ESSAY

When Law Bows to Politics: Explaining *Payne v. Tennessee*

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INTRODUCTION

A stunning philosophical error lies at the heart of the Supreme Court's recent decision in *Payne v. Tennessee*.[1] Although the root of the error is exposed in the majority opinion in *Payne*, neither the dissenting opinion in the case nor the academic criticism of the decision has focused on this flaw.[2] The error, however, is so egregious that it can mean but one thing: that in *Payne*, a majority of the Court bowed to politics, and in so doing abandoned principle and law.

In Part I of this Essay, I describe the philosophical framework

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[1] 111 S. Ct. 2597 (1991).

[2] *See, e.g.*, Ranae Bartlett, Case Note, Payne v. Tennessee: *Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 ARK. L. REV. 561 (1992); Catherine Bendor, Recent Development, *Defendants' Wrongs and Victims' Rights*, 27 HARV. C.R.-C.L. L. REV. 219 (1992); Elizabeth A. Meek, Note, *Victim Impact Evidence and Capital Sentencing: A Casenote on* Payne v. Tennessee, 52 LA. L. REV. 1299 (1992); K. Elizabeth Whitehead, Case Note, *Mourning Becomes Electric:* Payne v. Tennessee*'s Allowance of Victim Impact Statements During Capital Sentencing Proceedings*, 45 ARK. L. REV. 531 (1992); *see also* Richard S. Murphy, Comment, *The Significance of Victim Harm:* Booth v. Maryland *and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303 (1988).

relevant to the question of why we punish certain conduct. In Part II, I review the decisions that *Payne* overruled. Finally, in Part III, I argue that the Court's opinion in *Payne* is deeply flawed and that it reflects an obeisance to political forces at the expense of legal principle.

I. THE PHILOSOPHICAL FRAMEWORK

Consider three scenarios:

(1) Harry comes home from work and discovers that his wife has left him. He drinks a few beers, loads his shotgun, goes out onto his back porch, and fires the gun over and over until his anger leaves him. He does damage to a bunch of trees, but nothing else.

(2) At the same time that Harry is drinking his second beer, Harriet, who lives a mile or so down the road, gets home and discovers that her husband has left her. She skips the beer and heads straight out to her back porch, where she too fires her shotgun until her tears have stopped. The next day, the body of a homeless man, call him Darryl, is found in the trees behind Harriet's home. Her shooting spree has damaged a few trees, and it has killed someone.

(3) The facts are the same as in scenario (2), but instead of killing Darryl, Harriet has killed Rabbi Ezra Cohen, an amateur entomologist who was searching in the wooded area for a rare beetle.

One of the central problems in the philosophy of punishment is why we distinguish between scenarios (1) and (2).[3] That is, why do we punish Harriet more severely than we punish Harry? There is a powerful sense in which their actions were identical, even though the consequences were different. Both behaved recklessly, but neither planned to kill, and neither expected that there would be a human being in the trees. We might also assume that neither Harry nor Harriet had ever known anyone to venture into the trees, and that no one would reasonably expect that human beings would be in the forest.

Nevertheless, the penal codes of most states would permit Harriet to be prosecuted for manslaughter. Notwithstanding the sense in which she and Harry "did" the same thing, Harriet will

[3] For a fine recent discussion that refers to much of the relevant literature and that utilizes the normative distinction between responsibility and blame, see Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992). *See also* sources cited *infra* note 4.

face substantially more serious penalties. Of course, a jury might well decide, in view of her state of mind, that Harriet should not be punished with especial severity. But it might also decide to punish her harshly; the important point is simply that it *may* so decide. In most jurisdictions, while Harriet may be held to answer for manslaughter, Harry will be charged, at most, with reckless conduct.

The criminal law literature and the philosophy of punishment generally have discussed this issue extensively.[4] My object in this brief Essay is not to rejoin the debate as to why we distinguish between Harry and Harriet for purposes of punishment. Rather, I propose to focus on Harriet. I assume, in other words, that the philosophical distinction between scenarios (1) and (2) is tenable. The question I examine is whether, having drawn this distinction, it is appropriate to draw a still more subtle distinction by focusing on the identity of the person whom Harriet has inadvertently killed. Or, put differently, does the tenability of the distinction between scenarios (1) and (2) also support a distinction between scenarios (2) and (3)? I will suggest that the answer is no. In so doing, I will focus on the Supreme Court's recent decision in *Payne v. Tennessee*,[5] in which the Court, overruling two earlier decisions (one that was barely four years old[6] and another that was barely two years old[7]), held that the answer is yes.

II. FROM *BOOTH* TO *PAYNE*

The question in *Payne* concerned the relevance of the details of the murdered person's life to the punishment meted out to the murderer. That is, may Harriet be punished more severely if the person she accidentally kills turns out to be Rabbi Cohen rather than Darryl? *Payne* held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject [during the sentencing phase of a capital trial], the

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[4] The classic treatment of the broad issue is H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 62-108, 325-405 (2d ed. 1985). *See generally* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES (1985); Michael Davis, *Why Attempts Deserve Less Punishment than Complete Crimes*, 5 LAW & PHIL. 1 (1986); Michael Davis, *Harm and Retribution*, 15 PHIL. & PUB. AFFAIRS 236 (1986); Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (1965); *Symposium: Justice in Punishment*, 25 ISR. L. REV. 281 (1991).

[5] 111 S. Ct. 2597 (1991).

[6] Booth v. Maryland, 482 U.S. 496 (1987).

[7] South Carolina v. Gathers, 490 U.S. 805 (1989).

Eighth Amendment erects no *per se* bar."[8] In other words, a state may distinguish between scenarios (2) and (3).[9] *Payne* overruled two recent decisions, *Booth v. Maryland*[10] and *South Carolina v. Gathers*.[11] Part of the reason that the *Payne* court embraced the distinction between scenarios (2) and (3) is that neither the *Booth* nor the *Gathers* majority opinions satisfactorily addressed the central contention of Justice Scalia's dissenting opinions in those cases.[12]

In *Booth*, the son, daughter, son-in-law, and granddaughter of a murdered couple were interviewed by a member of the Maryland Division of Parole and Probation. The resulting statement, called the Victim Impact Statement (VIS), was read to the jury during the sentencing phase of Booth's trial. The statement described, inter alia, the son's horror at finding his parents murdered; the daughter's and son-in-law's lasting depression, as well as the daughter's inability to eat; and, perhaps most poignantly, the pall cast over the granddaughter's wedding, which had been scheduled for the weekend following the murder and which, under Jewish law, proceeded in spite of the murder.[13] Justice Powell, writing for a majority of five,[14] attached the entire VIS as an appendix to his opinion.[15]

In *Gathers*, there was no victim impact evidence as such. Instead, during his closing argument, the prosecutor emphasized the murder victim's personal characteristics: specifically, the victim's deep religiosity (manifested by the fact that he always carried with him a bible, which the murderer had destroyed), and the victim's patriotism (manifested by the fact that he had with him

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[8] *Payne*, 111 S. Ct. at 2609. In a tart dissent, Justice Stevens chastised the Court for abandoning such recent precedents, for betraying well-established Eighth Amendment values, and—most seriously—for succumbing to the political pressure exerted by the victims' rights movement. *Id.* at 2631 (Stevens, J., dissenting). Justice Stevens lamented: "Today is a sad day for a great institution." *Id.*

[9] This conclusion follows from the holding in *Payne* because otherwise the evidence relating to the details of the murder victim's life would not be relevant, and would therefore be inadmissible. *See id.* at 2609.

[10] 482 U.S. 496 (1987).

[11] 490 U.S. 805 (1989).

[12] *See Payne*, 111 S. Ct. at 2610-11.

[13] *Booth*, 482 U.S. at 510-12.

[14] Justices Powell, Brennan, Marshall, Blackmun, and Stevens. *See id.* at 497.

[15] *Id.* at 509-15.

his voter's registration card). Justice Brennan, writing for himself and four other Justices,[16] observed that the evidence deemed inadmissible under the Eighth Amendment by *Booth* included survivors' statements concerning the victim's personal characteristics.[17] He thus concluded that these descriptions were also barred from coming in, even by way of the prosecutor's closing argument.[18]

In *Booth*, upon which *Gathers* squarely rests, Justice Powell adduced two primary arguments against allowing victim impact evidence during the sentencing phase of a capital trial. One of these reasons is purely doctrinal; the other represents a blend of doctrinal and pragmatic concerns. The doctrinal basis for the holding has been further explicated by decisions rendered since *Booth* itself was decided.

With the benefit of these subsequent decisions, as well as those that *Booth* itself cites, the doctrinal strand of Justice Powell's argument can be summarized as follows: A sentence of death must be reliable.[19] Reliability means, at a minimum, that the sentence of death must be based on a "reasoned moral response" to the circumstances of the crime, as well as on the individuality of the defendant.[20] Hence, mandatory death penalty laws are unconsti-

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16 Justices White, Marshall, Blackmun, and Stevens. *See Gathers*, 490 U.S. at 805. Justice White dissented in *Booth* but joined the majority in *Gathers* on the basis of *Booth*. He wrote: "Unless *Booth v. Maryland* is to be overruled, the judgment below must be affirmed. Hence, I join JUSTICE BRENNAN'S opinion for the Court." *Id.* at 812 (White, J., concurring) (citation omitted). Despite Justice White's belief that *Gathers* was dictated by *Booth*, one might conclude that a salient fact distinguishes the cases: Whereas *Booth* concerned other people's feelings about the murder victim, *Gathers* concerned the personal characteristics of the victim himself.

17 *Id.* at 810-11.

18 *Id.* at 811.

19 *See Booth*, 482 U.S. at 502-09; *see also* Penry v. Lynaugh, 492 U.S. 302, 319 (1989); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); *cf.* Franklin v. Lynaugh, 487 U.S. 164, 181 (1988) (stating that death penalty requires clear and objective standards providing specific and detailed guidance); California v. Ramos, 463 U.S. 992, 998-99 (1983) (stating that death penalty requires greater degree of scrutiny of capital sentencing procedures to minimize risk of arbitrary and capricious action); Enmund v. Florida, 458 U.S. 782, 798 (1982) (stating that focus in death penalty case must be on defendant's culpability, not on culpability of co-defendants).

20 *See, e.g.*, Blystone v. Pennsylvania, 494 U.S. 299, 304-05 (1990); *Penry*, 492 U.S. at 319; *Franklin*, 487 U.S. at 181-82. The "reasoned moral response" phrase appears to have originated in Justice O'Connor's opinion

tutional because they do not permit the jury to analyze either of these variables.[21] Similarly, state statutes are unconstitutional as applied when they prevent the jury from giving effect to mitigating evidence, because it is precisely this evidence that helps define the criminal's individuality.[22] Survivors' statements, however, pertain to neither the individuality of the criminal defendant nor the individual circumstances of the defendant's crime. They are thus irrelevant to the reasoned moral response that the Eighth Amendment commands.[23]

In the second strand of the *Booth* opinion, Justice Powell argued that the practical ramifications of allowing victim impact evidence might transform the sentencing phase of a capital trial into a mini-trial on the victim's character.[24] The defendant would necessarily be permitted to cross-examine statements by survivors and would be permitted to call his own witnesses to rebut the characterizations proffered by the survivors.[25] One can imagine a daughter of a murder victim testifying as to her anguish, followed by the defendant's effort to discredit her by pointing out, for example, that she had been estranged from her murdered father for ten years. Of course, Justice Powell's attention to the enormous practical difficulties of managing this type of evidentiary ordeal was not altogether untethered to doctrinal concerns. He emphasized

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in California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

What we mean by "circumstances of the crime" is an issue I return to in Part III.

21 *See* Sumner v. Shuman, 483 U.S. 66, 75-76 (1987); Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976) (plurality opinion); *Woodson*, 428 U.S. at 303.

22 *See Penry*, 492 U.S. at 319; Hitchcock v. Dugger, 481 U.S. 393, 399 (1987); McCleskey v. Kemp, 481 U.S. 279, 306 (1987); Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Proffitt v. Florida, 428 U.S. 242, 251-52 (1976) (plurality opinion).

23 Writing in *Payne*, Chief Justice Rehnquist characterized *Woodson*, *supra* note 19, as describing "a class of evidence which *must* be received," as distinguished from *Booth*'s ostensible conclusion that *Woodson* described "a class of evidence that *could not* be received." Payne v. Tennessee, 111 S. Ct. 2597, 2607 (1991). Here Chief Justice Rehnquist creates a straw man, as *Woodson* simply did not address what type of evidence must be excluded, but instead rested on the basic idea that the jury must be able to respond to the individuality of the defendant. *See Woodson*, 428 U.S. at 303. *Booth* says nothing to the contrary and, fairly read, construes *Woodson* no more broadly than does Rehnquist. *See Booth*, 482 U.S. at 504.

24 *Booth*, 482 U.S. at 506-07.

25 *Id.* at 506.

that because a rule allowing the daughter to testify would necessitate such a sideshow, it would undoubtedly divert the jury's attention from what it ought, under the Eighth Amendment, to be doing.[26]

Justice Brennan's opinion in *Gathers* stressed the doctrinal theme developed in *Booth*. He emphasized that personal characteristics of the murder victim of which the defendant was unaware before the crime do not bear on the murderer's personal culpability.[27] These characteristics are thus irrelevant to the sentencing decision.[28]

In both *Booth* and *Gathers*, Justice Scalia wrote acerbic dissenting opinions. His dissent in *Booth*, joined by Chief Justice Rehnquist and Justices White and O'Connor, argued that the survivors' testimony is relevant because it illuminates the nature of the harm that the defendant caused.[29] As Scalia put it: "It seems to me, however—and, I think, to most of mankind—that the *amount of harm* one causes does bear upon the extent of his 'personal responsibility.' "[30] That is, there is a tenable philosophical distinction between scenarios (1) and (2).

Justice Scalia's dissent in *Gathers*, which no other Justice joined, repeated the argument he put forward in *Booth* and concluded:

> *Booth* has not even an arguable basis in the common-law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that present society, through its laws or the actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility.[31]

After arguing that the doctrine of stare decisis did not support continued obedience to *Booth*, which he deemed unequivocally wrong, Justice Scalia added: "In any case, I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."[32]

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26 *Id.* at 506-07.

27 South Carolina v. Gathers, 490 U.S. 805, 811-12 (1989).

28 *Id.* What we mean by the murderer's "personal culpability" is an issue I return to in Part III.

29 *Booth*, 482 U.S. at 519-20 (Scalia, J., dissenting).

30 *Id.* at 519 (emphasis added).

31 *Gathers*, 490 U.S. at 825 (Scalia, J., dissenting).

32 *Id.* This sentence epitomizes Justice Scalia's hypersensitivity to the political process. *See infra* note 57 and accompanying text.

In support of his understanding of the way in which society thinks that the magnitude of the harm bears on the defendant's personal responsibility, Justice Scalia in *Booth* offered two hypotheticals. Suppose, he mused, that a driver recklessly speeds down a residential street at sixty miles per hour. Society might punish him by taking away his driver's license. But if the same driver doing the same thing runs into a pedestrian and kills her, we put the driver in jail for manslaughter. The "moral guilt in both cases is identical,"[33] Scalia concluded, so the difference in punishment has to do with the fact that the driver who kills someone has greater responsibility.[34] According to Scalia, the same logic applies in the case of two bank robbers. Both aim their guns at a guard and pull the trigger, but one kills the guard while the other's gun misfires. Only the former may be put to death, even though their moral guilt is the same.[35]

In neither *Booth* nor *Gathers* did the majority respond to Justice Scalia's examples. Instead, the conclusions in *Booth* and *Gathers* at times appear to turn entirely on the distinctive nature of the death penalty itself, thus eliding Scalia's argument. This strategy was unfortunate, because once Justices Powell and Brennan—the authors of, respectively, *Booth* and *Gathers*—retired, Justice

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[33] *Booth*, 482 U.S. at 519 (Scalia, J., dissenting). I must confess that I am somewhat baffled by Justice Scalia's peculiar usage of the term "moral guilt." Typically, when the law says that someone is guilty, that statement avers that the individual did an act proscribed by the law. When a philosopher describes an individual as morally guilty, however, the individual may or may not have done a legally proscribed act. It follows that to the extent that guilt is a moral notion at all, as distinct from a purely legal one, it is not at all clear that the moral guilt of Justice Scalia's two hypothetical figures *is* identical. Indeed, this is why some philosophers are persuaded that there is a tenable *moral* distinction between Harry and Harriet. Act-utilitarians, though perhaps not rule-utilitarians, would fall into this category. *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 38-40 (Isaiah Berlin et al. eds., 1954); JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 82-88 (Hafner Publishing Co. 1948); CHARLES FRIED, RIGHT AND WRONG 30-53 (1978); G.E. MOORE, PRINCIPIA ETHICA § 89 (1902); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955); *see also* HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT 1-10, 95-103 (1988); DAVID GAUTHIER, MORALS BY AGREEMENT 157-89 (1986); *see generally* sources cited *supra* note 4 (discussing philosophy of punishment).

[34] *Booth*, 482 U.S. at 519.

[35] *Id.*; *see supra* note 33 and accompanying text (analyzing Justice Scalia's use of term "moral guilt").

Scalia's unanswered argument captivated the new Court. The result was the *Payne* decision.

Writing for himself and five others,[36] Chief Justice Rehnquist explained that both the *Booth* and *Gathers* decisions rested on mistaken premises. Contrary to the view expressed in *Booth*, "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law."[37] Rehnquist then quoted Justice Scalia's example of the two "identical" bank robbers, adding that under the facts of *Tison v. Arizona*,[38] a bank robber who acts recklessly and kills someone can be put to death while a bank robber who acts recklessly and kills no one cannot.[39] Rehnquist asserted that *Booth* simply misread a large body of precedent, for "it was never held or even suggested in any of our cases preceding *Booth* that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed."[40] Victim impact evidence was thus deemed relevant and admissible because it illuminates the particular harm that the defendant caused.[41]

III. Justice Scalia's Philosophical Mistake—and *Payne*'s

In 1972, in *Furman v. Georgia*,[42] the Supreme Court declared the then existing death penalty statutes unconstitutional. Since that time, the singular consistent strand of an otherwise arguably incoherent body of death penalty jurisprudence has been the proposition that "death is different."[43] As a doctrinal proposition, this

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[36] Justices White, O'Connor, Scalia, Kennedy, and Souter. *See* Payne v. Tennessee, 111 S. Ct. 2597, 2601 (1991).

[37] *Id.* at 2605.

[38] 481 U.S. 137 (1987).

[39] *Payne*, 111 S. Ct. at 2605. Ironically, Chief Justice Rehnquist's allusion to *Tison* provides an additional illustration of the argument I advance in the following section.

[40] *Id.* at 2607.

[41] *Id.* at 2608.

[42] 408 U.S. 238 (1972).

[43] *See, e.g., id.* at 286-91 (Brennan, J., concurring), 306 (Stewart, J., concurring); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 187-88 (1976) (plurality opinion); *see generally* Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 Hous. L. Rev. (forthcoming 1992).

statement rests on two distinct premises. The first is that death is irrevocable, and society therefore cannot recompense one who has been wrongfully punished.[44] The second is that the infliction of the death sentence is so awesome, so different in kind from all other punishments, that the procedures that surround it, as well as the normative and legal discourse used to analyze it, must be sui generis.[45] This important strand of Eighth Amendment law is a bedrock proposition; one accepts it or one does not.[46] It appears, however, that no member of the Supreme Court (including Justice Scalia) rejects it.[47]

When we ask, therefore, "why do we punish?" we are asking a question that is somewhat different from the question "why do we execute?". To be sure, reasons may overlap, but precisely because death is different, the answers that are generally satisfactory in philosophical analyses of punishment are of more limited value when we are talking with particularity about the death penalty.

To some extent, therefore, Justice Scalia's mistake in *Booth* is that he does not give proper weight to this central strand of death penalty doctrine and consequently does not account for the impact it has on his argument. In truth, however, Justice Scalia's mistake is far more basic. His position would thus remain vulnerable even if the "death is different" premise were formally jettisoned.

Justice Scalia notes that we punish the reckless driver who kills someone more severely than we punish the driver who luckily

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[44] *Furman*, 408 U.S. at 290 (Brennan, J., concurring). It might be argued that society is also not able to give someone back the years that are lost serving an unjust prison sentence. But society might choose to compensate a wrongfully imprisoned person by paying some monetary stake. Even if it is true that neither injury—neither imprisonment nor death—can be fully remedied, it does seem that some repair is possible in one context but not the other.

[45] *See id.* at 286-91.

[46] *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 85e (G.E.M. Anscombe trans., 2d ed. 1958).

[47] *But see* William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737, 760-78 (1985); Daniel R. Harris, Note, *Capital Sentencing After* Walton v. Arizona*: A Retreat from the "Death is Different" Doctrine*, 40 AM. U. L. REV. 1389, 1417-24 (1991). As I argue below, even if the Court has sub silentio rejected the "death is different" doctrine, Justice Scalia's argument remains vulnerable nonetheless.

does not.[48] Similarly, we punish the bank robber whose gun happens not to misfire more severely than we punish the robber whose gun does not work.[49] Both of these observations are correct, of course, but they are neither helpful nor germane, for they are simply additional illustrations of the distinction between scenarios (1) and (2), which I do not challenge here.

Consider scenario (1). One might ask why we punish Harry at all. He, after all, caused no serious injury. We punish him nonetheless because he *might* have injured someone. It is not that what Harry did is so bad; it is that what he did might have been awful. We punish Harry to express to him and to the rest of society that our culture will not abide the creation of such risks. Our society metes out punishment partly because of the harm people do, but also partly because of the harm they might have done.[50] When we punish someone like Harry, retribution plays virtually no role in the motivation; instead, we punish him to deter others from doing what he did, and to express our culture's strong objection to creating the potential for injury that Harry's conduct created.

Justice Scalia's assertion that the moral guilt of the two actors is "identical" is therefore a bit peculiar.[51] As a subjective proposition it seems patently incorrect, for there is little doubt that the actor who causes the injury *feels* more guilty than the one who does not.[52] That is, Harriet feels much worse, more guilty, than Harry—and rightly so. Harry himself would feel much worse than he does if he had happened to kill someone. Further, and of critical importance, it is not at all clear that Harriet feels worse in

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[48] Booth v. Maryland, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting).

[49] *Id.*

[50] This too is why we punish offenses like speeding. Of course, the notion of causality is deeply problematic in criminal law as elsewhere, though the law attempts to deal with its infinitude by deploying the notion of proximate cause. *Cf.* HART & HONORÉ, *supra* note 4, at 69 (analyzing concept of proximate cause); W.D. ROSS, THE RIGHT AND THE GOOD 36 (1st ed. 1930) (describing philosophical difficulty of tracing an act's consequences).

[51] *See supra* note 33 and accompanying text (discussing Justice Scalia's use of term "moral guilt").

[52] For a helpful discussion of the concept of guilt, and the distinction between guilt and shame, see HERBERT MORRIS, ON GUILT AND INNOCENCE 59-63 (1976). Using Professor Morris's terminology, I would say that Harriet feels greater shame. One difficulty with Justice Scalia's argument is that he uses the vague and ambiguous concept of guilt without rigor or precision. *See Booth*, 482 U.S. at 519 (Scalia, J., dissenting).

scenario (3) than she does in scenario (2). She might, of course, but it is quite imaginable that she will not.

Perhaps, then, Justice Scalia has in mind some objective account of guilt. Obviously in the context of a theory that bases considerations of guilt solely on what the actor does, as distinguished from the consequences she causes, Justice Scalia's contention is tautologically true. But we do not live in such a context.[53] The very fact that we punish Harriet more severely than we do Harry suggests that our culture does not regard their guilt, their culpability, as identical.[54] This point becomes still more apparent when we ask exactly why it is that we punish Harriet so severely.

Whereas the reason we punish Harry is limited to our desire to deter similar conduct, when we punish Harriet under either scenario (2) or (3) our motivation is somewhat different. Needless to say, the impulses present in our decision to punish Harry remain in force, but now there is an additional, far more compelling, impetus: We punish Harriet because she *killed* someone. The retributive impulse not present in Harry's case is quite powerful in Harriet's. Indeed, the primary difference between our culture's desire to punish the conduct in scenarios (1) and (2) is that our culture's retributive impulse is triggered in one case but not in the other.

Two lessons can be gleaned from this observation. The first is that as an objective proposition, Harry's and Harriet's guilt is arguably not identical. Second, and far more importantly, the distinction between Harry and Harriet, resting as it does on the fact that Harriet killed someone while Harry did not, does not support a further distinction between scenarios (2) and (3). When we ask why we punish Harriet severely, the answer is simple and straightforward: because she killed someone.[55] That is it.

Justice Scalia's own illustrations support this very analysis. It is thus appropriate to wonder how he has managed to think he has constructed an argument that supports a distinction between sce-

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[53] *See supra* note 4 and accompanying text (discussing philosophical context of punishment).

[54] *See supra* note 33 and accompanying text (discussing concept of moral guilt).

[55] *See, e.g.*, WALTER BERNS, FOR CAPITAL PUNISHMENT (1979); Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662 (1986); *see generally* IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans., 1887) (arguing that justice requires death penalty for murder).

narios (2) and (3). The answer seems to be, as Justice Stevens pointed out in his *Payne* dissent, that Scalia's analysis has been distorted by his sensitivity to political concerns.[56] This sensitivity is evident in the following passage in which Justice Scalia, concurring separately in *Payne*, continued his rhetorical assault on the holdings of *Booth* and *Gathers*:

> *Booth's* stunning *ipse dixit*, that a crime's unanticipated consequences must be deemed "irrelevant" to the sentence, . . . conflicts with a public sense of justice keen enough that it has found voice in a nationwide "victim's rights" movement.[57]

Here, Justice Scalia's attentiveness to the political climate obviously extrudes itself; here, as well, his fundamental error shows. For notwithstanding Scalia's invective, *Booth* did *not* deny the relevance of the consequences of John Booth's actions. On the contrary, those consequences were indisputably relevant to the sentence, for it was precisely the consequences of his action that made Booth eligible for the death penalty; it was the consequences that made Booth more like Harriet than like Harry.

In short, what makes someone eligible for the death penalty in our culture is one simple fact: that the defendant killed someone, that he took a human life. The very core of this response is visceral, biblical even. A life for a life. We do not execute defendants because they took a *particular* life; we kill them simply because they killed.

Justice Scalia has confused the issue of why we punish at all with the different, and more specific, question of why we execute. Indeed, his vehemence apparently caused him to overlook two critical facts in his *Booth* dissent. First, Justice Powell's opinion in *Booth* was on its face limited to the capital context.[58] This limitation reflects the extent to which it relied on the "death is different" idea that has undergirded modern death penalty jurisprudence.[59]

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[56] Payne v. Tennessee, 111 S. Ct. 2597, 2627 (1991) (Stevens, J., dissenting).

[57] *Id.* at 2613 (Scalia, J., concurring) (citation omitted).

[58] *See* Booth v. Maryland, 482 U.S. 496, 509 (1987).

[59] *Id.* at 504. The language of *Booth* cannot be read apart from this context; moreover, the language is purposefully narrow. Justice Powell wrote: "While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant *in the unique circumstance of a capital sentencing hearing*." *Id.* (emphasis added). In not even acknowledging this limitation of *Booth*,

Second, and more fundamentally, Justice Scalia's charge that *Booth* renders "consequences" irrelevant is absolutely incorrect, yet *Payne* rests intimately and inextricably on the accuracy of this characterization.[60] Because it is false, the logic of *Payne* unravels. We can discern the falsity once we distinguish between primary and secondary harm.

Criminal sentencing surely depends in part on the consequences of the defendant's actions. This is a difficult matter philosophically, but it is firmly established in law. Our culture deems consequences normatively relevant in assessing punishment.[61] *However, the consequences that are relevant in assessing punishment are precisely and exclusively those that are reflected in the laws that appertain to punishment.* These consequences we can call "primary harm." "Secondary harm" includes all other harm. Secondary harm is irrelevant (in both the capital and non-capital contexts)[62] to assessment of punishment. Penal statutes suggest that primary harm is the harm caused by the criminal to the direct object of his crime; secondary harm is all other harm. The direct object is what the law (i.e., the state's penal code), reflecting our culture's moral values, regards as the "victim."

This terminology is consistent with and informed by Hart and Honoré's observation concerning the equivocal meaning of "responsible." They write:

> Usually in discussion of the law and occasionally in morals, to say that someone is responsible for some harm means that in accordance with legal rules or moral principles it is at least permissible, if not mandatory, to blame or punish or exact compensation

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Justice Scalia and the *Payne* majority would seem implicitly to have rejected this notion, which means that Scalia's argument is only as strong as his assault on this central pillar of death penalty law. *See supra* note 47 and accompanying text (arguing that no Supreme Court Justice rejects "death is different" doctrine).

For statements of the "death is different" doctrine, see, e.g., Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion). *See generally* Mann, *supra* note 43.

60 *See Payne*, 111 S. Ct. at 2604-05.

61 *See supra* note 4 and accompanying text (discussing philosophical context of punishment). It is also noteworthy that recent evidence attributes greater shaping force to culture than to gender in determining moral judgments. *See* B. Bower, *Culture Puts Unique Spin on Moral Judgment*, SCI. NEWS, May 2, 1992, at 295.

62 Except insofar as the definition of the crime includes secondary harm. *See infra* note 63 and accompanying text.

> from him . . . . Very often, however, especially in discussion of morals, to say that someone is responsible for some harm is to assert (*inter alia*) that he *did* the harm or *caused* it . . . .[63]

In a moral sense, therefore, the distinction between primary and secondary harm may be illusory; in law, however, it is tenable and probably essential.

Thus, in the sentence, "Dick shot John," "Dick" is the subject (the defendant charged with committing the action), "shot" is the verb (the action the subject is accused of doing that *caused* the injury), and "John" is the direct object (the victim). The harm to the victim—that is, whether John is wounded or killed—is relevant to the very definition of Dick's crime, and hence to the range of punishment to which he may be subjected. Similarly, to use Justice Scalia's own illustration, when the bank robber points a gun at the bank guard and pulls the trigger, killing the guard, the primary harm is to the guard, who has been killed; when the robber's gun misfires, the primary harm is still to the guard, but now the injury is primarily psychological (i.e., the guard is scared; thus, the robber has committed assault). Criminal law might punish the first bank robber, but only the first bank robber, with death, owing to the variation in primary harm. In both cases, the secondary harm is irrelevant.

Put differently, the secondary harm is that which the law has disregarded for purposes of exacting punishment. Hence, if the bank guard's wife is present when the bank robber shoots and kills her husband, this neither enhances nor diminishes the bank robber's suitability for the death penalty.[64] On the other hand, if

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63 HART & HONORÉ, *supra* note 4, at 65.

64 It is also true, as I will elaborate upon momentarily, that the presence of the bank guard's wife is irrelevant for purposes of assessing punishment. Both of these conclusions assume that the bank robber does not know of the woman's presence. If we alter this assumption, then the bank robber's state of mind is changed, so that this variable might well become relevant.

I think that the distinction between primary and secondary harm also proves salutary in contexts other than homicide. For example, the victim in a robbery is the person from whom the property is taken. Where a bank is robbed, of course, it would be possible to define as the victim either the bank itself (i.e., its owners), the employees of the bank who were confronted by the robber, the depositors whose money was taken, or any combination of the above. But the law tends not to do this. Similarly, where an arsonist burns a building, the building itself might be thought of as the victim, or the victim might be the building's owner. But the criminal law (as distinguished from morals) makes clear that in no event would it be sensible to gauge the arsonist's punishment in terms of the trauma suffered by the owner.

the bank guard's wife is present when the bank robber's gun misfires, it is not a germane argument in support of a harsher sentence that she believed that her husband was about to die.[65]

When we examine the harm that the criminal law deems primary, we learn what injuries the law seeks to prevent. More directly, we learn what actions that law forbids. Capital murder statutes—and the body of Supreme Court case law that has interpreted them—make clear beyond peradventure that the reason that society may execute the bank robber whose gun works is that he killed someone. It has nothing to do with whether the victim's wife witnessed the killing or whether it upset her. The reason that society may punish more severely the drunk driver who kills someone after running a red light is that the driver killed someone. The Court has time and again recognized this principle, and this recognition is epitomized by *Coker v. Georgia*,[66] in which the Court held that a state may not execute a rapist.[67] The reason is that the rapist did not kill.[68]

Actually, it is not precisely accurate to say that the reason we execute is because a human life has been taken, for some states do tend to distinguish among certain lives. These distinctions tend to be based on occupation. They are properly viewed as expressing the value to society of certain professions. Thus, a state may provide the death penalty only for those who kill a police officer, a judge, or an elected official.[69] Such distinctions, based on status rather than on the individual or personal characteristics of the murder victim, reflect society's normative judgments. That is, the salience of statutory distinctions that punish some murderers more harshly based on their victims' status is that these distinctions illuminate more clearly the normative basis upon which a certain sovereign society has based its decisions to execute.[70]

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65 Then there is the example of the bystander wife who is pregnant and miscarries as a consequence of the trauma. The frustrated robber may well be liable in tort for wrongful death, but, though criminal law may change, this harm is beyond the ken of that for which he is criminally liable.

66 433 U.S. 584 (1977) (plurality opinion).

67 *Id.* at 598.

68 *See id.*

69 *See* Booth v. Maryland, 482 U.S. 496, 517 & n.2 (1987) (White, J., dissenting).

70 What is the difference between a statute that provides that murderers who kill police officers will be subject to the death penalty and one that provides that murderers who kill loving fathers will be? Perhaps nothing,

Justice Scalia's opinions in *Booth*, *Gathers*, and *Payne* rest on the conclusion that the distinction society recognizes by statute between scenarios (1) and (2) supports a further normative (but non-statutory) distinction between scenarios (2) and (3). This is an obvious non sequitur. Moreover, Justice Scalia's argument does not merely endorse the moral and legal legitimacy of statutory distinctions between scenarios (2) and (3); it implies, and seems to depend upon the idea, that our culture already utilizes such distinctions. As an empirical proposition, that contention seems dubious; and as a normative and legal proposition, it is as unwieldy as it is offensive.

For example, once the law permits a prosecutor to introduce evidence of secondary harm in the absence of a specific legislative classification (the result in *Payne*), there is no reason to limit such testimony to immediate family members.[71] One might be seriously traumatized by a murder even if one is not consanguineously related to the victim. If, say, Wallace Stevens had been murdered, would I, as a lover of Wallace Stevens' poetry, be permitted to testify against the murderer during the punishment phase of the trial? Would the impact of that crime on me be a factor that the state could permit the jury to consider? Suppose that I am severely traumatized by the murder of a complete stranger—for example, by the details of one of Jeffrey Dahmer's murders.[72] May I testify against Dahmer? These are rhetorical

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for the existence of such a statute would cast doubt on the proposition that the reason we execute is that a human life has been taken. Nevertheless, there must surely be constitutional limits to the distinctions that may be drawn by a state legislature. Hence, a state could not punish those who kill whites, but not those who kill blacks, with death. Equally, a state could not statutorily distinguish between wealthy and destitute murder victims. This conclusion would remain true even if the number of poor people claiming entitlement program benefits seriously drained that state's treasury.

[71] Of course, as suggested above, some immediate family members may be of little help. *See supra* text accompanying note 26 (providing example of estranged daughter testifying at trial of her father's murderer). If the murder victim's son is estranged, then it is hard to see how that son's testimony is relevant under Justice Scalia's approach in *Payne*.

In *Payne* itself, moreover, because the victim impact evidence came from one of the survivors of Payne's attack, Justice Scalia's approach makes it in Payne's interest to leave no survivors: no one who can testify as to her own anguish. Payne had stabbed a mother and her two children, killing the mother and her two-year-old daughter. The mother's three-year-old son survived. *See* Payne v. Tennessee, 111 S. Ct. 2597, 2601-02 (1991).

[72] Jeffrey Dahmer is a serial killer accused of brutally murdering 17

questions. Perhaps they would be hard constitutional questions if a state statute classified famous poets with police officers, or if it provided a harsher sentence for murderers who caused especial pain and anguish to members of society at large. But society has no such statutes, and there was none involved in *Payne*.

This illustrates the way in which politics, not sound legal thinking, is responsible for the result in *Payne*. The seeds of the problem were sowed in *Booth* itself, which addressed so-called "victim impact statements."[73] In truth, the *victim* in *Booth* was dead.[74] The statements at issue were not statements of the victim; they were statements of the survivors.[75] Justice Powell no less than Justice Scalia acquiesced in the improper characterization of distraught family members as victims.[76] There is a sense, no doubt, in which the loved ones of those whom Booth murdered were victims too, just as there is a sense in which every member of society is victimized or harmed when a murder occurs. But that semantic sense—even that moral sense—is not the legal meaning of the term. The legal definition of victim is limited to the direct object of the crime; everyone else, regardless of proximity, is a mere bystander.[77]

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people in Ohio and Wisconsin. In some cases, Dahmer cut up his victims' bodies and cannibalized them. Dahmer pleaded guilty to 16 of the 17 murders in 1992; he was not charged in the remaining slaying. *See Dahmer Pleads Guilty Again, and Receives 16th Life Sentence*, N.Y. TIMES, May 2, 1992, § 1, at 5.

[73] *See* Murphy, *supra* note 2, at 1304, 1316.

[74] Chief Justice Rehnquist also suggested in *Payne* that so-called victim impact statements help communicate to the jury that the victim, too, "is an individual whose death represents a unique loss to society and in particular to his family" rather than a "faceless stranger." *Payne*, 111 S. Ct. at 2608 (quoting Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting) and South Carolina v. Gathers, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting)). This concern is surely a red herring. There are many ways to communicate to the jury that the victim is not an amorphous, faceless stranger, and the state uses many of them. Data that I have collected elsewhere demonstrate that prosecutors, even in the aftermath of *Booth*, had no difficulty in portraying murder victims as unique individuals whose murders cried out for justice. *See* David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 54-72 (1991). Moreover, to the extent that Chief Justice Rehnquist's argument is persuasive, it argues in favor of the broad type of testimony to which I allude in the text.

[75] *See Booth*, 482 U.S. at 499.

[76] *See generally id.*

[77] This is not to say that bystanders are perforce legally of no moment.

This does not mean, contrary to Justice Scalia's nearly apoplectic protest, that the consequences of the criminal's conduct are deemed irrelevant. Quite the contrary: They remain pertinent to the very definition of the crime and to the determination of who is eligible for the death penalty. Thus, for example, the law differentiates—and properly so—among merely scaring someone, physically injuring that person, and killing her. Although each of these states can result from the same act (e.g., the pointing of a gun and the pulling of its trigger), the state exacts varying punishments because the same act results in different primary harm—different injuries to the direct object of the crime, the victim. Any other harm is irrelevant to the criminal sentence.[78] It matters that Harriet killed someone while Harry did not; it does not matter whom Harriet killed.

CONCLUSION

What murderers do is kill people. That is their crime. Further, the reason society chooses to execute them is that they have killed someone. They have killed a human being.[79] That is the offense for which we execute. The murderer's depravity is not less when

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Some crimes, like reckless endangerment, might be defined in terms of the risk that they pose to people who turn out not to be injured at all. There are, then, crimes in which the presence of bystanders is pivotal.

[78] A final irony. In Teague v. Lane, 489 U.S. 288, 300-01 (1989) (plurality opinion), the Supreme Court determined that it would decide the retroactivity of so-called new rules as a threshold matter and articulate the new rule only after first determining that it would apply retroactively. *Payne* clearly represents a new rule in that it explicitly overruled two earlier decisions. *Payne*, 111 S. Ct. at 2611 & n.2. Thus, the fact that the merits were reached in *Payne* suggests, under *Teague*, that the new rule it articulated will apply retroactively. This conclusion is important because one can easily imagine a scenario whereby the *defendant* would avail himself of the rule of *Payne*. Many murders are killings of unsavory victims. This is especially true when the murder is a by-product of a drug-related crime. A defendant might want to suggest, probably by indirection, that the victim of his crime was vermin. *Payne*, of course, seems to require that such a proffer be admissible, and the fact that the merits were reached in the case implies that defendants can raise the new rule in collateral proceedings. That is simply bizarre.

[79] Justice O'Connor seems to have conceded precisely this point in *Gathers*. *See* South Carolina v. Gathers, 490 U.S. 805, 819 (1989) (O'Connor, J., dissenting). The point has also been made by Justice Stevens. *See* Spaziano v. Florida, 468 U.S. 447, 468-69 (1984) (Stevens, J., concurring in part and dissenting in part).

he kills a homeless vagrant with no family rather than a mother whose children love her. What the murderer has done is the same irrespective of whether the murdered poet is Wallace Stevens, whose poems I cherish, or Ezra Pound, whose poems I refuse to read.

In arguing to the contrary, the Court in *Payne* adopted Justice Scalia's fallacious conception of the meaning of victim. Errors are always unfortunate in constitutional law. They are especially so when the stakes are so great—as they are when we execute—and more disturbing still when they are driven by politics rather than law.