) (Rehnquist, J., dissenting).

98. *Payne v. Tennessee*, 111 S. Ct. 2597, 2606-07 (1991).

99. At least two other justices have previously written opinions using anti-*Lockett* arguments similar to Scalia's. Then-Justice Rehnquist dissented in *Lockett* on essentially the same grounds Justice Scalia employed in *Walton*. *Lockett*, 438 U.S. at 628 (Rehnquist, J., dissenting). Justice White also relied on many of these arguments in his dissent to the 1976 plurality's mandatory death penalty decisions in *Woodson* and *Roberts v. Louisiana*. See *Roberts v. Louisiana*, 428 U.S. 325, 358-63 (1976) (White, J., dissenting).

100. 110 S. Ct. 3047, 3058 (1990) (Scalia, J., concurring).

101. *Booth v. Maryland*, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting).

Rehnquist's majority opinion in *Payne*.¹⁰² When Justice Scalia's *Walton* opinion is read in conjunction with his *Booth* opinion, the resulting doctrine amounts to a wholesale reversal of the Supreme Court's death penalty jurisprudence that has developed since *Gregg*.

In this section I will first describe Justice Scalia's attacks on *Lockett* and *Gregg*. I will then discuss a more intricate issue raised by Scalia's *Booth* opinion. In *Booth*, having urged the Court to begin dismantling the elaborate legal apparatus for carrying out the death penalty, Scalia returns the death penalty debate to the more basic issue of constitutional legitimacy, which was never satisfactorily addressed in the Court's 1976 opinions. I will discuss this issue in detail in the next two sections.

A. *Scalia's Rejection of Unguided Discretion*

In the current legal atmosphere, *Walton v. Arizona* is an unremarkable decision. The case was one of ten death penalty cases decided in the Court's 1989 term, at least eight of which represented defeats for death penalty opponents.¹⁰³ In *Walton*, the Court upheld the Arizona death penalty statute. A four-member plurality (composed of Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy) held, among other things, that the Arizona statute did not violate the principles of *Lockett* by requiring that defendants in capital trials prove by a preponderance of the evidence all mitigating circumstances calling for a sentence other than death.¹⁰⁴ The same four-member plurality held that the Arizona statute did not violate *Woodson's* prohibition of mandatory death sentencing schemes by requiring that the judge "shall" impose the death penalty if one or more aggravating circumstances are found.¹⁰⁵

102. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2605 (1991).

103. See *Walton*; *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990); *Sawyer v. Smith*, 110 S. Ct. 2822 (1990); *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990); *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Butler v. McKellar*, 494 U.S. 407 (1990); *Boyde v. California*, 494 U.S. 379 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). Only *McKoy* and *Clemons* could be considered victories for death penalty opponents. (And minor victories at that: *McKoy* has no bearing outside North Carolina, and *Clemons* established a standard that would disadvantage future appellants in death penalty cases.) I note this fact as evidence for my contention that the new conservative majority is aggressively seeking to eliminate existing restrictions on executions.

The Court's 1990 Term was no more encouraging to the denizens of death row. *Payne* was one of six death penalty cases decided in the 1990 Term. Four of these cases resulted in rulings favoring the prosecution. See *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Schad v. Arizona*, 111 S. Ct. 2491 (1991); *Lankford v. Idaho*, 111 S. Ct. 1723 (1991); *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Parker v. Dugger*, 111 S. Ct. 731 (1991).

104. *Walton v. Arizona*, 110 S. Ct. 3047, 3055-56 (1990).

105. *Id.* at 3056.

Justice Scalia provided the fifth vote on the *Lockett* and *Woodson* issues, but based his vote on a much broader rationale than did the four-member plurality. Justice Scalia argued that the Court should simply overrule *Lockett* and *Woodson*.¹⁰⁶ Overruling those cases is necessary, Scalia argued, because they are irreconcilable with the principle of limited discretion that is at the heart of *Furman*.¹⁰⁷ Justice Scalia announced that, insofar as "our jurisprudence and logic have long since parted ways,"¹⁰⁸ he would no longer apply either *Woodson* or *Lockett*.

As the previous section of this Article demonstrates,¹⁰⁹ the first step in an attack on *Lockett* is easy: simply reiterate the arguments in the 1972 and 1976 decisions of the moderate members of the Court who provided the deciding votes in *Furman* and *Gregg*. As Scalia notes, this moderate faction on the Court assumed that "capital punishment was not in itself a cruel and unusual punishment"¹¹⁰ and that the real problem lay in the inadequate mechanisms used to impose the death penalty in the period leading up to *Furman*. Scalia then documents extensively the process, starting with *Gregg*, by which the Court set about elaborating upon the principle that "capital sentencing procedures must constrain and guide the sentencer's discretion to ensure 'that the death penalty is not meted out arbitrarily and capriciously.'"¹¹¹

According to Scalia, the *Woodson/Lockett/Eddings* doctrine of individualized sentencing and unlimited discretion regarding mitigation evidence "has completely exploded whatever coherence the notion of 'guided discretion' once had."¹¹² Scalia snidely dismisses notions that the standards regarding aggravating and mitigating evidence serve different purposes. Alluding to the "twin objectives" of aggravating and mitigating factors, Scalia says, "is rather like referring to the twin objectives of good and evil. They cannot be reconciled."¹¹³ If you are going to stand by *Furman* and *Gregg*, Scalia tells his fellow justices, then you have to give up *Woodson* and *Lockett*.¹¹⁴

106. *Id.* at 3058 (Scalia, J., concurring).

107. *Id.* at 3067 (Scalia, J., concurring).

108. *Id.* at 3059 (Scalia, J., concurring).

109. See *supra* notes 38-98 and accompanying text.

110. *Walton v. Arizona*, 110 S. Ct. 3047, 3060 (1990) (Scalia, J., concurring).

111. *Id.* at 3061 (Scalia, J., concurring) (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)).

112. *Id.*

113. *Id.* at 3063 (Scalia, J., concurring).

114. This ultimatum is not due to any special concern about the importance of the guided-discretion rules in correcting the arbitrariness found in pre-1972 death penalty statutes. Scalia is simply exhibiting a sportsman's concern for fair play. He seeks only to ensure that both players

In place of *Woodson* and *Lockett*, Scalia offers a constitutional standard defined by a *Gregg*-derived rationality standard. Under Scalia's standard, the Court would defer to legislative judgments about the number and breadth of both aggravating and mitigating factors relevant to capital sentencing determinations, limited only by the *Gregg* requirement that all capital punishment schemes provide some rational means of separating defendants who are eligible for the death penalty from those who are not.¹¹⁵ Therefore, states presumably could exclude from the penalty phase much of what is typically introduced in current capital trials.¹¹⁶

Other than allowing states to restrict the amount of mitigating evidence introduced at death penalty trials, the major practical consequence of Scalia's approach in *Walton* would be to reintroduce mandatory death sentences to the American criminal justice system. Indeed, Scalia explicitly endorses the constitutionality of mandatory death sentences.¹¹⁷ It is in the context of this discussion that Scalia discusses briefly his conception of the Eighth Amendment. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."¹¹⁸ In Scalia's view, the amendment's two operative terms—"cruel" and "unusual"—both must be satisfied before the courts will strike down a punishment scheme chosen by a state: "[T]he Amendment explicitly requires a court to consider not only whether the penalty is severe or harsh, but also whether it is 'unusual.' If it is not, then the Eighth Amendment does not prohibit it, no matter how cruel a judge might think it to be."¹¹⁹

in the death penalty game—lawyers for the prosecution and lawyers for the defense—be permitted to play by the same rules. The sportsman Scalia would be equally happy to abandon the guidance requirement dictated by *Furman* in favor of a wide-open, totally unguided system played with *Lockett* rules applied to both the prosecution's aggravating evidence and the defense's mitigating evidence. See *Walton*, 110 S. Ct. at 3063-64 n.* (Scalia, J., concurring) ("If and when the Court redefines *Furman* to permit [sentencers to be given complete discretion without a requisite finding of aggravating factors] . . . I shall be prepared to reconsider my evaluation of *Woodson* and *Lockett*.").

115. *Id.* at 3064 (Scalia, J., concurring).

116. Scalia derides the scope and nature of such evidence with a few examples:

that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race; that he has a limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised his mother.

Id. at 3062 (Scalia, J., concurring).

117. *Id.* at 3067 (Scalia, J., concurring).

118. U.S. CONST. amend. VIII.

119. *Walton*, 110 S. Ct. at 3066 (Scalia, J., concurring).

This interpretation allows Scalia to omit discussion of the death penalty's cruelty¹²⁰ and to pass immediately to the argument that the death penalty is "unusual." Scalia first implies that he would adopt a narrower version of the term "unusual" than the Stewart and White plurality opinions in *Furman* (whose concerns later formed the basis for the plurality opinions in the 1976 cases).¹²¹ Justices Stewart and White understood the term "unusual" to mean infrequently imposed. (Hence, Justice Stewart's comparison of a death sentence with a lightning strike.)¹²² Justice Scalia hints that he would prefer a far less protective interpretation, which would permit "traditional form[s] of punishment that [are] rarely imposed."¹²³ But he acknowledges that the term "can bear the former meaning,"¹²⁴ and thus is willing to acknowledge that the Eighth Amendment requires the states to avoid the "unusual" imposition of the death penalty in the sense of "rarely imposed."¹²⁵ Unfortunately for capital defendants, this leads Scalia to the point reached by Justice White in 1972: the problem with the death penalty is not that too many executions are being carried out, but rather that *too few* are being carried out.¹²⁶ Thus, the solution to the arbitrariness problem is to permit states to increase the number of death sentences imposed through means such as mandatory death sentencing statutes.

120. However, Scalia makes clear that he does not think the death penalty is cruel. In stating his view that mandatory death sentences are constitutional, he notes in passing that such sentences are not cruel "[either] absolutely [or] for the particular crime." *Id.* at 3067 (Scalia, J., concurring). Omitting a more elaborate discussion of the term "cruel" permits Justice Scalia to avoid discussing the two other rationales used by the *Woodson* plurality for invalidating mandatory death sentences—that there is an overwhelming present social consensus against the use of mandatory death sentences and that mandatory death sentences violate the "fundamental respect for humanity underlying the Eighth Amendment." *Id.* at 3090 n.7 (Stevens, J., dissenting) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

121. See *Walton*, 110 S. Ct. at 3066 (Scalia, J., concurring).

122. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

123. *Walton*, 110 S. Ct. at 3066 (Scalia, J., concurring). This interpretation follows from Justice Scalia's general approach to constitutional interpretation, which emphasizes the use of historical tradition to give meaning to constitutional terms and interprets historical tradition at the lowest possible level of generality. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

124. *Walton*, 110 S. Ct. at 3066 (Scalia, J., concurring).

125. *Id.*

126.

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. . . . [W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied.

Furman v. Georgia, 408 U.S. 238, 311 (1972) (White, J., concurring).

B. *Scalia's Rejection of Guided Discretion*

Justice Scalia premises his rejection of the *Woodson/Lockett/Edwards* line of cases on the need to preserve the central principle of *Furman*. The core requirement of *Furman*, which even Justice Scalia accepted in *Walton*,¹²⁷ is that a state system imposing death sentences must be systematic and rational to pass constitutional muster.¹²⁸ *Furman* especially demands that sentencer discretion must be constrained by law. If Justice Scalia were serious about upholding this core function of *Furman*, one might expect him to apply stringent relevance requirements to the statutory standards used by the states in defining the category of defendants eligible for a death sentence. One also might expect him to apply equally rigorous relevance standards to evidence introduced at the penalty phase of capital trials. Yet Justice Scalia has not been especially vigilant in either regard. Indeed, in contrast to Scalia's extended paean in *Walton* to strict constraints on sentencer consideration of mitigation evidence, his attitude toward sentencer discretion to consider aggravating evidence has been far more lenient.

Even in *Walton* itself, one sees evidence of Scalia's *laissez-faire* attitude toward limiting prosecutors' use of broad, ill-defined aggravating circumstances in death penalty trials. In *Walton* and *Lewis v. Jeffers*,¹²⁹ the Court upheld an aggravating factor of the Arizona death penalty statute that permitted the imposition of a death sentence if the defendant committed the murder in an "especially heinous, cruel, or depraved manner."¹³⁰ Problems arising from the application of similar aggravating factors in other statutes have bedeviled the Court since *Gregg* itself.¹³¹

127. *Walton*, 110 S. Ct. at 3067 (Scalia, J., concurring).

128. *Furman v. Georgia*, 408 U.S. 238 (1972).

129. 110 S. Ct. 3092 (1990).

130. ARIZ. REV. STAT. ANN. § 13-703 (F)(6) (1989).

131. See *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990) ("especially heinous, atrocious, or cruel"); *Maynard v. Cartwright*, 486 U.S. 356, 359 (1988) ("especially heinous, atrocious, or cruel"); *Godfrey v. Georgia*, 446 U.S. 420, 422 (1980) ("outrageously or wantonly vile, horrible, or inhuman"); *Gregg v. Georgia*, 428 U.S. 153, 201 (1976) (plurality opinion) ("outrageously or wantonly vile, horrible, or inhuman"); *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976) ("especially heinous, atrocious, or cruel"). The *Walton* and *Jeffers* defendants' complaints about the Arizona "especially heinous" factor followed the pattern of complaints about other versions of this factor considered by the Court in previous cases. Reduced to its essence, the claim is simply that phrases such as "heinous, atrocious, and cruel" have no inherently obvious meaning that would distinguish one murder case from another. In the common use of the terms, every murder is heinous, atrocious, and cruel, especially to jurors who are unlikely to judge more than one death penalty case in their lives and are likely to be insensitive to the gradations of aggravation that the *Gregg* system requires. Therefore, the argument goes, "especially heinous" factors do

In *Walton*, the Court upheld Arizona's use of the term "cruel" as an aggravating factor, despite only dubious efforts by the Arizona courts to limit the definition of that term.¹³² At least the term "cruel" warranted some discussion by the Court. In *Jeffers*, the Court upheld the "heinous . . . or depraved" terms of the Arizona statute without any substantive discussion at all.¹³³ The Court simply cited a single boilerplate line in the *Walton* majority opinion, which was issued the

not provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring). Or, as another author has summed up the "especially heinous" argument, "These aggravating circumstances . . . have generated more controversy than any other aggravating circumstance. Commentators have universally criticized them as vague, overbroad, and meaningless." Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 943-44 (1986).

132. The Arizona courts had followed the usual pattern of states with similar statutory provisions. First, the Arizona courts attempted to flesh out the terms used in the statute with the dictionary definitions of those terms. See *State v. Knapp*, 562 P.2d 704, 716 (Ariz. 1977), cert. denied, 435 U.S. 908 (1978). As the Arizona experience indicates, such definitions usually do little more than add indefinite descriptions of the original indefinite term. The dictionary definition used by the Arizona Supreme Court to define the vague term "cruel" is "disposed to inflict pain esp. in a wanton, insensate or vindictive manner." *Id.* Perhaps recognizing that this definition added little of substance to the original term, the Arizona court then took the second typical step in bolstering the definition of the statutory term "cruel": specifying particular factual circumstances that would establish the requisite "cruelty." See *Walton v. Arizona*, 110 S. Ct. 3047, 3078-82 (1990) (Blackmun, J., dissenting). The problem with this second step is that the list of factual circumstances capable of satisfying this factor was never deemed finite. Thus, each new case involving the term "cruel" could theoretically add yet another factual example of the condition. The end result is that the statutory term fails to serve its intended function of distinguishing rationally the murders that deserve punishment by death from those that do not. Or, as Justice Blackmun concluded in his *Walton* dissent, "the Arizona Supreme Court's construction of 'cruelty' has become so broad that it imposes no meaningful limits on the sentencer's discretion." *Id.* at 3080 (Blackmun, J., dissenting).

133. 110 S. Ct. 3092. The Arizona Supreme Court followed the same pattern in interpreting the terms "heinous" and "depraved" as it did in interpreting "cruel." However, the court outdid itself in describing factual circumstances indicating the existence of heinousness or depravity. In *State v. Correll*, the court held that a killer's "total disregard for human life" would satisfy the "heinous . . . and depraved" statutory terms and therefore subject the killer to a death sentence. 715 P.2d 721, 734 (Ariz. 1986). By the odd logic of the Arizona Supreme Court, it should be possible (because Arizona's statute does not require mandatory death sentences for all first-degree murderers) to be convicted of first-degree murder in Arizona without having displayed a "total disregard for human life." But because the Arizona statute provides that a person commits first-degree murder if "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation," ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (1989), we know that it is *not* possible to be convicted of first-degree murder in Arizona without exhibiting a "total disregard for human life." Therefore, either the Arizona statute mandates a death sentence for every first-degree murderer, which is unconstitutional under *Woodson*, or the aggravating circumstance in question does not narrow the set of first-degree murderers at all, which is unconstitutional under *Gregg*, or Arizona's is a totally arbitrary system in which any first-degree murderer may be subjected to a death sentence on the whim of the jury and courts, which is unconstitutional under *Furman*. Yet the United States Supreme Court held the Arizona statute constitutional in *Walton* and *Jeffers*. Readers stymied by such logical conundrums should steer well clear of modern death penalty law.

same day, in holding that *Walton* forecloses claims against any aspect of the Arizona "especially heinous, cruel, or depraved" aggravating factor.¹³⁴ Justice Scalia joined the majority in upholding the constitutionality of the Arizona "especially heinous" aggravating factor, adding in *Walton* only the offhand remark that Arizona's statute is "precise enough, in my view, both to guide the sentencer and to enable review of the sentence."¹³⁵

Scalia's unconcerned acceptance of Arizona's problematic guided discretion statute is but one indication that perhaps Scalia is not as enthusiastic about *Furman* and *Gregg* as his *Walton* concurrence would have us believe. Scalia's approach to the victim impact statement cases is another, ultimately far more important indication that the "guided discretion" system may soon be robbed of any substance. These opinions are important in two respects. First, they reveal Scalia's implicit rejection of the premises of *Furman* and *Gregg* and his insensitivity to the problem of arbitrariness that motivated the plurality opinions in those cases. Second, in these opinions Scalia proposes a framework for a new set of presumptions about the constitutional purposes of capital punishment. Chief Justice Rehnquist adopted a portion of the Scalia approach in his *Payne* majority opinion.¹³⁶ If the Court adopted Scalia's attitude and approach *in toto*, it would have the effect of overruling *Furman* and *Gregg* in all but name. The majority's cavalier attitude toward the essence of the "guided discretion" scheme in *Walton* and *Jeffers* indicates that a sub silentio overruling of *Furman* and *Gregg* would cause little grief among Scalia's conservative colleagues.

134. *Lewis v. Jeffers*, 110 S. Ct. 3092, 3100 (1990). The problem with the majority's approach is that the Arizona courts had interpreted the "especially heinous, cruel, or depraved" factor as disjunctive; each term meant something different, and the presence of facts supporting any one term was enough to establish the existence of the aggravating circumstance. See *State v. Beaty*, 762 P.2d 519, 529 (Ariz. 1988), cert. denied, 491 U.S. 910 (1989). Indeed, in *Jeffers* itself the Arizona Supreme Court ruled that although the defendant's murder was "heinous . . . and depraved," it did not satisfy the "cruel" component of the statutory term. *State v. Jeffers*, 661 P.2d 1105, 1130-31 (Ariz.), cert. denied, 464 U.S. 865 (1983). Since the "depraved" component of the statute has a different meaning than the "cruel" component, the Supreme Court's discussion of the "cruel" component at issue in *Walton* is irrelevant to the consideration of the "depraved" component at issue in *Jeffers*.

The United States Supreme Court can communicate to lower courts just as strongly through its attitude and style of deciding a case as it can through explicit statements in a particular decision. Thus, the *Jeffers* majority's refusal to address the subtle distinctions between the two Arizona statutory terms communicates something very important to state courts attempting to comply with *Gregg*'s guidance requirement: the subtleties of interpreting statutory aggravating circumstances no longer matter.

135. *Walton v. Arizona*, 110 S. Ct. 3047, 3068 (1990) (Scalia, J., concurring).

136. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2605 (1991).

The Scalia opinions in the victim impact statement cases are short and deceptively indirect. Scalia's dissent in *Booth* is the more important opinion.¹³⁷ However, at first glance, Scalia's dissent does not seem even to address the main points of the *Booth* majority opinion. As noted in Section I above, Justice Powell's majority opinion in *Booth* makes three main points about victim impact statements in death penalty trials, each of which draws on concepts central to *Furman* and *Gregg*. Justice Powell objects to the introduction of victim impact statements at capital trials on the grounds that such statements (1) do not relate to the character of the defendant or the circumstances of his crime;¹³⁸ (2) imply "that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy;"¹³⁹ and (3) would "serve no other purpose than to inflame the jury," thus leading to a sentence "inconsistent with the reasoned decision-making we require in capital cases."¹⁴⁰

Instead of directing his criticism to these points, Scalia addresses the core principle informing all three of Justice Powell's objections—the notion that the Constitution requires the capital punishment system to inflict the death penalty only upon defendants with a certain level of moral guilt. Justice Powell's position in *Booth* is that victim impact statements are irrelevant to ascertaining moral guilt.¹⁴¹ Justice Scalia's response is that moral guilt is not necessarily the most important factor in the sentencer's decision to impose the death penalty.¹⁴²

Scalia argues that the imposition of the death penalty does not depend only on moral guilt, because the requisite level of moral guilt may be present even though no killing occurs.¹⁴³ To illustrate this point, Scalia offers this hypothetical:¹⁴⁴ A person who drives sixty miles per hour through a residential area and does not hit anyone will be guilty of a traffic offense and nothing more. However, if he hits and kills a pedestrian, he may be charged with manslaughter. Scalia asserts that the driver has the same measure of moral guilt regardless of whether he hits the pedestrian, yet he will be subject to a manslaughter charge only if the killing occurs.¹⁴⁵ From this example,

137. See *Booth v. Maryland*, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting).

138. *Id.* at 502-05.

139. *Id.* at 506 n.8.

140. *Id.* at 508-09 (footnote omitted).

141. *Id.* at 502-06.

142. *Id.* at 519-20 (Scalia, J., dissenting).

143. *Id.* at 519 (Scalia, J., dissenting).

144. *Id.*

145. *Id.*

Scalia deduces that the applicability of criminal law generally, and the death penalty particularly, is based on defendants' moral guilt *and* on their "personal responsibility," which Scalia defines as "the degree of harm that they had caused."¹⁴⁶ Therefore, Scalia argues, victim impact statements are relevant in death penalty trials because they "lay before the sentencing authority the full reality of human suffering the defendant has produced."¹⁴⁷

Justice Scalia's approach is contrary to the spirit of the *Woodson/Lockett/Eddings* line of decisions, each of which is premised on the notion that the defendant's moral culpability is the key to whether he or she may be sentenced to death. This is not surprising because Justice Scalia subsequently stated in *Walton* that he would overrule those decisions.¹⁴⁸ The relationship between Scalia's arguments in *Booth* and the principles of *Gregg* is more complicated and will be explored at length in the next two sections. Scalia identifies a major conceptual weakness in the *Gregg* scheme, but even Scalia's own approach to the death penalty contains a number of serious logical flaws. Thus, it is possible to make a strong argument against Scalia's assertions about both moral guilt and personal responsibility without revisiting *Gregg*.

Scalia argues in *Booth* that a death sentence may sometimes be justified because of a defendant's "personal responsibility" (i.e., the extent of harm caused by the defendant's crime) rather than the defendant's "moral guilt."¹⁴⁹ The argument against Scalia's de-emphasis of moral guilt in death penalty proceedings can be illustrated by a modified version of Scalia's own hypothetical about the speeder in a residential neighborhood. Suppose that instead of one driver, there are two drivers cruising through a residential neighborhood at sixty miles per hour. Driver one is taking his wife to the hospital at midnight because she has a life-threatening heart condition and is suffering from severe chest pains. Driver one hits and kills a sixty-five-year-old woman who is wandering around the neighborhood looking for her lost cat. The woman has thirteen grandchildren who love her very much. Driver two is drunk and careening through the neighborhood in the late afternoon. He speeds past a stopped school bus, then hits and kills a person lying beside the road. The victim is an unemployed fifty-year-old man who has a long record of minor criminal convictions, lives alone, and has no family and few friends. The un-

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

147. *Id.*

148. *See supra* notes 99-126 and accompanying text.

149. *See* 482 U.S. at 519-20 (Scalia, J., dissenting).

fortunate victim was himself drunk. He was returning home after drinking at a local bar all day, but passed out beside the road.

The implications of the modified hypothetical are obvious: Driver two has by far a greater quantum of "moral guilt" than driver one. He was driving very recklessly, in an impaired condition, and in a situation where children and other people are likely to be on the road. A properly conducted trial of driver two will focus on this fact. Likewise, a trial of driver one will focus on the fact that although his actions were reckless, they are excusable in part because of the understandable pressures of the circumstances. The identity and characteristics of the victims in the two cases are relevant only insofar as they help the jury answer the single question legitimately at issue in each case: What did the defendant do and why did he do it? The fact that driver one caused a great deal more harm than driver two¹⁵⁰ is—and should be—irrelevant to the sentencer's decision about the respective drivers' punishments.

This modified hypothetical reflects the reality of the death penalty sentencing situation much more accurately than Justice Scalia's version of the hypothetical. In Justice Scalia's version one driver behaves in exactly the same way, but driver one does not hit anyone and driver two kills a pedestrian. The victim, not the driver, is the focal point of Scalia's hypothetical because the victim is the only variable that distinguishes the two situations. But in death penalty trials the identity and characteristics of the victim are a distraction from the main point of what the defendant did and why he did it.

Scalia is accurate but misleading when he asserts that moral guilt is not the *sole* concern of the jury at the penalty phase of a death penalty trial.¹⁵¹ Scalia is accurate because at every capital trial the jury must find the requisite level of "personal responsibility" before even considering the possibility of imposing a death sentence. In other words, the penalty phase of a death penalty trial can only take place if the jury has already determined that the defendant is "personally responsible" for the murder of another human being. But Scalia's assertion is misleading because once this threshold level of "personal responsibility" has been met, the focus of the trial shifts to the defendant's actions, and the victim is largely irrelevant to the main objective of the remaining proceedings.

Another problem with Scalia's proposed focus on "personal responsibility" and on the identity of the victim is that Scalia himself

150. That is, driver one killed a more compelling victim, whose death will adversely affect a larger number of people.

151. See *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

undoubtedly would refuse to carry his proposal to its logical conclusion. This is best illustrated by considering how Scalia would treat information about a victim who was less upstanding, well known, and beloved than the victims in *Booth*.¹⁵² According to Scalia, victim impact statements are relevant because they give the jury a more accurate idea of the degree of harm the defendant has caused. In *Booth* that harm was greater because the victims' deaths had a significant effect on the lives of several surviving family members.¹⁵³ Thus, according to Scalia, the family members could testify about these effects, and the prosecutor could ask the judge to instruct the members of the jury that they could consider these effects in reaching their verdict as to Booth's sentence.

But if Scalia is correct that sentencing juries can ascribe to a defendant greater personal responsibility in cases in which the victims' lives touch and positively influence many other lives, then, conversely, he must also believe that personal responsibility for murder is lower when the victim is an unimportant individual having little contact with, much less influence on, other human beings. If Scalia is correct about the premises and purposes of death sentencing, then the defendant in *Gathers* should have been permitted to have the judge instruct the jury that the victim's relative lack of importance or influence should be used as a mitigating factor in deciding whether Gathers would be sentenced to death.¹⁵⁴

Scalia's argument is that murderers should be held accountable for any effect the murder has on others in society. The penalty should be more severe, Scalia asserts, if the effects of killing a particular victim are greater than normal. Stated in abstract terms, this is a utilitarian argument that society should be permitted to interpret its criminal law in a manner that provides the strongest protection to society's more valuable human assets. Scalia suggests that death penalty juries should be shown the "amount of harm [the defendant] has caused."¹⁵⁵ In *Booth* that harm was emotional, and the persons harmed were the immediate family members. But harms resulting from a murder are not just emotional, and the ancillary victims are not only family members.

152. The victims in *Booth* were described by family members as "loving parents and grandparents whose family was most important to them. . . . [They] were extremely good people who wouldn't hurt a fly." *Booth*, 496 U.S. at 514 (appendix to opinion of the Court).

153. *Id.* at 510-15. See also *supra* notes 20-24 and accompanying text.

154. The victim in *Gathers* was a 31-year-old unemployed man who had a history of mental problems. *South Carolina v. Gathers*, 490 U.S. 805, 807 (1989).

155. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

Others in society also suffer harm as a result of a murder.¹⁵⁶ Employers are harmed by the loss of productive workers. The community is harmed by the loss of citizens who contribute their time and energy to serve the commonweal. Indeed, society in the broadest collective sense is harmed by every murder to the degree that society's educational and financial investment will never be repaid by a victim whose life is ended prematurely.

This larger context of Scalia's argument suggests the permissibility of some sort of utility calculus that would be stated specifically in capital punishment statutes. Under such a calculus, persons having particular characteristics would be assigned higher relative social values.¹⁵⁷ Highly educated persons would be assigned a higher value than high school dropouts, for example. Persons possessing highly specialized skills would be assigned higher values than fungible generalists. Rich people would be assigned higher values than poor people, based on the higher tax revenues produced by the rich persons, the number of jobs created by the expenditure of funds by rich persons, and the recognized social value already assigned by the market, which allocates economic resources to their most efficient use.¹⁵⁸

Of course, the use of a utility calculus would only accentuate the differential treatment of these categories of victims. But under Scalia's rationale, different categories of victims *should* get different treatment. In general, society benefits more from its more prosperous, better educated, more highly skilled, and more politically involved members, and therefore it is only logical that society should protect those persons more rigorously.

I suggest this utility calculus partly tongue-in-cheek and partly to make clear where Scalia's proposals lead. I stated earlier that Scalia would not follow his proposals to their logical conclusion. But maybe I am wrong. Scalia himself says:

Perhaps these sentiments do not sufficiently temper justice with mercy, but that is a question to be decided through the democratic processes of a free people, and not by the decrees of this Court. There is nothing in the Constitution that dictates the answer, no more in the field of capital punishment than elsewhere.¹⁵⁹

156. Justice White, who joined Justice Scalia's *Booth* opinion, also wrote a separate dissent in which he explicitly expanded the notion of victim impact from the immediate family to society at large. *Id.* at 517 n.2 and accompanying text (White, J., dissenting).

157. As Justice White pointed out in *Booth*, society already does this to some extent by authorizing the death sentence for the killing of certain political officials and police officers. *See id.* (White, J., dissenting).

158. *See generally* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

159. *Booth*, 482 U.S. at 520 (Scalia, J., dissenting).

In this statement, you have a glint of Scalia's true position. Scalia's *Walton* concurrence notwithstanding, his position is not that the Court must choose between the strict sentencing guidance mandated by the *Furman/Gregg* line of decisions and the absolute sentencing discretion mandated by the *Woodson/Lockett* line of decisions. Scalia's position is much more radical: Both the *Gregg* principles and the *Woodson/Lockett* principles are derived from an improperly expansive interpretation of the Constitution. Contrary to the interpretation represented by these decisions, Scalia seems to believe that there are virtually no constitutional limits on a state's imposition of the death penalty.

The scorched-earth approach undertaken by Justice Scalia does have one hidden benefit: It returns the death penalty debate to original principles. One problem the Court has had in judging death penalty cases is that it has focused almost exclusively on *how* the states may impose the death penalty and only superficially on *why* the states may impose the death penalty. Scalia's attack on the mechanistic/technical approach to death penalty law at least returns the Court to the point where it must consider the states' asserted purposes for which the death penalty may be used. Scalia's *Booth* opinion suggests several justifications for the death penalty, and also suggests that Scalia sees no constitutional problem with these justifications. As the next two sections will demonstrate, Scalia's arguments do point out a significant flaw in the Court's *Gregg* analysis. However, Scalia's arguments are also flawed—and in a much grander way. Ironically, Scalia's arguments against *Gregg* may have an effect that is exactly the opposite of what he intends: What is proposed as an attack on the system limiting the states' freedom to impose the death penalty has the effect of undercutting the constitutional justification for *any* system of capital punishment.

IV. THE PENALTY WITHOUT A PURPOSE: RETRIBUTION, DETERRENCE, AND THE DEATH PENALTY

The Court has been vexed by a dilemma of its own making ever since it permitted the states to reintroduce the death penalty in 1976. The dilemma is posed by the two objectives that came out of the Court's 1976 decisions: the elimination of arbitrariness and the preservation of individualized sentencing.¹⁶⁰ Both objectives are laudable.

160. See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

Indeed, I believe the Court is correct in holding that both objectives are constitutionally mandated. But conservatives such as Scalia are also correct in observing that the two objectives are irreconcilable in the bifurcated system created by *Gregg*.¹⁶¹ As Scalia argues in *Walton*,¹⁶² the jury at the penalty phase of a *Gregg*-style trial is either given discretion or it isn't. This dilemma has led conservative justices such as Scalia to argue that the Court cannot accomplish the task it set for itself in its mid-1970s capital-punishment decisions. The conservatives argue that the Court should simply get out of the death penalty business by eliminating most constitutional rules restricting state imposition of capital punishment.

The premise of this Article is that the conservatives' arguments misconstrue the Court's dilemma. The Court's two objectives are not, as Justice Scalia argues, irreconcilable with each other. Rather, they are irreconcilable with the death penalty. More precisely, these constitutional objectives are irreconcilable with any constitutionally legitimate justification for the death penalty. The conservatives have very effectively used one objective to argue against the other, but they have never produced an equally effective rejoinder to the main point of the 1976 plurality: a system that is either arbitrary or that ignores the unique circumstances of each defendant and crime violates our most basic notions of constitutional justice.¹⁶³ The conservatives' only response to this basic principle is melancholy resignation. "Perhaps these sentiments do not sufficiently temper justice with mercy," Scalia laments in *Booth*, before dismissing the whole matter as someone else's problem.¹⁶⁴ These lamentations are unnecessary; the solution is (intellectually, if not politically) simple. Contrary to Justice Scalia's assertions, the two objectives defined by the Court in 1976 can both be achieved, but only by eliminating the source of the conflict: the death penalty.

It is the Court's own fault that the death penalty dilemma has been misunderstood. The Court has never undertaken any systematic review of the legitimate constitutional rationale justifying the death penalty.¹⁶⁵ The Court has skirted this issue by deferring broadly to the conclusory assertions of the states about their statutory rationales. Starting with *Gregg* and the other 1976 cases, the justices focused their attention almost exclusively on the minutiae of capital sentencing

161. *Gregg*, 428 U.S. at 153.

162. *Walton v. Arizona*, 110 S. Ct. 3047, 3058 (1990) (Scalia, J., concurring).

163. *See Gregg*, 428 U.S. 153.

164. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

165. For a discussion of the Court's skimpy treatments of this issue, *see infra* notes 175-88 and accompanying text.

while ignoring the larger issues of constitutional justification for the death penalty. But this process of fine-tuning had no clear direction, given that the Court always proceeded from the premise that the penalty itself is constitutional. The system inevitably collapsed into a morass of complications and contradictions, resulting in a post-*Gregg* system that appears to produce results just as irrational and arbitrary as the pre-*Furman* system.

Justice Scalia's attacks on the Court's process of constantly fine-tuning the capital punishment system provide the opportunity to reconsider the original premises of the death penalty. Justice Scalia's opinions in the victim impact statement cases contain a critique of the 1976 plurality's view concerning the justifications for the death penalty and suggest Scalia's alternative, more jaundiced view.

In the remainder of this section I discuss these two alternatives, neither of which provides a satisfactory constitutional justification for the penalty. Indeed, neither the *Gregg* plurality nor Justice Scalia accurately represents the states' true objectives as defined by their death penalty statutes. If the various death penalty statutes now in effect are any indication, the states themselves have only muddled and perhaps even irrational notions about the purposes of the death penalty. This situation is unacceptable under even the most lenient reading of the Constitution. Surely even Justice Scalia would concede that a penalty must serve *some* purpose to survive constitutional scrutiny.

A. *The Court's Confused Attempts To Justify the Death Penalty*

Theories of punishment are commonly divided into two broad types: utilitarian and retributive. Utilitarians are consequentialists. To a utilitarian, punishment is justified only if it produces a greater quantum of social good than the absence of punishment.¹⁶⁶ Likewise, utilitarians assert that a punishment should never be more severe than

166. The philosophically attuned reader will be aware of the deep splits among utilitarians about almost every aspect of utilitarian theory. There are act-utilitarians, who would apply utilitarian principles to each particular incident of punishment; and there are rule-utilitarians, who would apply utilitarian principles through rules of general applicability, without regard to whether a particular instance of punishment would increase the overall measure of utility. Likewise, even among groups of act- or rule-utilitarians there are disagreements about initial definitions of terms such as "good" or "utility," as well as the means by which social goods are measured. H.L.A. HART, *Utilitarianism and Natural Rights*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 181, 187-94 (1983); J.O. URMSON, *The Interpretation of the Moral Philosophy of J.S. Mill*, in *THEORIES OF ETHICS* 128-36 (Philippa Foot ed., 1967). For the most part, these philosophical disagreements among utilitarians are irrelevant to the following discussion, because I believe that both the *Gregg* plurality's and Justice Scalia's systems of capital punishment are inconsistent with *any* variation of utilitarianism. To the extent that the differences between utilitarians are relevant, they will be discussed below.

necessary to produce the intended result of deterring criminal behavior.¹⁶⁷ The rationale for applying the least severe punishment necessary to prevent the designated criminal conduct is that society should try to achieve its purpose of preventing crime at the lowest cost possible.¹⁶⁸ More severe punishments are costlier for society to inflict than less severe punishments; therefore society should always select the least severe effective alternative as a means of maximizing its return on the punishment. Finally, utilitarians view punishment with an orientation toward the future, i.e., toward the likely ramifications in the future of a punishment inflicted in the present.¹⁶⁹

Retributivists, on the other hand, contend that punishment is justified on purely moral terms. That is, punishment is society's necessary moral response to the moral violation a criminal act represents.¹⁷⁰ In the retributive scheme, punishment is not simply a temporal matter of pragmatic usefulness; it is an imperative derived from the very nature of law.¹⁷¹ In Kant's famous example, even on the last day of a society's existence a murderer must be executed "so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment."¹⁷² Retributivists are not concerned with the

167. Bentham provides the classic statement of this proposition: "The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given." JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 169 (J.H. Burns & H.L.A. Hart eds., 1970).

168. Again, the classic statement of this proposition is Bentham's. According to Bentham, one of the four objects of punishment is "whatever the mischief be, which it is proposed to prevent, to prevent it at as *cheap* a rate as possible." *Id.* at 165.

169. John Rawls, *Two Concepts of Rules*, in *THEORIES OF ETHICS*, *supra* note 166, at 146.

170. In the words of Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, "In order that an act should be punishable, it must be morally blameworthy. It must be a sin." SIR ALFRED DENNING, *THE CHANGING LAW* 112 (1953).

171. As with the utilitarians, there is substantial disagreement among retributivists about the nature of the theory. Indeed, the term has been used to describe some very different approaches to punishment. See John Cottingham, *Varieties of Retribution*, 29 *PHIL. Q.* 238 (1979). There is even disagreement about the source of the obligation to inflict *jus talionis* for a criminal violation. Religious theorists will argue on behalf of God as the source of the obligation to punish, while secularists will find the obligation in some categorical (or at least hypothetical) moral imperative or even social contract theory. Theorists sometimes even disagree with themselves over sourcing. Compare JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* 100 (1979) (offering a "quasi-contractual" theory of obligation, derived from Kantian punishment theory) with Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?* 87 *COLUM. L. REV.* 509 (1987) (casting doubt on his earlier conclusions and also on the issue of whether Kant even had a theory of punishment). As with the internecine battles among utilitarians, the theoretical disagreements among retributivists are irrelevant to the present discussion, except where specifically mentioned below.

172. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (John Ladd trans., 1965).

practical consequences of punishment. Rather, they are concerned with ensuring that every criminal violator receives his or her just desert (*jus talionis*) for violation of a universal law. Likewise, the criminal can assert no argument against the punishment, for simply by entering into society the criminal subjects himself or herself to the operation of this law.¹⁷³ Finally, in contrast to the utilitarians, who emphasize the future consequences of present punishment, retributivists are oriented toward the past. Retributivists focus exclusively on the nature of past violations that justify present punishment, and disregard any future effect the punishment might have on the criminal or on society as a whole.¹⁷⁴

The United States Supreme Court has attempted to apply these theories of punishment to the modern system of capital punishment only once, in *Gregg*. Unfortunately, the *Gregg* discussion is not very enlightening. The entire discussion of these complicated theoretical issues in Justice Stewart's *Gregg* plurality opinion takes only five pages in the official reporter.¹⁷⁵ Yet in this short space Justice Stewart's discussion in effect provides a constitutional endorsement for both the utilitarian and retributive justifications of capital punishment.

Justice Stewart discusses the retribution theory in only one paragraph and two footnotes.¹⁷⁶ In this skimpy discussion Justice Stewart endorses the version of retributive theory that emphasizes the denunciatory function of punishment.¹⁷⁷ "[C]apital punishment is an expres-

173.

No one suffers punishment because he has willed the punishment, but because he has willed a punishable action. If what happens to someone is also willed by him, it cannot be a punishment. . . . To say, "I will to be punished if I murder someone," can mean nothing more than, "I submit myself along with everyone else to those laws which, if there are any criminals among the people, will naturally include penal laws."

Id. at 105.

174. Rawls, *supra* note 169, at 145-47.

175. *Gregg v. Georgia*, 428 U.S. 153, 183-87 (1976) (plurality opinion).

176. *Id.* at 183.

177. *Id.* It is not clear why Justice Stewart does not mention the more mainstream versions of retributive theory. One reason may be the insurmountable obstacles presented by the task of formulating a version of retributive theory that is both secular (to satisfy the requirements of the First Amendment's Establishment Clause) and easily applicable by courts and legislatures. The applicability problem is raised by the need to ascertain the precise nature and degree of the defendant's moral guilt in every case. This is necessary to apply the proper amount of retribution to rectify the defendant's moral violation. In other words, a retributive system must have some mechanism for determining how much punishment the defendant "deserves" in light of all the circumstances of his or her case or, indeed, all the circumstances of his or her entire life. See Gertrude Ezorsky, *The Ethics of Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* xi, xxvi (Gertrude Ezorsky, ed., 1972). It has been difficult for supporters of retributive theories to come up with plausible mechanisms for judging moral guilt even in the cloistered world of academic philosophy. In the real world of judges, lawyers, juries, and criminal trials the task (if done in an intellectually honest manner) is probably impossible.

sion of society's moral outrage at particularly offensive conduct," Justice Stewart wrote.¹⁷⁸ The death penalty, he wrote, is "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."¹⁷⁹

Justice Stewart does not note or respond to the many flaws that have been identified in the denunciatory version of retributive theory.¹⁸⁰ Nor does Justice Stewart recognize that adopting the denunciatory version of retributive theory in *Gregg* is inconsistent with the plurality's vote the same day to strike down the mandatory death sentencing statutes in *Woodson* and *Roberts*.¹⁸¹ He notes simply that although "[r]etribution is no longer the dominant objective of the

178. *Gregg*, 428 U.S. at 183.

179. *Id.* at 184.

180. The most significant problem with the denunciatory version of retribution is that it relies on a dubious logical presupposition. Specifically, it is not necessary to punish someone, much less execute someone, to denounce the culprit's bad behavior. Society has many other ways to get the message across that murder is wrong. As H.L.A. Hart pointed out, advocates of the denunciatory version of retributive theory make the logical mistake of confusing a *justification* of punishment with a *defining feature* of punishment. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 263 (1968). In other words, although denunciation is a defining feature of punishment, it does not justify punishment because other forms of social expression may communicate denunciation (and therefore serve the social purposes of denunciation) as well or better than punishment. In Hart's words, "[w]e do not live in society in order to condemn, though we may condemn in order to live." *Id.* at 172. Another flaw of the denunciation justification noted by Hart is that the theory permits judges to punish without considering the consequences of their actions. The denunciation justification "tempt[s] [judges] from the task of acquiring knowledge of and thinking about the effects of what they are doing." *Id.* at 171. Also, the denunciation justification presumes a moral consensus that does not exist. The theory relies on the judge or jury as the communicant of this mythical social consensus. This is too heavy a burden in a morally plural society, in which the judge's (or jury's) "judgment of the reasonable man very often is a mere projected shadow, cast by the judge's own moral views or those of his own social class." *Id.*

Finally, all denunciatory theory is conceptually confused because theory cannot identify the proper target of the denunciatory message. If the criminal being punished is the intended recipient of the denunciatory message, the message will quite likely be overridden by the criminal's concern with his or her own suffering. This is especially true where the criminal is faced with a death sentence. Long prison sentences and death sentences "are painful independently of any expressive meaning which they may have: so is this not liable to distract the offender from their expressive meaning, rather than reinforcing it?" R.A. DUFF, TRIALS AND PUNISHMENTS 242 (1986). However, if members of society other than the offender being punished are the intended recipients of the denunciatory message, then the theory seems to abandon retribution in favor of utilitarian purposes such as education, prevention, or deterrence. The author of one of the better theoretical discussions of the expressive nature of punishment takes the latter point to heart, by treating the attendant social benefits of denunciation, rather than the denunciation itself, as the primary goal of "expressive" punishments. See JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95-118 (1970).

181. See *infra* notes 202-06 and accompanying text.

criminal law,' . . . neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men."¹⁸²

Justice Stewart's discussion of utilitarian theories of justification is a bit longer, but no more enlightening, than his discussion of retribution. The utilitarian case for capital punishment rises or falls on the question of deterrence.¹⁸³ The social utility that utilitarians must prove in order to justify the death penalty is a level of general deterrence that outweighs the cost to society of inflicting the punishment plus the value of the obvious suffering resulting from the intentional taking of a human life by the state. Also, to justify the death penalty, utilitarians must prove that the penalty provides a higher quantum of social utility than society could achieve through the use of other, less extreme (and less expensive)¹⁸⁴ penalties. In short, deterrence is the key to a utilitarian death penalty.

Despite much effort, however, no one has been able to establish conclusively that the death penalty deters the commission of capital crimes any better than long prison sentences.¹⁸⁵ The state of the re-

182. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (citing *Williams v. New York*, 337 U.S. 241, 248 (1949)).

183. I am speaking here of general deterrence, or the theory that the execution of a particular capital murderer will deter other persons from committing similar crimes. Incapacitation and specific (or individual) deterrence are two other utilitarian values that come into play in noncapital contexts. Incapacitation is the theory that the defendant must be kept out of society so that he or she can do no more harm. Incapacitation cannot justify a death sentence because imprisonment, which is a less intrusive and less expensive alternative to execution, would satisfy the utilitarian need to isolate the violent offender from society. Specific deterrence is the theory that punishment is justified on the ground that the person punished will be deterred from committing similar acts in the future. Specific deterrence cannot justify a death sentence because the less intrusive means of life imprisonment without parole would serve the same utilitarian purpose.

184. See Andrew H. Malcolm, *Society's Conflict on Death Penalty Stalls Procession of the Condemned*, N.Y. TIMES, June 19, 1989, at B10. Malcolm cites the work of Robert Spangenberg, a death penalty opponent who studied capital punishment costs for the American Bar Association and found that the cost of a "prolonged legal battle" over a death sentence may be three times what it costs to imprison a 30-year-old for life. *Id.* See also Lori Rozsa, *Lack of Money Halts Opening of Prison for the Condemned*, MIAMI HERALD, Apr. 13, 1992, at 1A, 5A ("It costs an average of \$3.2 million to execute an inmate, . . . five times the cost of keeping a person in prison for life.").

185. Much of the modern work on this subject focuses on social scientist Isaac Ehrlich's claim that he has established a link between the death penalty and the deterrence of capital crimes. See Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975) (hereinafter Ehrlich, *Deterrent Effect*); Isaac Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975); Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977); Isaac Ehrlich, *Of Positive Methodology, Ethics, and Polemics in Deterrence Research*, 22 BRIT. J. CRIMINOLOGY 123 (1982). There has been a flood of critical response to Ehrlich's work, citing numerous flaws and inadequacies in his methods and conclusions. See, e.g., WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, at 303-35 (1984); Lawrence R. Klein et al., *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in

search today is not significantly different than it was in 1976, when Justice Stewart was forced to conclude that "there is no convincing empirical evidence either supporting or refuting [deterrence claims]." ¹⁸⁶ Yet, having made this concession regarding the evidence, Justice Stewart then endorsed the states' reliance on deterrence (and thus on utilitarian arguments) to justify their capital punishment statutes. In the absence of evidence, Stewart says, "[w]e may nevertheless assume safely" that some murderers will not be deterred, while other potential killers may be deterred. ¹⁸⁷ After gliding past the logical difficulties inherent in "assuming safely" something that may not, in fact, be true, Stewart concludes that "the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." ¹⁸⁸

B. *Look To What We Do, Not To What We Say*

The discussion of punishment theories in the *Gregg* plurality opinion occurs at the end of Section III, which addresses the constitution-

NATIONAL RESEARCH COUNCIL, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 336-60* (Alfred Blumstein et al. eds., 1978); Brian Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s*, 61 MINN. L. REV. 743 (1977); Hans Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317; Deryck Beyleveld, *Ehrlich's Analysis of Deterrence*, 22 BRIT. J. CRIMINOLOGY 101 (1982); James A. Fox & Michael L. Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect on the Death Penalty*, 23 LOY. L.A. L. REV. 29 (1989).

The authors of one recent review of this debate note that even Ehrlich himself explicitly states that his conclusions "do not imply that empirical investigation has proved the preventive effect of capital punishment." FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 182 (1986) (quoting Ehrlich, *Deterrent Effect*, *supra*, at 416). The authors of this study note further that:

neither Ehrlich nor anyone else has provided any evidence that capital punishment is a more effective deterrent to homicide than [sic] long prison terms. It is not that the evidence is inconclusive; it does not exist. We have no empirical data to tell us what the differential deterrent effects of disparate periods of incarceration are vis-a-vis the death penalty.

Id. This situation is unlikely to change, for reasons summarized by Charles Black:

The inescapable flaw [of studies attempting to prove deterrence] is, of course, that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A "scientific"—that is to say, a soundly based—conclusion is simply impossible, and no methodological path out of this tangle suggests itself.

CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 33-34 (2d ed. 1981).

186. *Gregg v. Georgia*, 428 U.S. 153, 185 (1976) (plurality opinion).

187. *Id.* at 185-86.

188. *Id.* at 187.

ality per se of the death penalty.¹⁸⁹ After the favorable discussion of the utilitarian/deterrence and retribution theories, Justice Stewart concludes that the Constitution does not prohibit punishment based on these theories—even where the evidence supporting the theories is virtually nonexistent or contradictory.¹⁹⁰ This seems to settle the matter: the death penalty is constitutional. But Justice Stewart then demarcates a new section of the opinion, in which he addresses at length the details of the constitutional requirements imposed on states that apply the death penalty.¹⁹¹ Because of the way Justice Stewart segregates the theoretical discussion from the discussion of the mechanics of the new constitutional system of capital punishment, it is unclear whether Stewart intends to draw any linkage between the theories of punishment and the new rules regarding the application of the death penalty.

However, the structure of the *Gregg* plurality's argument dictates that the two discussions *must* be linked. The only reason provided for the "guided discretion" requirements imposed by the *Gregg* plurality is that these requirements cure the arbitrariness problem identified in *Furman*.¹⁹² As several justices pointed out in *Furman*, the problem with the old, pre-*Furman* statutes is that they failed to apply the death penalty in a manner that would serve a constitutionally legitimate interest, i.e., retribution or deterrence.¹⁹³ The guided discretion system established in *Gregg* is the Court's answer to this problem. This system provides a mechanism through which the Court can ensure that an individual is sentenced to death only if the sentence will serve at least one of the two legitimate state interests of deterrence and retribution. The requirements imposed in Section IV of the *Gregg* plurality opinion would have no basis in law without reference to the two justifications for the death penalty that Stewart discusses in the opinion's previous section. Therefore, the unequivocal endorsement of the death penalty's constitutionality at the end of Section III of the *Gregg* opinion is qualified by the requirements enumerated in Section IV. *Gregg* does not hold that retribution and utilitarianism/deterrence justify the death penalty; *Gregg* only holds that the "guided discretion" system's peculiar formulation of retribution and deterrence justifies the death penalty.¹⁹⁴

189. *Id.* at 183-87.

190. *Id.* at 185-86.

191. *Id.* at 190.

192. *Id.* at 206-07.

193. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 300-05 (1972) (Brennan, J., concurring); *id.* at 308-09 (Stewart, J., concurring); *id.* at 311 (White, J., concurring).

194. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

The problem with the *Gregg* solution is that the system defined by guided discretion coupled with individualized sentencing does not address the problems identified in *Furman*. I am not speaking now of the fact that the post-*Gregg* system is just as arbitrary as the pre-*Furman* system, although I believe that is the case. I am speaking of the *Gregg* system's failure to provide a satisfactory answer to the broader theoretical conclusion of *Furman*: the pre-*Furman* system was too arbitrary to serve either of the two legitimate purposes justifying capital punishment—retribution or deterrence. Although the plurality in the 1976 death penalty decisions claims it is responding to this theoretical failing of the pre-*Furman* system, in fact the criteria for death sentencing set forth in *Gregg* and the other 1976 cases do not bear a systematic relationship to the theoretical purposes of retribution and deterrence that the *Gregg* criteria are supposed to serve. The significance of this failure cannot be understated. If I am correct, the current capital punishment system is subject to attack not only on the empirical ground that it fails to produce predictable results, but also on the theoretical ground that the system is irrational because it is not based on any legitimate state interest.

1. *Retribution, Deterrence, and the Individualized Sentencing Requirement*

The Court's requirement of individualized sentencing illustrates the disjunction between what the Court said about theoretical justifications for the death penalty and what the Court did in terms of establishing limits and constraints on death sentencing. The reader will recall that the requirement of individualized sentencing is the primary point of the *Woodson* decision, and later served as the theoretical basis for the *Lockett* and *Eddings* requirement that a sentencer must be given unlimited discretion to mitigate a death sentence.¹⁹⁵ The reader also will recall that Justice Scalia attacked the individualized sentencing requirement in his *Walton* concurrence on the ground that the requirement is inconsistent with the guided discretion system mandated in *Gregg*.¹⁹⁶ Putting Scalia's views on these theoretical issues aside for the moment,¹⁹⁷ the basic problem with the Court's individualized sentencing requirement is that the requirement is inconsistent with both utilitarian and retributive justifications for the death penalty.

195. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

196. See *supra* notes 103-26 and accompanying text.

197. His views on the subject will be discussed at length in the next section. See *infra* notes 223-48 and accompanying text.

For example, individualized sentencing would have no place in a purely utilitarian system that concentrated exclusively on the deterrence value of each death sentence. Under such a system, society would be interested less in the fairness of any single defendant's death sentence than in the effect a swift and certain death sentencing system would have on other individuals who might contemplate committing similar crimes. As Justice White points out in his dissent to the Court's most recent mandatory death sentencing ruling, a mandatory death sentence is the most effective way of achieving the widest possible deterrent effect.¹⁹⁸

The defendant in such a system would be little more than an instrument the state uses to reach its targeted audience of potential murderers. Individualized sentencing is unnecessary in a purely utilitarian system because a society employing this system would not care whether a particular defendant "deserves" his or her punishment, so long as the deterrent message is adequately communicated by the execution and the overall number of killings in society is reduced accordingly. Indeed, if a society employing a utilitarian capital punishment system could assure itself that the number of potential victims saved by the deterrent effect of the penalty is larger than the number of innocent persons wrongly executed for murders they did not commit, the society justifiably could decide that procedural protections should be virtually eliminated, on the ground that a few wrongful executions are worth enduring for the overall good of a lower murder rate.¹⁹⁹

The contradictions between the post-1976 constitutional requirements and the utilitarian/deterrence justification of the death penalty do not stop at *Woodson*. The utilitarian arguments favoring the death penalty may also argue in favor of extending death sentences to crimes other than murder, such as armed robbery, rape, kidnapping, or aircraft hijacking. Assuming that the problems of proof accompanying all deterrence arguments could be surmounted,²⁰⁰ and it could be shown that a few death sentences imposed for armed robbery would result in a significant reduction in the overall number of armed robberies, the utilitarian would be obliged to support application of the death penalty to armed robbery. However, despite the Supreme Court's favorable treatment of the deterrence argument in *Gregg*, the

198. *Sumner v. Shuman*, 483 U.S. 66, 87-88 (1987) (White, J., dissenting).

199. Opponents of utilitarianism often argue that utilitarianism may require innocents to suffer when such suffering would provide greater social benefits than a more limited form of punishment. See, e.g., DAVID A. J. RICHARDS, *THE MORAL CRITICISM OF LAW* 232-33 (1977).

200. For the problems of proof posed in the death penalty context, see *supra* note 185. For the broader criminal context, see generally Daniel Nagin, *General Deterrence: A Review of the Empirical Evidence*, in NATIONAL RESEARCH COUNCIL, *supra* note 185, at 95.

Court has refused to accept the applicability of that argument to crimes not involving a killing. The Court held in 1977 that the death penalty could not be imposed as punishment for crimes other than those involving the "unjustified taking of human life."²⁰¹ The Court's opinion deals with the problems posed by its own utilitarian arguments from *Gregg* in a manner that would become common in the post-*Gregg* era of death penalty jurisprudence: it ignored them.

The individualized sentencing requirement fares only slightly better when considered in light of the Court's retributivist argument. Retributivist theorists generally argue that an assessment of the defendant's character should play a role in assessing blame and inflicting punishment. However, the role of the defendant's overall character is usually subordinated to other concerns, such as the moral culpability of the defendant's specific criminal act, and the need to maintain society's moral equilibrium by punishing every criminal violation.²⁰² The Court does not mention, much less discuss, any such theory in striking down the Louisiana and North Carolina mandatory death penalty statutes.²⁰³ This is an unfortunate omission, because if one applies the Court's discussion of the retributivist argument in *Gregg* to the mandatory death penalty cases, a good argument could be made that *Woodson* and *Roberts* should have been decided in favor of the mandatory statutes. As noted above, the form of retributivism that the Court found attractive in *Gregg* emphasized the denunciatory function of punishment.²⁰⁴ Yet when the Court in *Woodson* and *Roberts* forced states to introduce qualifications and exceptions to death sentences in first-degree murder cases, it greatly diluted the denunciatory effect of capital punishment. The message that *all* intentional murderers will be put to death is clear and strong enough to satisfy the retributive spirit. The message that intentional murderers will *sometimes* be put to death is equivocal and weak; it expresses little except society's ambivalence.

2. Retribution, Deterrence, and "Guided Discretion"

Like the individualized sentencing requirement, the system of guided discretion the Court generated in *Gregg* lacks any systematic theoretical justification. The hallmark of the guided discretion system

201. *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

202. For a good discussion of the complicated interplay of these factors, see ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-97 (1981).

203. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

204. See *supra* notes 176-82 and accompanying text.

is the bifurcated trial, with a penalty phase conducted under the guidance of aggravating factors set forth in a statute. This basic structure is dictated by neither utilitarian nor retributivist principles. Nothing suggests that a *Gregg*-type bifurcated system makes the death penalty a greater deterrent than an alternative system. Indeed, the *Gregg* bifurcated system detracts from the utilitarian desideratum of deterrence because it introduces many variables that reduce certainty and therefore lessen the deterrent value of the punishment. Likewise, no one suggests that the typical statutory aggravating circumstances are good indications of the types of crimes that are deterred more readily by the application of the death penalty. On the contrary, it could be argued that the typical aggravating factor indicates just the opposite: these factors seem to describe crimes and criminals that are beyond deterrence.²⁰⁵

The application of retribution to the *Gregg* system is a more complicated issue. In theory, retribution could support the requirement of a bifurcated trial, with the penalty phase oriented toward ascertaining the precise degree of the defendant's moral guilt. But since every aspect of defendant's behavior could enter into this moral calculus, including aspects not covered by aggravating factors listed in the typical *Gregg*-type statutes, it is more doubtful that retributive principles justify the limitation on sentencing discretion mandated by *Gregg*. "The fact is that the considerations that determine the culpability of any crime are infinite in number and variety, depending on the criminal as well as the crime, and cannot possibly be catalogued objectively without gross error in the application of the definition of particular crimes."²⁰⁶

But regardless of whether retributive principles could justify the use of a *Gregg*-type guided discretion system in the abstract, the more immediate problem is that the actual factors that crop up in the *Gregg*-type death penalty statutes do not reflect retributive principles. Retribution simply does not seem to be the primary concern of states (or of the American Law Institute, whose Model Penal Code provided the original model for the *Gregg*-type statutes)²⁰⁷ that have adopted the typical guided discretion death penalty statute. In this limited respect Justice Scalia's observation in *Booth* is correct: moral guilt is not the determining factor in imposing the death penalty under the modern statutes.²⁰⁸ However, as a few examples will indicate, Justice Scalia misperceives the real rationale underlying the modern statutes.

205. See *infra* notes 209-19 and accompanying text.

206. E. GOWERS, A LIFE FOR A LIFE 38, quoted in HART, *supra* note 180, at 163.

207. See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

208. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

Consider the Maryland statute at issue in *Booth*.²⁰⁹ The statute has ten aggravating circumstances, most of which are typical of other states' death penalty statutes. The aggravating circumstances are:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder when he was confined in a correctional institution.

(3) The defendant committed the murder to escape or to attempt to escape from custody, or to evade capture.

(4) The victim was taken or attempted to be taken during a kidnaping or abduction, or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of the statute.

(6) The defendant committed the murder under an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed under an agreement or contract for remuneration or the promise of remuneration.

(8) The defendant was under a death sentence or life prison term when the murder occurred.

(9) The defendant committed more than one first-degree murder arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit a robbery, arson, rape, or sexual offense in the first degree.²¹⁰

As with most other statutes of this sort, the jury may impose a death sentence if it finds at least one aggravating circumstance.²¹¹

I contend that these aggravating circumstances are not motivated by, and in some cases are not even consistent with, retributive principles of punishment. Applying the factors in the Maryland statute to two hypothetical killers will clarify this point.

Killer number one murders the lover of his unfaithful wife in a killing that was carefully planned over a period of several weeks. Assume that killer number one had cheated on his wife many times, that the wife's lover did not know she was married, and that the victim was a widower who was a loving father and the only living relative of his three young children. Killer number two escapes from prison, kidnaps a child, and is trying to rob a convenience store when he is seen by a

209. *Id.* at 498 (citing MD. ANN. CODE art. 27, § 413(b) (1982).

210. MD. ANN. CODE art. 27, § 413(d) (1982 and Supp. 1986) (listing aggravating circumstances).

211. *Id.*

police officer. He kills both the officer and child when he tries to flee.

Under the Maryland statute, killer number one should receive something other than a death sentence because he does not satisfy any statutory aggravating circumstance. It is highly likely that killer number two will receive a death sentence. The state reasonably can claim that his actions fall within statutory factors (1), (3), (4), (5), (9), and (10).²¹² The likely sentences in the two cases seem clear, but what is the explanation for those different outcomes? Intuitively, the explanation does not seem to be a difference in the two killers' moral culpability. After all, as a society we find it just as inexcusable—that is, just as morally culpable—for the frustrated husband to kill the lover as we do for the escaped convict to kill the police officer and the child. A senseless killing is a senseless killing. Also, killer number one is an unsavory and cold-blooded creature, whose action has effectively ruined the lives of the victim's three orphaned children.

Yet there is some logic to the Maryland scheme. Maryland does not seek to execute killer number two because the state's residents find his senseless killing any less morally excusable than killer number one's senseless killing. The state seeks to execute killer two because its residents are simply *afraid* of him. The aggravating factors indicate that killer number two is incorrigible. In the most basic sense the aggravating factors in the Maryland statute all relate to whether the state believes it can ever hope to control the murderer in the dock. Killer number one fails to accumulate a single aggravated circumstance not because his killing is any less morally reprehensible than killer number two's or because he is a more moral person. Rather, killer number one accumulates no aggravated circumstances because he has not shown the kind of behavior that indicates he is beyond society's control.

Maryland's statute is nothing more than a rough predictor of future behavior. The state has concluded that when a person kills a police officer, or kidnaps and kills a child, or carries out a murder for hire, that person has shown a capability of engaging in the sort of antisocial behavior that indicates the state can never hope to reach him through ordinary legal strictures. Likewise, Maryland has concluded that when a person kills while escaping from prison, he is so desperate for his freedom that he will do anything to achieve it. Put him back in jail, and he is likely to do (or to try to do) the same thing again. Likewise, Maryland makes the judgment that when a murderer kills someone in prison while serving a life sentence, the murderer has recognized that he has nothing to lose, and demonstrated his willing-

212. See *supra* text accompanying note 210.

ness to act without restraint. In the absence of mitigating circumstances such as provocation, Maryland instructs its juries that they may put that murderer to death in order to prevent the inevitable next killing. Conversely, in situations like killer number one's killing-for-passion, Maryland's statute indicates that the risk of similar killings in the future is not great enough to warrant a death sentence. This difference in treatment has nothing to do with morality; it has to do with fear of the incorrigible sociopath.

If my interpretation of the Maryland statute (and therefore all but one of the other state death penalty statutes)²¹³ is correct, then it seems that Texas has the only forthright death penalty statute in the country. Texas does not use a standard set of aggravating circumstances to guide the jury at the penalty phase of a capital trial. Under the Texas system, the jury at the penalty phase considers three questions: whether the murder was committed "deliberately," whether the defendant's conduct was unreasonable in light of any provocation by the victim, and "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."²¹⁴ If the jury answers all three questions "yes," the defendant is sentenced to death.²¹⁵

It is not difficult to understand how a Texas jury that has just found the defendant guilty of "intentionally" killing the victim at the guilt phase of a capital trial can then answer the first two penalty phase questions "yes." Therefore, the key question in the Texas system is whether the defendant will commit future acts of violence. Thus, only the Texas statute states explicitly what all other states' death penalty statutes only grope toward in their enumeration of specific aggravating factors: Is the defendant in a particular murder case likely to kill again? (Or, to put it another way, is this defendant so incorrigible that we should fear his continued presence in society?) If the answer to this question is "yes," then the state may execute him. If the answer to the third question is "no," the Texas statute implies

213. The "heinous, atrocious, and cruel" (HAC) factor is the only aggravating circumstance that crops up frequently in other statutes but is not in the Maryland statute. See *supra* notes 129-35 and accompanying text. This factor is commonly interpreted to permit the execution of a defendant who tortures the victim before killing him or her. See *generally* *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988); *Proffitt v. Florida*, 428 U.S. 242, 254-56 (1976). The HAC factor also seems motivated largely by fear of the incorrigible defendant rather than by moral factors typically cited by retributivists. States seek to execute defendants who torture their victims before killing them because the states doubt that it is possible to alter permanently the behavior of someone whose actions are so disengaged from the normal constraints on human conduct.

214. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (West Supp. 1991)

215. *Id.* art. 37.071(d).

that an execution is not worth the bother because society can deal with the defendant in other ways.

The most obvious problem with the Texas statute is that the statute makes the decision to execute someone turn on a jury's judgment that is, by definition, imperfect. No jury has the power to ascertain with 100 percent certainty the future actions of the defendant, yet Texas requires the jury to do just that.²¹⁶ This imperfection did not sway the United States Supreme Court, which upheld the Texas system in one of the Court's five 1976 death penalty decisions.²¹⁷ The Court did not attempt to apply the theories of punishment discussed in *Gregg* to the Texas statute. If it had done so, it would have discovered that neither the deterrence nor the retribution arguments support a future dangerousness requirement. With regard to deterrence, the Texas statute itself reflects the recognition that individuals who are likely to commit acts of violence in the future cannot be deterred. Therefore, the state feels the need to execute these individuals before they commit another murder. On the other hand, retributive theories do not apply because these theories do not take into consideration any future activity when considering the justifiability of present punishment.²¹⁸ A retributivist justifies punishment only as a response to the 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.²¹⁹

216. The Texas system has produced a mini-industry of "experts" on future dangerousness, the most prominent of whom is Dr. James Grigson. Grigson is also known in the Texas death penalty trade as "Dr. Death" 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. See Shelley Clarke, Note, *A Reasoned Moral Response: Rethinking Texas's Capital Sentencing Statute After Penry v. Lynaugh*, 69 TEX. L. REV. 407, 447-48 & n.188 (1990). The American Psychological Association has argued that psychological testimony such as Grigson's should not be permitted because it is inherently unreliable. See Amicus Curiae Brief for the American Psychiatric Association, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080) at 8-9. The former chief mental health officer for the Texas Department of Corrections has testified that predictions of future dangerousness are correct only 33 percent of the time. See *Sattiewhite v. State*, 786 S.W.2d 271, 290 (Tex. Crim. App. 1989), cert. denied, 111 S. Ct. 226 (1990). Other studies have reported even higher error rates in future dangerousness predictions. See, e.g., Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 110-11 n.50 (1984) (collecting studies reporting error rates of up to 92%); Joseph J. Coccozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1098 (1976) (86% error rate). Despite the dubious scientific or predictive value of future dangerousness evidence, the Supreme Court has ruled that such evidence is permitted and does not render the Texas statute unconstitutionally arbitrary. See *Barefoot v. Estelle*, 463 U.S. 880 (1983).

217. *Jurek v. Texas*, 428 U.S. 262 (1976).

218. See *supra* notes 170-74 and accompanying text.

219. The third possibility is that Texas is concerned with incapacitation, i.e., killing the in-

I have offered two conclusions in this section. First, every state death penalty statute in the country is premised on the notion that certain defendants are likely to commit future acts of violence, are incorrigible and uncontrollable, and therefore must be executed. Texas explicitly makes future dangerousness the key factor, while other states simply make the determination of future dangerousness indirectly, through the use of aggravating factors such as those in the Maryland statute considered above.²²⁰ My second conclusion is that making future dangerousness the key to the process of "guided discretion" in the application of the death penalty cannot be supported by either the utilitarian/deterrence or retributive theories of punishment. If these two conclusions are combined, they seem to indicate that the system of guided discretion lacks any theoretical foundation. In other words, the system is irrational. I suspect that on one level Justice Scalia agrees with this conclusion. After all, he attacked both the individualized discretion system in *Walton*²²¹ and the guided discretion system in *Booth*, *Gathers*, and *Payne*.²²² Where Justice Scalia and I differ is in our response to the conclusion that the Court's current system makes no sense. I would use that conclusion to justify a reconsideration of *Gregg*'s initial holding that the death penalty can, if applied properly, satisfy the Eighth Amendment. Justice Scalia, on the other hand, offers yet another rationale to justify the continued im-

corrigible defendant so he will not kill again. As noted above, *supra* note 183, incapacitation arguments cannot support the death penalty, because there are alternative methods of removing and isolating the capital murderer from society.

The Supreme Court's blithe response to the problematic future dangerousness element of the Texas statute inadvertently raises the incapacitation argument. The Court noted that "[t]he task that a Texas jury must perform in answering the statutory question in issue is . . . basically no different from the task performed countless times each day throughout the American system of criminal justice." *Jurek*, 428 U.S. at 275-76. It is true that the ordinary criminal sentencing process requires sentencers and (at a later stage in the process) parole boards to consider a convicted defendant's likely future conduct in determining whether to put or keep the defendant in jail. However, these non-capital sentencing contexts are not analogous to death sentencing. When a judge in a non-capital case considers whether a prisoner is likely to commit crimes, for example, the judge is making that determination in order to choose between releasing the defendant into society and incapacitating the defendant by putting him or her in jail. There is no third option in the non-capital context. In the death sentencing context, however, the choice is not between death and freedom. The third option is permanent incapacitation in prison. Therefore, determinations of future dangerousness as the basis for a death sentence cannot rely on an incapacitation rationale because that rationale can be served equally well by other means.

220. See *supra* notes 209-13 (discussion of Maryland statute).

221. *Walton v. Arizona*, 110 S. Ct. 3047, 3058 (1990) (Scalia, J., concurring in part and concurring in judgment).

222. *Payne v. Tennessee*, 111 S. Ct. 2597, 2613 (1991) (Scalia, J., concurring); *South Carolina v. Gathers*, 490 U.S. 805, 823 (1989) (Scalia, J., dissenting); *Booth v. Maryland*, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting).

sition of the death penalty. It is on this note that we must return a final time to Justice Scalia's death penalty.

V. JUSTICE SCALIA'S DEATH PENALTY, PART II

As the previous section indicates, the present system of capital punishment cannot be justified by any of the most common punishment theories. Justice Scalia has acknowledged this in his death penalty opinions in cases such as *Walton* and *Booth*. His practical response to the existing theoretical vacuum is to permit the states much wider latitude in imposing death sentences than they have in the present system. But Justice Scalia cannot solve the problem posed by the incoherence of the Court's present stance toward death sentencing simply by deferring more broadly to state decisions on capital punishment. Even Scalia has not suggested that the Constitution *never* limits the imposition of capital punishment. A punishment imposed for no reason beyond whim or caprice is an irrational punishment, and presumably even Scalia would hold that the Constitution forbids irrational punishment. Thus, by permitting the states to impose the death penalty *at all*, Scalia must identify some legitimate penal rationale to justify the penalty. If my arguments in the preceding sections are correct,²²³ and the rationale is neither deterrence nor retribution, then what is it?

Scalia's short opinions in the victim impact statement cases hint at his answer. The main thrust of his opinions in those cases is that "personal responsibility" as well as "moral guilt" should be relevant to determining the proper sentence in a capital case.²²⁴ The term "personal responsibility" means nothing more than the entire harm—both direct and tangential—caused by the defendant's actions, regardless of whether the defendant knew of or could foresee the harm. At first glance, Scalia's opinions on victim impact statements seem to state nothing more than a very basic form of the traditional retributive justification of the death penalty. Under this interpretation, Scalia is merely asserting that a defendant's just deserts should be measured both by the level of defendant's moral culpability (as defined by such things as the defendant's mens rea) and the degree of harm caused by the defendant's immoral deeds. Although this argument is not unusual among retributive theorists,²²⁵ focusing on the nature of the vic-

223. See *supra* notes 99-222 and accompanying text.

224. See *supra* notes 137-47 and accompanying text.

225. For a more complete and systematic philosophical account of the complementary relationship of moral culpability and harm in retributive theory, see Nozick, *supra* note 202, at 363-97.

tim's harm can lead to odd conclusions about the severity of punishment that is "deserved."²²⁶

I believe Scalia is asserting something different, and far more radical, than this rather mundane restatement of retributive theory.²²⁷ There are several indications in his victim impact opinions that this is the case. For example, instead of treating what he calls "personal responsibility" (i.e., the harm defendant has caused) as a component of the moral guilt that justifies retributive punishment, Scalia treats harm and guilt as distinct justifications that operate independently of each other. In *Booth*, Scalia argues that:

the principle upon which the Court's opinion rests—that the imposition of capital punishment is to be determined solely on the basis of moral guilt—does not exist, neither in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions in this Court.²²⁸

The paragraph following this quote again distinguishes between defendant's moral guilt and the victim's harm. In this paragraph Scalia further justifies consideration of the victim's harm in capital cases by

226. For example, Blackstone suggests that some victims may be so important (and therefore the harm caused by their murder so egregious) that the retributive urge for correspondence between offense and punishment cannot be satisfied even by the death penalty. "[T]he execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune." 4 WILLIAM BLACKSTONE, COMMENTARIES *13.

227. Other problems appear if I am wrong and Justice Scalia is indeed arguing from a purely retributive position. For instance, Scalia's arguments in *Walton* are inconsistent with a purely retributive stance. He argues in *Walton* that state legislatures should be permitted to limit jury discretion to mitigate death sentences and should even be permitted to subject certain kinds of murders to a mandatory death sentence. See *Walton v. Arizona*, 110 S. Ct. 3047, 3066-68 (1990) (Scalia, J., concurring). Near-total deference to potentially very broad statutory limitations on sentencer consideration of mitigating factors contradicts the central retributive requirement that punishments be precisely proportionate to the degree of defendant's moral responsibility for the crime. This proportionality assessment can only be carried out on an individual basis at the sentencing stage of a trial. Permitting legislators to prejudge individual culpability by imposing a mandatory death sentence on anyone whose offense falls into a broad category of first-degree murder would violate the central retributive axiom that punishment should be an individualized sanction imposed for a particular criminal act. See KANT, *supra* note 172, at 100.

The same argument would seem to prohibit legislatures from limiting the sentencer's discretion to consider any aggravating circumstance the sentencer found relevant in a particular case. Otherwise, an individual murderer who "deserves" a death sentence under a proper application of retributive principles may unjustly escape proper punishment because the list of statutory aggravating circumstances was insufficiently comprehensive. This is contrary to Scalia's view expressed in *Booth* that the legislature should have the prerogative to permit or disallow aggravating factors such as victim impact. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

228. *Booth*, 482 U.S. at 520 (Scalia, J., dissenting).

reference to the democratic authority to use individual criminal trials to assert broader social interests:

Recent years have seen an outpouring of popular concern for what has come to be known as "victims' rights." . . . Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced—which (and *not* moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty.²²⁹

Scalia's *Payne* opinion reiterates this point. Scalia insists that the victim impact statement issue is not simply a pragmatic matter of equalizing opportunities of prosecutors and defense attorneys.²³⁰ He points out that he would vote to permit states to broaden consideration of victim impact evidence in aggravation of a death sentence even if *Lockett* were overruled and the states were no longer required to give sentencers unlimited mitigation discretion in capital trials.²³¹ The issue, he says, is not parity between mitigating and aggravating factors. Rather, the issue involves the more fundamental constitutional principle that "permits the People to decide . . . what is a crime and what constitutes aggravation and mitigation of a crime."²³² The holding of *Booth* is wrong, Scalia asserts, because it "conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victim's rights' movement."²³³

There are two keys to Scalia's opinions in the victim impact statement cases: the distinction between the defendant's moral guilt and the victim's harm, and the emphasis on the assertion of a generalized "public sense of justice" through the criminal process. Both themes are inconsistent with the retributivist tradition. As noted above, a retributivist would not distinguish between harm and guilt; rather, retributive theories regard the victim's harm as one component of the moral guilt that justifies punishment. In contrast, the articulation of the victim's harm in Scalia's scheme serves a function independent of moral guilt in assessing the proper punishment.

229. *Id.* (emphasis in original). In reviewing *Payne*, the Tennessee Supreme Court took its cue from Justice Scalia, asserting that the system based on *Booth* and *Gathers* is "an affront to the civilized members of the human race . . ." *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990).

230. *Payne v. Tennessee*, 111 S. Ct. 2597, 2613 (Scalia, J., concurring).

231. *Id.*

232. *Id.*

233. *Id.*

This independent function is linked to Scalia's second theme: the assertion of collective social values through a criminal trial. In the most basic sense, the assertion of collective values is a central feature of every punishment theory, including the various versions of retributive theory. For example, although the moral imperatives that justify punishment in retributive theory are premised on each individual's unassailable autonomy and freedom, even in retributive theory the society's collective political and legal processes are permitted to define and apply the universal moral imperatives by punishing those who commit crimes.²³⁴

Scalia's approach to capital punishment magnifies the collective element in punishment beyond anything found in retributive theory. Scalia's theory is distinguished from retributive theory in that it emphasizes the assertion of collective values for their own sake, independent of the moral deserts of the defendant. One of the cardinal axioms of retributive theory is that "[j]udicial punishment can never be used merely as a means to promote some other good for the criminal or for civil society."²³⁵ Likewise, retributive theory asserts that the criminal is the moral beneficiary of every justly imposed punishment, in the sense that punishments restore the "proper balance between benefit and obedience."²³⁶ In contrast, in Scalia's system the sentencing process in a capital case reflects social attitudes that encompass far more than the defendant's own crime. According to Scalia, the sentencer at a capital trial may use the unanticipated and unknown consequences of a particular defendant's actions as an aggravating factor in the defendant's trial because the society has an abstract need to ameliorate its "public sense of injustice" at criminal harms generally.

Justice Stevens misses Scalia's point when he responds in *Payne* that evidence of unanticipated consequences "sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose

234. Several recent retributivist theorists have resorted to social contract concepts to reconcile this individual moral autonomy with the social obligation to respect the law and submit to punishment when the law is violated. See *supra* note 171; see also HOWARD WILLIAMS, *KANT'S POLITICAL PHILOSOPHY* 97 (1983).

235. KANT, *supra* note 172, at 100.

236. MURPHY, *supra* note 171, at 100. Murphy also says:

The criminal himself has no complaint, because he has rationally consented to or willed his own punishment. That is, those very rules which he has broken work, when they are obeyed by others, to his own advantage as a citizen. He would have chosen such rules for himself and others in the original position of choice. And, since he derives and voluntarily accepts benefits from their operation, he owes his own obedience as a debt to his fellow-citizens for their sacrifices in maintaining them. If he chooses not to sacrifice by exercising self-restraint and obedience, this is tantamount to his choosing to sacrifice in another way—namely, by paying the prescribed penalty.

other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason."²³⁷ To Scalia, the exercise of the jury's emotion is itself the justification for introducing victim impact evidence, and ultimately for imposing the death penalty.²³⁸

Stevens and Scalia are at odds because they are dealing with two different criminal universes. In Stevens' universe, a criminal trial is anchored in the individualized facts pertaining to the defendant's moral guilt. In Scalia's universe, the individualized moral guilt of the defendant is only one part of the equation. Society's outrage at crimes analogous to the defendant's is the other, equally important part of the equation. In Scalia's universe, the trial serves only incidentally to mete out individual justice to a deserving defendant; its primary aim is to express society's sense of moral outrage and reaffirm collective values about justice. The defendant's punishment is a means to satisfy a social end, rather than an end in itself.²³⁹ If the unanticipated harm caused by a defendant is egregious enough, and that harm outrages society to a sufficient degree, the social outrage itself will justify a death sentence even though the defendant is no more morally guilty than other murderers who do not receive death sentences. This explains Scalia's willingness to abandon requirements that a judge or jury be required to consider any evidence the defendant wishes to introduce during the penalty phase to mitigate the defendant's moral culpability for a capital crime.²⁴⁰ In Scalia's universe, the sentencer may consider the defendant's moral guilt irrelevant.

It may seem at this point that Scalia has doubled back on himself and arrived at another form of utilitarian theory. And, in fact, Scalia's justification of the death penalty does resemble utilitarian theory in some respects. Like utilitarians, Scalia emphasizes the broader social context and implications of death sentencing, rather than the de-

237. *Payne v. Tennessee*, 111 S. Ct. 2597, 2625 (1991) (Stevens, J., dissenting).

238. Samuel Pillsbury has argued recently that the application of moral outrage is a legitimate part of a sentencer's duty in a capital case. See Samuel Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989). Whether it is possible, as Pillsbury contends, for such outrage to be channeled into a systematic and fair retributive punishment scheme is open to question. In any case, by moving away from the retributive punishment framework, Scalia's justification of the death penalty abandons the moral limits on sentencer outrage envisioned by Pillsbury's scheme. See *id.* at 685-98.

239. This distinguishes Scalia's theory from denunciatory theories discussed earlier. See *supra* notes 176-82 and accompanying text. Denunciatory theories are premised on retributive notions that a punishment's "essential expressive aim must be that of communicating to the criminal himself a proper condemnation of his crime." Duff, *supra* note 180, at 236.

240. See *Walton v. Arizona*, 110 S. Ct. 3047, 3058-59 (1990) (Scalia, J., concurring in part and concurring in judgment).

defendant's individual circumstances. Like utilitarians, he considers a punishment justified if it has a positive social effect that outweighs any negative effects. More precisely, Scalia would permit an inequitable result in an individual case (i.e., he would permit similar moral acts to be punished dissimilarly) if the inequitable results would produce significantly greater positive social consequences.

These similarities are only superficial. Scalia's death penalty theory is not utilitarian. First, the social utility Scalia asserts in favor of the death penalty—as an avenue for society's emotive reaction to violent crime—is not the utilitarian's usual hard, measurable, empirical consequence, such as deterrence. Also, unlike utilitarians,²⁴¹ Scalia does not impose a proportionality or cost/benefit measure as a requirement for the imposition of a punishment such as the death penalty. Indeed, Scalia's scheme does not impose upon states seeking to apply the death penalty utilitarian requirements of any kind. Scalia's death penalty is justified by the very act of using society's political processes to authorize the penalty and establish standards for its imposition. Scalia's basic principle is simply that "the People" are permitted to decide "what is a crime and what constitutes aggravation and mitigation of a crime."²⁴² In other words, if "the People" want to use the death penalty, then no further utilitarian proof, support, or justification is necessary.

Justice Scalia's arguments in favor of the death penalty raise a third major justification for punishment that I have not yet discussed: revenge. Scalia argues in *Booth* that states should be permitted to impose the death penalty on the basis of "the full reality of human suffering the defendant has produced."²⁴³ Then, he argues in *Walton* that states should be permitted to eliminate the sentencer's consideration of mitigating factors by adopting mandatory death penalty statutes.²⁴⁴ Finally, he puts these two positions together in *Payne*, noting that states should have the authority to impose the death penalty based on the harm caused by the defendant even if they are also permitted to prohibit consideration of mitigating evidence.²⁴⁵ A system arranged in this way would permit sentencers in capital trials to ignore the defendant's character altogether and react solely to the bare facts of the crime and its ancillary consequences. The defendant is viewed in one-dimensional fashion as nothing more than the agent of harm.

241. See *supra* note 168.

242. *Payne v. Tennessee*, 111 S. Ct. 2597, 2613 (1991) (Scalia, J., concurring).

243. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

244. *Walton*, 110 S. Ct. at 3058 (Scalia, J., concurring in part and concurring in judgment).

245. *Payne*, 111 S. Ct. at 2613 (Scalia, J., concurring).

Instead of meting out justice in retributive fashion, according to the defendant's moral deserts, Scalia's system avenges a harm by killing the agent of the harm. Society's anger is assuaged, even if in traditional retributive terms the punishment is disproportionate to the offense.

The philosophical literature contains very little discussion advocating the use of revenge as a justification for punishment. There are many good reasons for this. Revenge draws on a darker part of the human psyche, which most societies take care not to enshrine in law. Revenge tends to deny the imposition of a rational limit or structure to punishment. At the enforcement level, a punishment system premised on revenge tells the sentencer to depend on the viscera instead of the intellect to assess the level of punishment necessary in each case: one feels revenge, one does not think it. And as even the supporter of one form of "emotional justice" has recognized, feelings of this sort are very difficult to cordon or control.²⁴⁶ Finally, the revenge justification seems to trade the morally upstanding desideratum of *jus talionis* (just deserts) for the amoral and bloodthirsty *lex talionis* (an eye for an eye). To put it a slightly different way, punishment becomes justified by power rather than morality.

The widespread aversion to revenge as a justification for punishment seems to damn Scalia's death penalty under any but the most empty interpretations of the Eighth Amendment. I suspect Justice Scalia and those who follow his lead would object to the classification itself. I would expect the objection that what I call revenge is merely a harsh, strict-liability version of retribution. It is true that the line between retribution and revenge is not self-evident. The clear-eyed Holmes denied that the line even exists, declaring simply that retribution is "vengeance in disguise."²⁴⁷ But Scalia himself implicitly distances his justification for capital punishment based on the harms caused by the defendant (which I contend is premised on revenge)

246. See Pillsbury, *supra* note 238, at 690.

247. OLIVER W. HOLMES, *THE COMMON LAW* 45 (1881). I should add that Holmes saw nothing particularly deplorable about this. Although he believed that the sentiment of revenge should not be encouraged by the law, he also recognized that law could not avoid serving frequently as the enforcer of one of society's most violent and pervasive emotions.

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.

Id. at 41-42. Holmes viewed this fact like he viewed most unsavory facts about society: as a reflection of the unsavory nature of human beings.

from the facially retributive "moral guilt" justification.²⁴⁸ Also, Scalia's death penalty seems to fit the model of revenge theory sketched by retributivists, who are constantly having to deny some version of Holmes's contention that revenge and retribution are indistinguishable.

The retributivist Robert Nozick has offered one of the most thorough and systematic attempts to distinguish revenge theories from retributive theories.²⁴⁹ Nozick suggests five characteristics that distinguish revenge from retribution. Each of Nozick's suggested characteristics, set forth below, indicates that Scalia's death penalty is essentially vengeful rather than retributive in nature.

(1) "Retribution is done for a wrong, while revenge may be done for an injury or harm or slight and need not be for a wrong."²⁵⁰ This is another way of saying that revenge may be disproportionate to the moral gravity of the crime. As Scalia argues in all the victim impact statement cases, the harm caused by the defendant alone can justify a death sentence, without regard for the defendant's moral guilt.²⁵¹ Also, to the extent that a state may limit or even eliminate introduction of mitigating factors in a capital trial's penalty phase, as Scalia would permit, the defendant's moral guilt becomes impossible to assess and therefore irrelevant to the sentencing process.²⁵²

(2) "Retribution sets an internal limit to the amount of punishment, according to the seriousness of the wrong, whereas revenge internally need set no limits."²⁵³ This is another reference to the proportionality requirement of retribution, under which punishment is just only if it matches the moral culpability of the offender. Again, by rejecting the element of moral guilt as a limit on punishments, Scalia tilts toward revenge rather than retribution.

(3) Revenge is personal and inflicted because of what the defendant did to the punisher's own person, relative, or group. "On the other hand, the dispenser of retributive punishment need not have any such personal tie with the victim of the wrongful conduct."²⁵⁴ This is the characteristic of revenge that Scalia's scheme reflects most strongly.

248. See *supra* notes 137-47 and accompanying text.

249. See NOZICK, *supra* note 202, at 366-70. See also C.L. TEN, CRIME, GUILT, AND PUNISHMENT 42-46 (1987) (citing NOZICK).

250. See NOZICK, *supra* note 202, at 366.

251. See cases cited *supra* note 222.

252. See *supra* note 227.

253. See NOZICK, *supra* note 202, at 367.

254. *Id.*

Both the theoretical underpinning and the practical consequences of Scalia's victim impact statement opinions involve efforts to personalize the death penalty sentencing process and place the jury or judge in the position of the murder victim's grieving friends and family members. Reducing the distance between the sentencer and the victim introduces the emotions of revenge as an element of the jury's deliberative process. State approval of victim impact considerations encourages the sentencer to subjugate objectivity (in the sense of an effort to assess rationally the defendant's moral guilt) to the natural sympathy most judges and juries will feel with the aggrieved victims. Scalia's repeated references to the "victim's rights movement" reinforce the perception that he intends to personalize the death sentencing process.²⁵⁵ To the extent that the victim has interests in excess of those necessary to serve society's more general retributive or utilitarian interests in punishment, those interests can only be characterized as premised on instincts of personal revenge. That a state agent may be carrying out this vengeful act on behalf of the victim's family or friends does not change the vengeful character of the act.

(4) "Revenge involves a particular emotional tone, pleasure in the suffering of another," which is missing in retribution.²⁵⁶ Scalia's capital punishment scheme specifically anticipates that the death sentencing process will permit society to express the "outpouring of popular concern" for victims of capital crimes.²⁵⁷ As explained above, this concern for the victim's personal pain is different in kind from the retributive concern with maintaining an abstract correspondence between the defendant's moral guilt and his or her just deserts.²⁵⁸

255. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2613 (1991) (Scalia, J., concurring); *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting). Other members of the *Payne* majority also advocate the personalization of the sentencing process. According to Chief Justice Rehnquist, victim impact evidence "is 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." *Payne*, 111 S. Ct. at 2607 (emphasis in original). Justice O'Connor emphatically repeats this theme. "'Murder is the ultimate act of depersonalization.' . . . It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back." *Id.* at 2612 (O'Connor, J., concurring) (citation omitted).

256. See Nozick, *supra* note 202, at 367.

257. *Booth*, 482 U.S. at 520 (Scalia, J., dissenting).

258. I doubt whether any system permitting sentencers in death trials to base sentences on emotional judgments can escape the intrusion of vengeful sentiments that lead the sentencer to ignore central issues of moral guilt. For an argument to the contrary, premised on retributive principles, see Pillsbury, *supra* note 238. Pillsbury argues that the sentencer legitimately may employ retributive emotions of moral outrage against the defendant's crime, so long as those aggravating emotions are counterbalanced with mitigating emotions of empathy for the defen-

(5) It is not necessary that revenge be general and the revenger need not avenge again in similar circumstances.²⁵⁹ This characteristic of revenge fits Scalia's system in the sense that the outcome of every death penalty sentencing proceeding conducted under Scalia's laissez-faire guidelines will turn on the sentencer's emotional response to the victim's pain. Because sentencers will vary in emotional sensitivity to victim pain, and because death penalty statutes could permit virtually unlimited sentencer discretion in each case, death sentences under the Scalia scheme would lose even the bare pretense of generality that they presently enjoy.

Nozick's description of revenge theories of punishment seems to fit Scalia's system precisely. It remains to be asked whether this matters. After all, what is wrong with exacting revenge on individuals who have violated the most sacred precept of every civilized society by taking the life of a fellow human? Practically speaking, it simply returns American law to the state described by Justice Harlan in *McGautha v. California*: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."²⁶⁰ The only element Scalia adds to this existential uncertainty is that he brings into the open the aspect of revenge for innocent victims, an element that was probably in the minds of pre-1972 judges and juries anyway.

So why does this matter? Why do we feel an intuitive aversion to revenge as a motive for punishing a murderer? On a theoretical level we oppose revenge because it combines the worst aspects of utilitari-

dant's personal circumstances and positive moral qualities. *Id.* at 685-98.

Aside from the conceptual overlap of retributive and vengeful emotions, a major problem with this system is that it would produce indecipherable sentences. A sentencing system such as Pillsbury's proposal would be based partly on emotion and partly on reasoned application of specific facts and circumstances (similar to the present *Gregg*-type ordering of specific statutory mitigating and aggravating factors). But such a system will produce sentences whose justifications are only partly articulated. (This is necessarily so: if a sentencer's rationale could be fully and precisely articulated it would fall within the current explicit rule structure that Pillsbury finds unsatisfactory.) The part of the sentence that cannot be articulated satisfactorily, i.e., the emotional part, is problematic because no one (including perhaps the sentencer) knows whether the sentencer is responding to a legitimate factor relating to the defendant's moral guilt, or whether the sentencer is responding to some emotional factor within his or her own psyche. The fact that the present system of rule-oriented death sentencing unquestionably produces variable and inequitable results, *see id.* at 668-69, does not necessarily mean we should give up rational death sentencing in favor of moral hunches and emotions. It may mean instead that we should give up death sentencing altogether.

259. *See* Nozick, *supra* note 202, at 368.

260. *McGautha v. California*, 402 U.S. 183, 204 (1971).

anism and retribution, the two mainstream justifications for punishment. The main criticism typically leveled at utilitarian theories is that they permit a criminal defendant to be used as a means to an end, without regard to factors that may mitigate the defendant's moral guilt. Utility theories rely on the social impact of general deterrence to justify punishing a defendant more severely than his or her moral guilt dictates. Likewise, a revenge theory permits the criminal justice system to use the defendant as a means to assuage the pain and loss felt by the family and friends of the victim, and simultaneously purge society's violent sense of outrage at the defendant's conduct.

One of the two main criticisms usually leveled at retributive theories is that they permit punishment without regard to whether any social good is served by the infliction of pain on the person punished. Likewise, revenge theory permits a grievous punishment—an execution—when the only direct benefit derived from the punishment is a small measure of emotional relief for the victim's family and friends. The second criticism is that retributivists have no way of accurately measuring the level of moral guilt necessary to justify punishment. Revenge theory is even worse: a sentencer operating under this theory doesn't even try to assess the degree of moral guilt. The victim's harm is the key, not the defendant's explanation or rationale for that harm. The sentence under such a system is purely visceral. A logical explanation usually is not given for such sentences because a logical explanation usually is not possible.

On a more basic level, we shrink from revenge theories because we sense that punishments premised on revenge return us to a more primal and meaner state of social development. "Revenge is a kind of wild justice," Francis Bacon wrote, "which the more man's nature runs to, the more ought law to weed it out."²⁶¹ Justice Scalia displays no such concern. "Perhaps these sentiments do not sufficiently temper justice with mercy," he writes in *Booth*, "but that is a question to be decided through the democratic processes of a free people, and not by the decrees of this Court."²⁶² The problem with Scalia's "not my problem" approach is that the "democratic processes of a free people" take their cue on legal matters from the attitude toward justice expressed by the Supreme Court. Scalia refers to Portia's advice to Shylock on the quality of mercy.²⁶³ But Shylock has some advice of his own: "Why revenge! The villainy you teach me I will execute, and it shall go hard but I will better the instruction."²⁶⁴

261. FRANCIS BACON, OF REVENGE 15, in *SELECTED WRITINGS* (1955).

262. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., concurring).

263. See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

264. *Id.* act 3, sc. 1.

VI. CONCLUSION

One can say at least this about Justice Scalia's death penalty: it is an efficient machine. In Justice Scalia's world, there are few impediments to swift implementation of death sentences. When combined with the Court's recent constriction of the habeas corpus writ,²⁶⁵ Scalia's death penalty would remove the federal courts—and indeed the United States Constitution—almost entirely from the capital sentencing process. The spirit of Scalia's attack on modern death penalty jurisprudence would require the Court to overrule virtually every constitutional decision favoring death penalty defendants since 1972. In essence, the states would no longer have to justify any aspect of their death sentencing system. The “democratic processes of a free people”²⁶⁶ would be given free rein, come what may.

In a very short time, Justice Scalia's death penalty may become the Court's death penalty. At the structural level, the Court has already begun the process of giving back to the state legislatures control over the mechanics of the capital sentencing process. *Payne* indicates that a majority of the Court is content to grant state legislatures the right to broaden the discretion of sentencers to impose a death sentence based on their own inchoate views of the defendant's crime.²⁶⁷ The *Walton* majority indicates that most members of the Court want to give states the right to limit mitigating evidence.²⁶⁸ Chief Justice Rehnquist and Justice White dissented in the original mandatory death sentence cases.²⁶⁹ If their votes are added to Scalia's, only two more votes are needed to return to an era when all first degree murders may be subjected to mandatory death sentences. As the Court gets increasingly conservative, these votes will not be hard to find.

Chief Justice Rehnquist's majority opinion in *Payne* canvasses the changes that have occurred over the years in criminal sentencing principles. In this discussion he makes passing reference to the eighteenth century penal reformer Cesare Beccaria.²⁷⁰ If Rehnquist had read a bit more of Beccaria's famous treatise on punishment, he would have found a chapter on the punishment of death. That chapter contains

265. See, e.g., *McCleskey v. Zant*, 111 S. Ct. 1454 (1991) (limiting scope of issues that may be raised in successor habeas corpus petition); *Teague v. Lane*, 489 U.S. 288 (1989) (restricting retroactive application of new constitutional interpretations in habeas corpus proceedings).

266. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., concurring).

267. See *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

268. See *Walton v. Arizona*, 110 S. Ct. 3047 (1990).

269. See *Roberts v. Louisiana*, 428 U.S. 325, 337 (1976) (White, J., dissenting); *Woodson v. North Carolina*, 428 U.S. 280, 308 (1976) (Rehnquist, J., dissenting); *Woodson*, 428 U.S. at 306 (White, J., dissenting).

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

Beccaria's appeal to Europe's new "humane princes,"²⁷¹ urging them to abandon the death penalty as an "example of barbarity."²⁷² Even in Beccaria's day the rational arguments that the death penalty was measurably beneficial to society failed both empirical and logical analysis. Yet then as now, the death penalty remained overwhelmingly popular. "Why is this sentiment of mankind indelible to the scandal of reason?" Beccaria wondered.²⁷³ This is Beccaria's despairing answer:

It is, that, in a secret corner of the mind, in which the original impressions of nature are still preserved, men discover a sentiment which tells them, that their lives are not lawfully in the power of any one, but of that necessity only which with its iron sceptre rules the universe.²⁷⁴

Justice Scalia's death penalty would once again permit "the People" to return the iron scepter to its former place of prominence in American criminal jurisprudence. Open acceptance of the "wild justice" of revenge would thus replace the Court's brief, timid, and unsuccessful efforts to make the death penalty systematic and fair. This judicial about-face would obscure the simple truth that the Court's history of death penalty jurisprudence amply demonstrates: it is futile even to pretend that the system can work fairly or systematically. But then, as Beccaria recognized, "the history of mankind is an immense sea of errors, in which a few obscure truths may here and there be found."²⁷⁵ Some distant Court will discover those truths anew. For now, we're on our own.

271. CESARE BECCARIA-BONESANA, AN ESSAY ON CRIMES AND PUNISHMENTS 108 (Edward D. Ingraham trans. 1953).

272. *Id.* at 104.

273. *Id.* at 105.

274. *Id.*

275. *Id.* at 106.