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Regulating the Tender Heart When the Axe is Ready to Strike

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We have . . . no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation . . . . [T]he false humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. [Georgia Supreme Court, 1873][1]

[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. [United States Supreme Court, 1978][2]

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims. [United States Supreme Court (quoting Tennessee Supreme Court), 1991][3]

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1. Eberhart v. Georgia, 47 Ga. 598, 610 (1873). Susan Eberhart had been convicted of murder and sentenced to death for her participation in the strangling of her lover's wife. *Id.* at 601. Until the late 1970s, Georgia prosecutors read the quoted passage to the jury during their closing arguments at the sentencing phase of a capital trial. After the Georgia courts initially failed to find fault with this practice, *see, e.g.*, Jackson v. State, 136 S.E.2d 375 (Ga. 1964), and continued to find it harmless error, *see, e.g.*, Drake v. State, 247 S.E.2d 57 (Ga. 1978), *cert. denied*, 440 U.S. 928 (1979); Potts v. State, 243 S.E.2d 510, 523 (Ga. 1978); Presnell v. State, 243 S.E.2d 496, 507 (Ga.), *rev'd in part on other grounds*, 439 U.S. 14, 17 (1978), the Eleventh Circuit has consistently vacated death sentences imposed after sentencing hearings in which the prosecutor quoted from *Eberhart; see* Presnell v. Zant, 952 F.2d 1524 (11th Cir. 1992).

2. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (Stewart, Powell, & Stevens, JJ.)).

3. Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) (quoting State v. Payne, 791

I. INTRODUCTION

A new paradigm guides the Supreme Court's death penalty jurisprudence. In the past, capital sentencing pitted the defendant against the State.[4] The capital defendant entered this potentially fatal confrontation equipped with certain constitutional protections designed to minimize the impermissible risk of inappropriate application of the most severe penalty in the State's arsenal of criminal sanctions. Now, the capital defendant no longer faces off against the State, with its superior resources and power. In the new paradigmatic sentencing hearing, the capital defendant now encounters an even more formidable opponent: the person whose death[5] made her eligible for the death penalty, the capital victim.[6]

As a result of this paradigm shift, the risk of wrongful execution no longer determines the scope of the capital defendant's constitutional protections. The capital defendant's need for constitutional protection is instead balanced against her victim's rights. In a macabre turn, the Supreme Court has transformed the capital sentencing hearing into a rematch between the offender and her victim. The capital sentencing hearing was originally designed to allow for an individualized sentencing determination based on a consideration of

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S.W.2d 10, 19 (Tenn. 1990)).

4. This article does not distinguish between state and federal prosecutions. Although state prosecutors still initiate the vast majority of capital cases, their federal colleagues seek the death penalty in a growing number of cases. The federal drug kingpin statute, 28 U.S.C. § 848(e)(1) (1988), has already inspired several death penalty prosecutions. *See, e.g.,* United States v. Pitera, 795 F. Supp. 546, 550 n.1 (E.D.N.Y. 1992) (citing United States v. Chandler, 90-CR-266 (N.D. Ala. 1991)) (rejecting constitutional challenges against 21 U.S.C. § 848(e)(1)(A) (1988)); United States v. Villarreal, 963 F.2d 725 (5th Cir. 1992) (government unsuccessfully sought death penalty under 21 U.S.C. § 848(e)(1)(B) (1988)); United States v. Pretlow, 779 F. Supp. 758 (D.N.J. 1991) (also denying constitutional challenge); United States v. Cooper, No. 89-CR-580, 1991 U.S. Dist. LEXIS 7226, at *1 (N.D. Ill. May 24, 1991) (death penalty sought under 21 U.S.C. § 848(e)(1)(A) (1988)); United States v. Davis, No. 89-CR-580, 1991 U.S. Dist. LEXIS 3376 (N.D. Ill. Feb. 25, 1991) (same); United States v. Whiting, 771 F. Supp. 476 (D. Mass. 1991) (unsuccessful attempt to obtain death penalty under federal drug kingpin statute). Prosecutors have so far been able to convince only one jury, in the Northern District of Alabama, to impose a death sentence in a federal drug kingpin case. *See Pitera*, 795 F. Supp. at 550 n.1 (citing United States v. Chandler, 90-CR-266 (N.D. Ala. 1991)). It will be interesting to observe whether the absence of the federal-state comity concerns motivating much of the Supreme Court's recent unwillingness to regulate the state's administration of the death penalty will translate into a more meaningful review of federal death penalties.

5. With the Supreme Court's decision in Coker v. Georgia, 433 U.S. 584, 592 (1977), that the death penalty for rape constituted cruel and unusual punishment under the Eighth Amendment, the death penalty has been effectively restricted to murder. *See* ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 31 (1989).

6. For the sake of convenience, this article focuses throughout on single-victim cases. The discussion obviously also applies to multiple-victim cases.

all evidence that could raise a reasonable doubt as to the appropriateness of sentencing a particular capital defendant to death.[7] Now the hearing appears as an officially sanctioned display of private vengeance against the capital defendant, for whose benefit it had been established in the first place. The jury[8] no longer determines the defendant's individualized moral desert; the jury now chooses between two contestants: the defendant and the victim, locked once again in mortal combat. And the Supreme Court's job is to level the playing field.

The Court has established a level playing field by drastically limiting a capital defendant's rights, on the one hand, and expanding the capital victim's rights, on the other. More generally, the Supreme Court has deindividualized the capital defendant and individualized her victim. The Court has embarked on its new mission with a vengeance. In its haste, it has left stare decisis and doctrinal consistency by the wayside. The Court has also abandoned accuracy in capital sentencing, once the dominant consideration in death penalty jurisprudence, for the sake of uniformity. Specifically, the Supreme Court has not only deserted the once untouchable principle of individualized sentencing in capital cases, but has also significantly elevated the threshold for a tolerable risk of wrongful execution.

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7. *See* Lockett v. Ohio, 438 U.S. 586, 587 (1978); Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283 (1991).

8. This article assumes that the jury plays an important role in making the sentencing determination. Although the Supreme Court has held that a capital defendant does not have a federal constitutional right to have a jury determine her sentence, Spaziano v. Florida, 468 U.S. 447, 464 (1984), the majority of states still do not permit judges to override juries' recommendations of life imprisonment. Even in states where the jury only makes a non-binding recommendation to the judge, the capital defendant generally has the right to have a jury make that recommendation. This might change, however, if a recent decision by the Seventh Circuit should become the law of the land. In *Schiro v. Clark*, a panel of the Seventh Circuit upheld the Indiana capital sentencing scheme, which grants the judge unlimited discretion to override the jury's life sentence recommendation. Schiro v. Clark, 973 F.2d 962 (7th Cir. 1992). In an opinion by Judge Cummings, the Seventh Circuit held that the so-called *Tedder* standard was not constitutionally required. *Id.* at 968. The *Tedder* standard permits the judge to override the jury's life sentence recommendation only if the evidence supporting a death sentence is "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). *Spaziano*, the case in which the Supreme Court acquiesced to jury overrides, involved a jury override based on the *Tedder* standard. *Spaziano*, 468 U.S. at 476.

Unless otherwise indicated, this article does not distinguish between weighing and non-weighing states, a distinction that lately has assumed an important role in the Supreme Court's capital jurisprudence. *See, e.g.*, Espinosa v. Florida, 112 S. Ct. 2926 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Clemons v. Mississippi, 494 U.S. 738 (1990).

This article is not the first to document a paradigm shift in capital jurisprudence accomplished at the cost of disavowing basic tenets of capital jurisprudence. In 1983, Professor Robert Weisberg, in a much cited article, interpreted two cases of the 1982 Term, *Zant v. Stephens*[9] and *Barclay v. Florida*,[10] as the Supreme Court's announcement "that it was going out of the business of telling the states how to administer the death penalty phase of capital murder trials."[11] In the same article, Professor Weisberg also traced the succession of capital sentencing models until 1983. He revealed the development from the free-for-all of unbridled sentencer discretion before the Supreme Court's multifaceted message in *Furman v. Georgia*,[12] to the penalty trial of the capital defendant that resembled the guilt trial and which emerged from the quintet of 1976 death penalty cases,[13] and arguably back to the pre-*Furman* state of nature as a result of the "dismantling of the entire doctrinal basis for the trial metaphor" in *Stephens* and *Barclay*.

The recent Supreme Court opinions in *Saffle v. Parks*[14] and *Payne v. Tennessee*[15] not only illustrate the Court's new capital sentencing paradigm, but also remove any residual doubt about the Court's lack of interest in supervising death penalty administration in the states through anything other than the most general and flexible constitutional guidelines. While the paradigm adopted in *Stephens* and *Barclay* left intact the capital sentencing hearing's focus on "the personality and soul of the defendant,"[16] a feature that had remained constant since the pre-*Furman* days of discretionary chaos, *Parks* and *Payne* invent the metaphor of a balanced battle between defendant and victim and place the victim, not the defendant, in the limelight. At the same time, *Parks* and *Payne* turn the once proud duo of accuracy and uniformity into a shadow of itself, thereby eviscerating death penalty jurisprudence by stripping it of its doctrinal base. As a "new rule" case in the tradition of *Teague v. Lane*,[17] *Parks* also stands as another visible attempt by the Supreme Court to leave state death penalty administration in peace by drastically limiting the availability of federal habeas relief, once state

9. 462 U.S. 862 (1983).

10. 463 U.S. 939 (1983).

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

12. 408 U.S. 238 (1972).

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

14. 494 U.S. 484 (1990).

15. 111 S. Ct. 2597 (1991).

16. Weisberg, *supra* note 11, at 325.

17. 489 U.S. 288 (1989).

death row inmates' primary avenue for challenging their death sentences.

Although other recent cases have called into question the Court's continuing commitment to minimizing the risk of wrongful executions,[18] *Parks* and *Payne*, in their combined effect, most pointedly unveil the Court's new model of the capital sentencing hearing. While *Parks* exemplifies the waning of the Court's concern about capital sentencing proceedings that deindividualize and dehumanize the capital defendant, *Payne* illustrates the Court's novel pursuit of sentencing proceedings that individualize and humanize the capital victim. In *Parks*, the Court found no constitutional fault[19] with a penalty-phase instruction that effectively neutralized Robyn

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18. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514 (1992); Medina v. California, 112 S. Ct. 2572 (1992); Coleman v. Thompson, 111 S. Ct. 2546 (1991); Boyde v. California, 494 U.S. 370 (1990).

19. An objection might be made that, strictly speaking, the Court never reached the merits of Parks's claim, but disposed of the case on prudential retroactivity grounds. The substantive analysis undertaken by the Court in applying the retroactivity test under Teague v. Lane, 489 U.S. 288 (1989), however, "indicated that if the Court had reached the merits, it . . . would have approved of anti-sympathy instructions." Paul J. Heald, *Retroactivity, Capital Sentencing, and the Jurisdictional Contours of Habeas Corpus*, 42 ALA. L. REV. 1273, 1285 (1991); *see also* Hardy v. Wigginton, 922 F.2d 294, 297 (6th Cir. 1990). For an exploration of the interrelation between substantive constitutional law and "new rule" cases in general, and *Parks* in particular, *see* Markus D. Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1 (1992). State and lower federal courts have heard *Parks*'s substantive message loud and clear. For state cases, *see, e.g.*, State v. Jackson, 565 N.E.2d 549, 561 (Ohio 1991) (Ohio Supreme Court holding anti-sympathy instructions constitutional, citing *Parks* in support of the proposition that "we have rejected similar arguments"); Thomas v. State, 811 P.2d 1337, 1349-50 (Okla. Crim. App. 1991) (*Parks* rejected challenge to anti-sympathy instruction); Sellers v. State, 809 P.2d 676, 690 (Okla. Crim. App. 1991) (same); Banks v. State, 810 P.2d 1286, 1294 (Okla. Crim. App. 1991) (quoting extensively from *Parks*, arguing that *Parks* rejected an Eighth Amendment challenge to anti-sympathy instructions); Kuenzel v. State, 577 So. 2d 474, 497 (Ala. Crim. App. 1990) (quoting extensively from *Parks*, arguing that "[i]n *Parks*, the Supreme Court of the United States rejected the principle that the Eighth Amendment requires that jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence"); People v. Davis, 794 P.2d 159, 193 n.31 (Colo. 1990) (en banc) (arguing that in *Parks*, "[t]he Supreme Court rejected a challenge to an instruction given in the sentencing phase . . . [and] upheld the use of the instruction"); Hitchcock v. State, 578 So. 2d 685, 688 n.2 (Fla. 1990) (citing *Parks* for the proposition that challenges to anti-sympathy instructions "have been decided adversely to [appellant's] contentions"); State v. Boyd, 797 S.W.2d 589, 594 (Tenn. 1990) (after quoting extensively from *Parks*, concluding that "[t]he issue is without merit"). For federal cases, *see, e.g.*, Lesko v. Lehman, 925 F.2d 1527, 1549 (3d Cir. 1991) (quoting extensively from *Parks*; citing *Parks*, along with California v. Brown, 479 U.S. 538 (1987), as "two more recent Supreme Court decisions that have upheld substantially similar anti-sympathy jury instructions"); Hardy v. Wigginton, 922 F.2d at 297; Smith v. Black, 904 F.2d 950, 969 (5th Cir. 1990) (citing *Parks* for distinction between what evidence the jury may consider and how it may consider such evidence).

Leroy Parks's mitigating evidence by admonishing the jury to avoid any influence of sympathy in its sentencing determination.[20] Overruling two recent decisions,[21] the Court in *Payne* lifted the strict constitutional bar against victim impact evidence in capital sentencing proceedings[22] to permit the introduction of inflammatory testimony by the victims' mother and grandmother about the effect the brutal murders of his mother and sister had on a little boy who himself had survived several deep wounds inflicted by the same butcher knife that had killed his mother and sister before his very own eyes.[23]

After placing *Parks* in the context of the Supreme Court's recent transformation of super due process for capital defendants[24] into super fast process, Part II of this article demonstrates how *Parks* signals that the Court has resolved the long recognized tension between accuracy and uniformity in capital sentencing by endorsing bright line uniformity and abandoning accuracy. Part II concludes by exposing how this exultation of elusive uniformity over accuracy translates into a disregard for the once intolerable risk of wrongful execution. Part III marks *Payne* as the entrance of the victims' rights agenda into mainstream capital jurisprudence and demonstrates the impropriety of harm assessments during the sentencing phase of capital trials. Part III then reveals the new nightmare scenario that has replaced the risk of wrongful execution as the driving force behind the Supreme Court's capital jurisprudence: the imposition of a sentence of life imprisonment without the possibility of parole, instead of death, because the sentencer failed to fully consider the capital victim as a uniquely individual human being. In conclusion, Part IV suggests that the Court's willingness to reinvent stare decisis in *Payne* is directly proportional to its desire to even the score between capital defendant and capital victim. It then places the Court's new vision of balanced capital sentencing into historical perspective and suggests that the Court's wholesale endorsement of victims' rights at the cost of disregarding the dignity of persons convicted of capital crimes has caused a system overload in

20. The instruction read: "You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence." *Parks*, 494 U.S. at 487.

21. South Carolina v. Gathers, 490 U.S. 805 (1989); Booth v. Maryland, 482 U.S. 496 (1987).

22. In particular, the Court held admissible "evidence and argument relating to the victim and the impact of the victim's death on the victim's family." 111 S. Ct. at 2611 n.2; *see also infra* note 164.

23. 111 S. Ct. 2597, 2603 (1991); *see also infra* text accompanying note 175.

24. *See* Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

the delicate process of administering the penalty of death.[25]

II. *SAFFLE V. PARKS*: DEINDIVIDUALIZING AND DEHUMANIZING THE CAPITAL DEFENDANT

Out of the chaos of the Supreme Court's death penalty jurisprudence in the early 1970s arose two pillars that supported the construct of a death penalty in harmony with the Eighth Amendment: individualized sentencing and guided discretion.[26] On the one hand, the State had to allow the capital defendant to present all evidence that reasonably could lead the sentencer to exercise her discretion to impose a sentence less than death. On the other, the State had to place the sentencer's discretion within the bounds of certain fundamental principles. The first requirement sought to assure accuracy in capital sentencing, while the second requirement sought to assure uniformity. Both requirements implemented a deeply rooted desire to eradicate the risk of wrongful execution. Only deserving offenders were to be sentenced to death. Individualized sentencing was required to assure that the sentencer would accurately determine an offender's desert. Guidance of the sentencer's discretion was required to assure that the desert of all offenders was determined according to the same principles.

The Supreme Court's decision in *Parks* threatens to topple the delicate jurisprudential construct that supports the constitutionality of the death penalty by taking a hefty bite out of one of its two supporting pillars: individualized sentencing. *Parks* signals the Court's abandonment of the heart and soul of its capital jurisprudence: minimizing the risk of wrongful execution. *Parks* thereby continues the Court's search for categorical rules and easily identifiable principles at the expense of the just resolution of individual cases. Not surprisingly, the opinion in *Parks* itself arbitrarily draws bright lines to transform death penalty jurisprudence into a bright line affair. The Court's assault on accuracy leaves its capital jurisprudence with hardly a leg to stand on, considering that the Court had seriously weakened its uniformity requirements some years ago.[27] Any sacrifices of accuracy for the sake of uniformity the Court might have wanted to make in *Parks* therefore appear to have gone

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25. *Cf.* Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67 (1992) (arguing that irreconcilable conflict between accuracy and uniformity should lead the Court to abandon its death penalty project).

26. For a more detailed discussion of these two components, *see infra* text accompanying notes 62-82.

27. *See* Raymond J. Pascucci et al., Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129 (1984); *see also* Bilionis, *supra* note 7, at 285 (by 1991, only accuracy doctrine had survived).

to waste, leaving the Court's capital jurisprudence without significant doctrinal support.

A. *Parks in Context: Accelerating Habeas Review of Death Sentences*

Parks combined a run-of-the-mill set of facts with an unexceptional procedural history.[28] On August 17, 1977, a gas station attendant was found shot to death in Oklahoma City.[29] Less than two weeks later, Robyn LeRoy Parks, in a telephone conversation with a police informant, not only confessed to the murder but also explained his motive: he wanted to prevent the attendant from reporting him to the police for having used a stolen credit card to pay for gas.[30] The facts of this senseless murder were so trite that Parks's jury not only rejected the prosecutor's invitation to find the aggravating circumstance of an "especially heinous, atrocious, or cruel" murder, but also refused to conclude "that [Parks] would commit criminal acts of violence that would constitute a continuing threat to society."[31] The jury instead found the technically appropriate aggravator of a murder "committed for the purpose of avoiding or preventing a lawful arrest or prosecution,"[32] and sentenced him to death. Parks, after all, had volunteered his motive for the crime: to avoid arrest and prosecution for credit card fraud.

Parks's ten-year appellate history is similarly commonplace among capital cases.[33] Of its ten years in the appellate pipeline, Parks's case spent six years in the state system, and only four in the

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28. For a comparison, *see infra* text accompanying note 173, for the facts of *Payne*.

29. Parks v. State, 651 P.2d 686, 689 (Okla. Crim. App. 1982), *cert. denied*, 459 U.S. 1155 (1983).

30. *Id.*

31. Parks v. Brown, 840 F.2d 1496, 1499 n.1 (10th Cir. 1987), *reh'g granted*, 860 F.2d 1545 (10th Cir. 1988), *rev'd sub nom.* Saffle v. Parks, 494 U.S. 484 (1990).

32. Parks v. Brown, 860 F.2d 1545, 1547 (10th Cir. 1988) (en banc), *rev'd sub nom.* Saffle v. Parks, 494 U.S. 484 (1990).

33. *See* IRA P. ROBBINS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 43 (1990) (Report of the A.B.A. Section of Criminal Justice Project on Death Penalty Habeas Corpus) ("It is rare for a death sentence to be carried out within five or six years of its imposition."), *quoted in* Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 187 n.86; Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1038 n.26 (1989) (noting an average gap of eight years between conviction and execution), *cited in* Walton v. Arizona, 497 U.S. 639, 669 (1990) (Scalia, J., concurring in part and concurring in the judgment). For specific examples of recent capital cases with appellate histories of comparable length, *see, e.g.*, Presnell v. Zant, 959 F.2d 1524 (11th Cir. 1992) (fourteen-year appellate history); Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992) (en banc) (ten-year appellate history); James v. Singletary, 957 F.2d 1562 (11th Cir. 1992) (eight-year appellate history); Harris v. Vasquez, 943 F.2d 930, 971-72 (9th Cir. 1991) (twelve-year appellate history).

federal system.[34] Parks did not file more than one petition for state post-conviction relief. Parks did not file successive federal habeas petitions.[35] Neither the federal courts nor Parks caused any unnecessary delay, unless a rehearing en banc now represents a superfluous ornamentation.

Parks, along with its companion, *Butler v. McKellar*,[36] were the first cases in which the Supreme Court denied state death row inmates federal habeas relief under the novel retroactivity rule established in *Teague v. Lane*[37] and applied to capital cases in *Penry v. Lynaugh*.[38] Under the *Teague* test, unless at least one of two exceptions applies, a constitutional rule of criminal procedure which challenges a conviction or sentence that became final prior to the establishment of the rule is not to be retroactively applied to a state prisoner's federal habeas petition under 28 U.S.C. § 2254 (1988). The first exception allows for retroactive application of constitutional rules that remove the conduct for which the petitioner was convicted from the purview of the criminal law. The second exception provides for the retroactivity of watershed rules of criminal procedure, "without which the likelihood of an accurate conviction [or sentence] is seriously diminished."[39] *Teague* replaced the retroactivity test of *Linkletter v. Walker*,[40] which it denounced as "unprincipled" and "inequitable."[41] As an appraisal of the *Teague* retroactivity rule exceeds the scope of this article, it suffices to remark that *Teague* limits the scope of federal habeas to such an extent that a federal court recently ruled that *Teague* must also apply to habeas petitions filed by federal prisoners pursuant to 28 U.S.C. § 2255 (1988), because not doing so would treat state prisoners more harshly than federal prisoners.[42]

As the first case in which the Supreme Court denied a state death row inmate federal habeas relief under the *Teague-Penry* tandem, *Parks* firmly takes its place in an ever-expanding series of Supreme Court efforts to limit the scope of federal habeas review of state judgments in general, and of state death sentences in

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34. *Cf.* Harris v. Vasquez, 949 F.2d 1497, 1545-46 (9th Cir. 1991) (of its twelve years on appeal, Harris's case spent only three years in the state system).

35. *Cf. id.* at 1545-46 (Harris filed three federal habeas petitions).

36. 494 U.S. 407 (1990).

37. 489 U.S. 288 (1989).

38. 492 U.S. 302 (1989). The Court granted the habeas writ in *Penry*, its first application of *Teague* in a capital case.

39. *Teague*, 489 U.S. at 313. For a more detailed discussion of *Parks*'s role in the Court's new retroactivity approach, *see* Dubber, *supra* note 19.

40. 381 U.S. 618 (1965).

41. *Teague*, 489 U.S. at 303.

42. Elortegui v. United States, 743 F. Supp. 828, 831 (S.D. Fla. 1990).

particular.[43] In addition to the *Teague* retroactivity cases,[44] the phalanx of holdings arrayed against the onslaught of habeas petitions includes at the time of publication: *Duckworth v. Eagan* (strongly hinting that "nonconstitutional claims under Miranda" might no longer be reviewable on federal habeas),[45] *McCleskey v.*

43. *See* Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357, 363, 399, 404 (1990-91). The Supreme Court has gone far beyond the call of duty in its attempt to tighten and limit federal habeas review of state convictions and sentences. For example, Chief Justice Rehnquist early on emerged as one of the leading proponents of curtailing the availability of federal habeas review to state prisoners. *See, e.g.*, Eliot F. Krieger, Recent Developments, *The Court Declines in Fairness*, 25 HARV. C.R.-C.L. L. REV. 164, 175 n.75 (1990) (discussing an address by the Chief Justice to the American Bar Association, *reprinted in The Third Branch*, 21 BULL. OF FED. CTS. 6 (1989)). In 1989, he appointed the so-called Powell Committee, chaired by former Supreme Court Justice Lewis F. Powell, to propose specific limitations. Marcia Coyle et al., *Fighting Words*, NAT'L L.J., May 28, 1990, at 5. The resulting Powell Report suggested two restrictions: (1) a one-year statute of limitations for federal habeas petitions, measured from the date of judgment finality and (2) a maximum of one federal habeas petition per prisoner, unless grave doubts about the accuracy of the conviction exist. *The House Crime Bill*, WASH. POST, Sept. 17, 1990, at A14; Linda Greenhouse, *Rehnquist Urges Curb on Appeals of Death Penalty*, N.Y. TIMES, May 16, 1990, at A1. In a major embarrassment to the Chief Justice, the country's most senior federal judges rejected the Powell Report at the Judicial Conference of the United States in March of 1990. Linda Greenhouse, *Vote is a Rebuff for Chief Justice*, N.Y. TIMES, Mar. 15, 1990, at A16. After intense lobbying efforts by the Chief Justice, *More Death, Less Justice*, N.Y. TIMES, May 21, 1990, at A20; Gerald F. Uelmen, *Finding the Fair Interval between Sentencing, Death*, L.A. TIMES, May 27, 1990, at M4; Marcia Coyle et al., *Fighting Words*, NAT'L L.J., May 28, 1990, at 5, the recommendations of the Powell Report nevertheless were included in the 1990 omnibus crime bill. To the great chagrin of anti-crime mobilizers, however, the Congressional Conference Committee dropped the recommendations from the bill during final negotiations. Marcia Coyle et al., *Rehnquist Is Still Hoping for Habeas Reform*, NAT'L L.J., Jan. 14, 1991, at 5. As Associate Deputy Attorney General Andrew G. McBride put it: "In one of the most cowardly legislative acts on record, liberal Democrats in the conference committee mugged the crime bill in the last hours of the 101st Congress." Andrew McBride, *Crime Bill's Frailty*, WASH. TIMES, Dec. 3, 1990, at G4. Alternatively, in the words of Congressman Hyde: "This was a strong anti-crime bill when it left the House. It left as Arnold Schwarzenegger and came back as Woody Allen." *Id.* For a more detailed rendition of these events, *see* Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 643-44 & nn.24 & 27 (1990-91); *see also* Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 822 & nn.140-41 (1992).

44. Stringer v. Black, 112 S. Ct. 1130 (1992); Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989); Teague v. Lane, 489 U.S. 288 (1989).

45. 492 U.S. 195, 201 n.3 (1989); *see also id.* at 205 (O'Connor, J., concurring) (*Miranda* violations should not be reviewable on federal habeas); Withrow v. Williams, 112 S. Ct. 1664 (1992) (granting certiorari to consider excluding *Miranda* claims from federal habeas review). The majority of a Seventh Circuit panel recently limited the reviewability of a state court's application of so-called "prophylactic rules" by replacing the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967), with a "substantial and injurious effect or influence" standard. Brecht v.

Zant (*McCleskey II*) (successive habeas petitions barred unless petitioner demonstrates cause and actual prejudice or fundamental miscarriage of justice),[46] *Coleman v. Thompson* (holding that capital defendant must "bear the risk . . . for all attorney errors made in the course of representation" and adopting "cause and prejudice" standard in procedural default context),[47] *Keeney v. Tamayo-Reyes* (partially overruling the landmark case of *Townsend v. Sain*[48] to require petitioner to demonstrate cause and prejudice in order to obtain a federal court hearing on material facts not adequately developed in state court),[49] *Sawyer v. Whitley* (narrowly defining "miscarriage of justice" exception to successive petition, abuse of the writ, and procedural default standards as requiring a showing of "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty"),[50] and there is no end in sight.[51]

Abrahamson, 944 F.2d 1363, 1375 (7th Cir. 1991), *cert. granted*, 112 S. Ct. 2937 (1992). The opinion by Judge Frank Easterbrook characterized this deferential standard as a "middle ground" between meaningful habeas review under *Chapman* and toothless habeas review of exclusionary rule applications under Stone v. Powell, 428 U.S. 465 (1976). *Brecht*, 944 F.2d at 1371. Depending on the definition of a "prophylactic rule," the use of a deferential standard of review in all habeas petitions challenging the application of so-called "prophylactic rules," however, may have a devastating effect far beyond exclusionary rule and *Miranda* violations. The Supreme Court has granted certiorari in this case. *Brecht*, 112 S. Ct. 2937 (1992).

46. 111 S. Ct. 1454 (1991); *cf.* Hudlin v. Alexander, 586 N.E.2d 86 (Ohio 1992) (citing *McCleskey II* in support of decision to adopt res judicata for state habeas petitions). *But cf.* Gunn v. Newsome, 881 F.2d 949 (11th Cir. 1989) (en banc) (pro se petitioner entitled to more lenient abuse of the writ standard than petitioner represented by counsel); *Habeas Corpus*, 51 CRIM. L. REP. (BNA) 1041 (citing Dean v. United States, 788 F. Supp. 306 (1992) (same).

47. 111 S. Ct. 2546, 2566 (1991); *cf.* McCoy v. Newsome, 953 F.2d 1252 (11th Cir. 1992) (petitioner's pro se status at time of first state habeas petition irrelevant for procedural default purposes and no exemption from "cause and prejudice" requirement).

48. 372 U.S. 293 (1963).

49. 112 S. Ct. 1715 (1992).

50. 112 S. Ct. 2514, 2517 (1992).

51. Three justices came dangerously close to scrapping plenary review of mixed constitutional questions on federal habeas. Wright v. West, 112 S. Ct. 2482, 2489-92 (1992) (plurality opinion by Thomas, J., joined by Rehnquist, C.J., & Scalia, J.). Justice Thomas's opinion in this non-capital case first lays the foundation for the adoption of deferential review of mixed questions. Then, at the last moment, and after an elaborate rewriting of habeas history, the opinion pulls back and leaves the question unresolved. *Id.* at 2492. Justice O'Connor's concurring opinion, a systematic and detailed refutation of Justice Thomas's reading of habeas history, asserts the continued vitality of plenary review. *Id.* at 2493 (O'Connor, Blackmun & Stevens, JJ., concurring). Justice O'Connor's adamant rebuttal comes as somewhat of a surprise, considering that she has advocated deferential habeas review since her days as an Arizona state court judge. *Cf.* Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 815 (1981) (then Arizona appellate judge O'Connor proclaiming that "[i]t is a step in the right direction to defer to

Parks, as a death penalty case, made for an excellent candidate to send a message to federal habeas petitioners and the federal judiciary. In the eyes of the Supreme Court, the protracted procedural histories of habeas petitions filed by death row inmates most vividly illuminate the disrespect for state interests in finality and sovereignty implicit in a broad and lengthy habeas review by the federal courts.[52] The Supreme Court's growing impatience with such disrespect recently culminated in a highly unusual per curiam opinion chastising a panel of the Ninth Circuit for "unnecessary delays and unwarranted stays [of execution]" in the disposition of a federal

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the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given by the state court") (emphasis in original), *quoted in* Joseph L. Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 B.Y.U. L. REV. 183, 184 n.7 [hereinafter Hoffman, *Retroactivity*]; Hoffmann, *supra* note 33, at 165. In a particularly telling move, she vehemently refuted Justice Thomas's suggestion that *Teague*, which she had authored, eviscerated the plenary review powers of federal habeas courts. *Wright*, 112 S. Ct. at 2496-97. Justice Kennedy, the other major contributor to the Court's attack on federal habeas, showed a similar concern to limit *Teague* to the retroactivity context. *Id.* at 2498-2500. Justices O'Connor's and Kennedy's dissents in *Tamayo-Reyes* are further indications that both may be reconsidering their restricted views on habeas. Kenney v. Tamayo-Reyes, 112 S. Ct. 1715, 1721, 1727 (1992).

Justice O'Connor's joining of Justice Stevens's bitter concurring opinion in *Sawyer*, which also was joined by Justice Blackmun, suggests that she may have softened her stance not only on habeas, but also on capital punishment. Sawyer v. Whitley, 112 S. Ct. 2514, 2530 (1992) (Stevens, J., concurring). Now that the Eighth Amendment no longer places meaningful constraints on the administration of the death penalty, perhaps Justices O'Connor and Kennedy will fall back on other provisions in the Bill of Rights to do the job. *See, e.g.*, Riggins v. Nevada, 112 S. Ct. 1810 (1992) (O'Connor, J., with Kennedy, J., concurring) (vacating death sentence under Due Process Clause); Morgan v. Illinois, 112 S. Ct. 2222 (1992) (same); Dawson v. Delaware, 112 S. Ct. 1093 (1992) (vacating death sentence under First Amendment); *see also* Payne v. Tennessee, 111 S. Ct. 2597, 2600 (1991) (suggesting that Fourteenth Amendment's Due Process Clause "provides a mechanism for relief" in fundamentally unfair sentencing hearings). *But see* Medina v. California, 112 S. Ct. 2572 (1992) (Kennedy, J.) (upholding death row inmate's conviction under Due Process Clause and cautioning that "the expansion of [the] constitutional guarantees [enumerated in the Bill of Rights] under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order").

52. *See* Friedman, *supra* note 43, at 800, 822. Outrage about the strains that habeas petitions by death row inmates place on the federal courts is not limited to the Supreme Court. Federal circuit courts often vent their frustration if they are forced to address a petitioner's challenges more than once. *See, e.g.*, Harris v. Vasquez, 943 F.2d 930, 935, 965 (9th Cir. 1991). Even district courts at times feel compelled to lash out at a particular petitioner for imposing on their time. *See, e.g.*, Davis v. Wainwright, 644 F. Supp. 269 (M.D. Fla. 1986) (dismissing as an abuse of the writ first federal habeas petition filed by death row inmate without the benefit of responsive pleading or an evidentiary hearing), *rev'd sub nom.* Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987).

habeas petition by a state death row inmate.[53] This testy opinion was topped a few months later by the final order in the Robert Alton Harris case, which, in a stunning move, prohibited any lower federal court from granting a stay of execution, presumably even if the stay motion was based on a meritorious and permissible claim.[54] The Court later clarified that "[a] court may resolve against [a petitioner who files her habeas petition shortly before the scheduled execution date] doubts and uncertainties as to the sufficiency of [her] submission."[55] Recently, the erstwhile most enthusiastic supporters of dismantling federal habeas power over the states, Justices O'Connor and Kennedy, who authored most of the opinions in the above anti-habeas series,[56] appear to have gotten cold feet. Both filed strong dissents to Justice White's majority opinion in *Tamayo-Reyes*.[57]

Parks's political and juridical base, the gradual and systematic evisceration of the Late Great Writ[58] in the name of federalism, has triggered an avalanche of criticism from commentators and justices alike.[59] Now that *Parks* has been assigned its proper place in the

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53. *In re* Blodgett, 112 S. Ct. 674 (1992).

54. Vasquez v. Harris, 112 S. Ct. 1713 (1992) ("No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."). Some hours earlier the Court had vacated the Ninth Circuit's stay in a per curiam opinion refusing to address Harris's claim that the execution by lethal gas would be cruel and unusual punishment in violation of the Eighth Amendment. The opinion spoke of "an obvious attempt to avoid the application of McCleskey v. Zant, 111 S. Ct. 1454 (1991), to bar this successive claim for relief" and of "Harris' obvious attempt at manipulation." Gomez v. United States Dist. Court, 112 S. Ct. 1652 (1992). For more detailed discussions of the Supreme Court's role in *Harris*, *see* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the* Harris *Execution*, 102 YALE L.J. 255 (1992); Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992); Stephen Reinhardt, *The Supreme Court, The Death Penalty, and The* Harris *Case*, 102 YALE L.J. 205 (1992).

55. Sawyer v. Whitley, 112 S. Ct. 2514, 2520 n.7 (1992) (citing *Gomez*, 112 S. Ct. at 1652). *Sawyer* also considered the demands on district judges' time in adopting a narrow interpretation of the "miscarriage of justice" exception. *Id.* at 2518.

56. Justice O'Connor wrote the opinions in *Teague*, *Penry*, and *Coleman*, and took a position more restrictive than the Chief Justice's majority opinion in *Duckworth*. Justice Kennedy wrote the opinions in *McCleskey II* and *Parks*. For more evidence of a possible wavering in Justices O'Connor's and Kennedy's commitment to elevating federalism over individual rights, *see* Stringer v. Black, 112 S. Ct. 1130 (1992) (an opinion by Justice Kennedy, joined by all Justices except Souter, Scalia, and Thomas, holding that Maynard v. Cartwright, 486 U.S. 356 (1988), and Clemons v. Mississippi, 494 U.S. 738 (1990), did not announce a new rule).

57. *See also supra* note 51.

58. I borrow this phrase from Robert Byers.

59. For criticism by Supreme Court Justices, *see, e.g.*, Coleman v. Thompson, 111 S. Ct. 2546, 2569, 2572 (1991) (Blackmun, J., dissenting) ("[D]isplaying obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade to erect petty procedural barriers

bigger picture, it is time to hone in on *Parks*'s specific contribution to death penalty jurisprudence.

B. *"Mistakes Will Be Made":*[60] *Bright Line Uniformity Trumps Accuracy*

The Eighth Amendment proscribes the arbitrary imposition of the death penalty.[61] Prior to *Parks's* and *Payne's* major shake-up of capital jurisprudence, this general proposition broke down into two elements, accuracy and uniformity. To guarantee uniformity, death penalty statutes had to both narrow the class of capital offenses and "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"[62] To pass the accuracy test, capital sentencing procedures had to allow for an individualized sentencing determination tailored to the specific offender.[63] Specifically, states had to allow the sentencer to consider all relevant mitigating evidence, including evidence about the defendant's background of the kind offered in *Parks*.[64] The requirement of an individualized sentence derives from a concern for accurate punishment, as the execution of an undeserving offender not only presumably violates the Eighth Amendment's prohibition of

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in the path of any state prisoner seeking review of his federal constitutional claims . . . . I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights. . . . In its attempt to justify a blind abdication of responsibility by the federal courts, the majority's opinion marks the nadir of the Court's recent habeas jurisprudence, where the discourse of rights is routinely replaced with the functional dialect of interests. The Court's habeas jurisprudence now routinely, and without evident reflection, subordinates fundamental constitutional rights to mere utilitarian interests."); Butler v. McKellar, 494 U.S. 407, 418 (1990) (Brennan, J., dissenting) ("[T]he Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime."). For academic responses, *see, e.g.*, David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1991); Goldstein, *supra* note 43; Paul J. Heald, *Retroactivity, Capital Sentencing, and the Jurisdictional Contours of Habeas Corpus*, 42 ALA. L. REV. 1273 (1991); Hoffmann, *Retroactivity, supra* note 51; Hoffmann, *supra* note 33; Krieger, *supra* note 43; Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L & CRIMINOLOGY 9 (1990); Ellen E. Boshkoff, Note, *Resolving Retroactivity after* Teague v. Lane, 65 IND. L.J. 651 (1990); Roger D. Branigin III, Comment, *Sixth Amendment—The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 1128 (1990); Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160 (1991); *Federal Jurisdiction and Procedure: Habeas Corpus*, 103 HARV. L. REV. 290 (1989).

60. Gregg v. Georgia, 428 U.S. 153, 226 (1976) (White, J., concurring).

61. *See, e.g.*, California v. Brown, 479 U.S. 538, 541 (1987).

62. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (citations omitted).

63. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

64. *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 490 (1990).

cruel and unusual punishment but also leaves the executed offender without remedies.[65] As *Gregg v. Georgia* announced as early as 1976, capital sentencing procedures may not create "a substantial risk that [the death penalty will] be inflicted in an arbitrary and capricious manner."[66] Two years later, *Lockett v. Ohio* again illustrated the Court's sensitivity to the unique risk involved in every capital case: "When the choice is between life and death, that risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."[67]

The tension between the accuracy and uniformity strands of the Court's capital jurisprudence has elicited comments from both on and off the Court.[68] Most recently, Justice Scalia, in characteristically dramatic fashion, decided that the tension actually amounted to a contradiction and vowed to abandon the accuracy element,[69] thereby reinforcing *Parks*'s implicit message that this hallmark of capital jurisprudence has seen its day. Justice Scalia's outburst marked the nadir of accuracy's long plunge from popularity. Only a decade ago, Justice Powell, the first Justice to address the tension between accuracy and uniformity, came down squarely on the side of accuracy by pointing out that "a consistency produced by ignoring individual differences is a false consistency."[70]

The tension between accuracy and uniformity traditionally—and correctly—has been traced back to a tension within the retribu-

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65. *See infra* text accompanying notes 142-46.

66. 428 U.S. 153, 188 (1976).

67. 438 U.S. 586, 605 (1978) (plurality opinion).

68. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514, 2533-34 (1992) (Stevens, J., concurring); Franklin v. Lynaugh, 487 U.S. 164, 182 (1988); McCleskey v. Kemp, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting); California v. Brown, 479 U.S. 538, 544-45 (1987) (O'Connor, J., concurring); Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982); *Lockett*, 438 U.S. at 622-23 (White, J., dissenting in part); Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 323 (1992); Radin, *supra* note 24, at 1149-50, 1155, 1180-81; Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

69. Walton v. Arizona, 497 U.S. 639, 657-73 (1990) (Scalia, J., concurring in part and concurring in the judgment). While Justice White recently branded Justice Scalia's position as "a view long rejected by this Court," Morgan v. Illinois, 112 S. Ct. 2222, 2234 (1992), Justice Scalia appears to have found new adherents in the Chief Justice and Justice Thomas, who joined his dissent in *Morgan*. The two even joined in Justice Scalia's scathing final paragraph, which characterized the majority opinion as "obscured within the fog of confusion that is our annually improvised Eighth-Amendment, 'death-is-different' jurisprudence" and accused the majority of "strik[ing] a further blow against the People in its campaign against the death penalty." *Id.* at 2242 (Scalia, J., dissenting).

70. *Eddings*, 455 U.S. at 112.

tive theory of punishment primarily[71] underlying the Court's death penalty jurisprudence.[72] Nevertheless, a different tension, that between rehabilitative and retributive concerns, might better explain the Supreme Court's recent abandonment of accuracy. In the end, it might have been the general disenchantment with, and outright dismissal of, anything vaguely resembling the rehabilitative approach to non-capital sentencing theory that led the Court to follow suit and turn away from accuracy in capital sentencing as well.[73]

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71. *See infra* text accompanying note 185.

72. *See, e.g.*, Radin, *supra* note 24, at 1150.

73. The recent case of Stringer v. Black, 112 S. Ct. 1130 (1992), is not to the contrary. In *Stringer*, the Court addressed the narrow question of "whether in a federal habeas corpus proceeding a petitioner is foreclosed from relying on [Maynard v. Cartwright, 486 U.S. 356 (1988)] and [Clemons v. Mississippi, 494 U.S. 738 (1990)] because either or both announced a new rule as defined in Teague v. Lane, 489 U.S. 288 (1989)." *Stringer*, 112 S. Ct. at 1133. The Court's reference in *Stringer* to the "well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases," *id.* at 1136, therefore must be placed in the context of *Teague* retroactivity analysis. Under *Teague*, a court looks not to the current state of the law, but to the state of the law at the time that the petitioner's conviction became final. Teague v. Lane, 489 U.S. 288, 305-10 (1989). There can be little doubt that at the time Stringer's petition became final in February of 1985, *Stringer*, 112 S. Ct. at 1141 (Souter, J., dissenting), the "general requirement of individualized sentencing" underlying both *Maynard* and *Clemons* was indeed "well-established." *Stringer*, 112 S. Ct. at 1137. Thus, a state court should have applied the individualized sentencing requirement when reviewing Stringer's death sentence.

Upon closer reading, the Court's comments about individualized sentencing in capital cases therefore do not refer to the current state of capital jurisprudence, but to the state of capital jurisprudence in early 1985. If these comments were meant to characterize capital jurisprudence in 1992, they would ignore not only the impact of *Parks* and *Payne*, but also the demise of the individualized sentencing requirement evident in the very cases that the Court cites in support of the continued validity of that requirement. By the time of *Clemons*, which came down during *Parks*'s term and preceded *Payne* by over a year, the individualized sentencing requirement had lost much of its bite.

According to *Stringer*, the Court in Godfrey v. Georgia, 446 U.S. 420 (1980), first applied the individualized sentencing requirement to the analysis of vague aggravating circumstances of the "heinous, atrocious or cruel" type challenged in *Stringer*. 112 S. Ct. 1135-36. *Godfrey* explicitly proceeded from the principle established in Furman v. Georgia, 408 U.S. 238 (1972), and "reaffirmed" in Gregg v. Georgia, 428 U.S. 153 (1976), that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey*, 446 U.S. at 427 (citing *Furman*, 408 U.S. at 238; *Gregg*, 428 U.S. at 189). Eight years later, a unanimous Court decided *Maynard* as a straightforward application of *Godfrey* with little fanfare and only a brief reference to the principle expounded in *Godfrey*. *See Maynard*, 486 U.S. at 362.

By 1990, however, the individualized sentencing requirement in *Maynard* and *Godfrey* was only grudgingly applied to vacate a Mississippi death sentence. *See Clemons*, 494 U.S. at 738. In an apologetic opinion by Justice White, who had filed a sharp dissent in *Godfrey* joined only by then-Justice Rehnquist and who had authored the unenthusiastic *Maynard* opinion, the majority gratuitously supplied the Mississippi Supreme Court with tips about salvaging Clemons's death sentence by reweighing aggravators and

The heyday of individualized sentencing coincided with the uncontested reign of rehabilitative punishment theory in the early half of this century. In rehabilitative sentencing schemes, judges would impose only the most indeterminate sentence ranges, while a parole board enjoyed virtually unrestricted discretion to tailor penalties to the particular offender. Proponents of retributive theory began to challenge the rehabilitative goal of individualized sentencing when this practice led to what were considered grossly non-uniform, and therefore unfair, penalties for similar offenses.[74] Still the most influential exposition of what came to be called "just desert" theory, Professor Andrew von Hirsch's *Doing Justice*,[75] appeared in the report of a commission set up for the explicit purpose of tackling the problem of non-uniformity in rehabilitative sentencing systems, which were perceived as sacrificing uniformity and fairness for the sake of elusive sentence accuracy.[76]

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mitigators or by performing harmless error review. *Clemons*, 494 U.S. at 744-50, 752-54 (Rehnquist, O'Connor, Scalia & Kennedy, JJ., concurring). Justice Blackmun objected strenuously, stating that a "bloodless" appellate reweighing of the pros and cons of executing a person violated the "well-established" right to an individualized sentencing determination. *Clemons*, 494 U.S. at 765-72 (Blackmun, J., concurring in part and dissenting in part). Since the opinion spent far less time in invalidating the vague aggravator than it did suggesting how to remedy the inconvenience it had caused the Mississippi court, *Clemons* shifted the focus from the unconstitutional death sentence to the state court's efforts to rescue an unconstitutional death sentence. In spite of this shift, the Mississippi high court decided on remand that it lacked the statutory authority to do what the Supreme Court had invited it to do. *See* Clemons v. State, 593 So. 2d 1004 (Miss. 1992).

As the Court's more recent invalid aggravator case, *Sochor v. Florida*, makes clear, "[w]hat is in issue is the adequacy of the State Supreme Court's effort to cure the error under the rule announced in *Clemons*, that a sentence . . . tainted [by an invalid aggravator] requires appellate reweighing or review for harmlessness." 112 S. Ct. 2114, 2122 (1992). Tellingly, it is in this narrow "band aid" area of aggravating circumstances, particularly in the weighing states, that the Supreme Court has been most active. *See Sochor*, 112 S. Ct. at 2114; *Stringer*, 112 S. Ct. at 1130; *Clemons*, 494 U.S. at 738; *see also* Espinosa v. Florida, 112 S. Ct. 2926 (1992) (per curiam); Parker v. Dugger, 111 S. Ct. 731 (1991); Creech v. Arave, 947 F.2d 873 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 2963 (1992). The Court's complaints no longer focus upon the structural faults in death penalty schemes, but upon the misapplication of the schemes. A state court now can easily remedy the misapplication by reweighing aggravators and mitigators or by conducting a harmless error analysis, or at least by including "a plain statement" that its earlier affirmance of the death penalty had applied one of these analytic tools. *See Sochor*, 112 S. Ct. at 2123.

74. *See* DAVID P. FARRINGTON ET AL., UNDERSTANDING AND CONTROLLING CRIME: TOWARD A NEW RESEARCH STRATEGY 139-40 (1986); ANDREW VON HIRSCH, DOING JUSTICE xxxii, xxxiv, xxxv, xxxvii-xxxviii, 4, 18, 29 (1976); John Hagan, *Extra-Legal Attitudes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC'Y REV. 357 (1974).

75. VON HIRSCH, *supra* note 74.

76. *Id.* at xv, 4.

Rehabilitative accuracy jars with retributive concerns in two ways. First, rehabilitative accuracy can be distinguished from retributive accuracy. According to retributive theory, the punishment should be proportionate to the extent of the offender's moral wrongdoing. The retributive theory of punishment revolves around the notion of fairness, which may imply a different notion of accuracy than that sought through rehabilitative sentencing. Retributive theory seeks to determine a penalty that accurately reflects the precise extent of the offender's moral wrongdoing, not her rehabilitative potential (or need for incapacitation or deterrence). In this sense, retributive sentencing can be viewed as abstracting from the offender's personal characteristics. It matches the penalty against an independent measure of moral wrongdoing, instead of adapting the penalty to the "uniqueness of the individual."[77] Second, as a system of objective assignment of wrongdoing, retributive fairness encompasses not only accuracy but also uniformity of punishment. Retributive fairness thus goes beyond the appropriateness of the particular punishment to a particular offender and demands that offenders whose actions have amounted to similar degrees of wrongdoing receive similar punishments. It is this requirement of uniformity that conflicts most clearly with the rehabilitative notion of individualized sentencing.

Arguably, the Court over the years has expanded its notion of moral relevance to a point where rehabilitative and retributive accuracy can no longer be separated.[78] As the individualized sentencing scheme permitted the State to introduce evidence of an offender's future dangerousness, it also allowed the defendant to introduce evidence of her rehabilitative potential. Throughout the 1970s and early 1980s, as the country was making an about-face in sentencing policy by replacing rehabilitative sentencing schemes dedicated to accuracy with retributive sentencing schemes dedicated to uniformity, the Supreme Court maintained its commitment to the requirement of individualized sentencing in death cases.[79] This led to the odd situation where the search for individualized sentencing commonly associated with a rehabilitative approach to criminal pun-

77. Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). This is not to say that retributive theory does not respect the unique dignity of each person. *See* text accompanying *infra* notes 212-20. In fact, retributivism views the application of a common moral yardstick to all as acknowledging the offender's dignity.

78. *Cf.* 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, 1321 (1988) ("[T]he Court has permitted the admission of evidence irrelevant to the defendant's culpability.").

79. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 597-609 (1978).

ishment survived only in the consideration of the one sentence that precludes all rehabilitation.

Lately, however, as individualized sentencing increasingly has been perceived as an anachronistic remnant of rehabilitative accuracy concerns, the Court has come to forget about the accuracy strand in retributive theory and to associate retribution with uniformity alone. With the lines now drawn between non-retributive passé accuracy and retributive up-to-date uniformity, the Court apparently has decided to throw the baby out with the bath water.[80] In a misguided attempt to keep up with the non-capital Joneses, the Court has discarded accuracy altogether, retributive or not.[81] Much as the recognition of the importance of individualized sentencing in non-capital cases had precipitated the endorsement of individualized sentencing fifteen years ago in *Lockett*,[82] the demise of individualized sentencing in non-capital cases now has contributed to the steady disappearance of individualized sentencing in capital cases.

Parks illustrates the trend away from an accuracy-focused review for the sake of uniformity in three ways. First, by its willingness to accept a substantial likelihood that jurors might misinterpret the anti-sympathy instruction as prohibiting them from considering any and all relevant mitigating evidence, the Supreme Court in *Parks* showed little concern for the undeserved imposition of the death penalty that might well have resulted in *Parks* and is likely to occur in similar cases.

Second, the Supreme Court's insistent attempts to discredit emotional responses as relevant grounds for sentencing decisions do nothing to further sentencing accuracy. The Court appears prepared to exclude relevant emotional responses, including retributive emotions, on the basis of a rationalistic retributive theory of punishment that draws inappropriate distinctions between emotional responses and moral judgments. By allowing the capital sentencer to consider only reasoned moral judgments, but not emotional responses, the

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80. There is no justification for this trend. Death penalty sentencing does not pose the admittedly significant problems inherent in a rehabilitative system of continuous sentence review, and requires accuracy, however elusive, far more than does a rehabilitative sentencing system for non-capital offenders.

81. *Cf.* Sawyer v. Whitley, 112 S. Ct. 2514, 2534 (1992) (Stevens, J., concurring) (the Court "respects only one of the two bedrock principles of capital-punishment jurisprudence," i.e., uniformity). While ignoring accuracy at sentencing, the Supreme Court has practiced an "exaltation of accuracy as the only characteristic of [the] fundamental fairness" detour around the successive petition, abuse of the writ, and procedural default roadblocks. *Sawyer*, 112 S. Ct. at 2527 (Blackmun, J., concurring) (quoting Smith v. Murray, 477 U.S. 527, 545 (1986) (Stevens, J., dissenting)). In a perverse twist, accuracy considerations thereby do nothing to prevent wrongful execution and everything to prevent redress for violations of process-based protections.

82. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978).

Court apparently hopes to ensure the imposition of a fair sentence by forcing jurors to consider only moral principles, which—unlike individual emotional responses—are presumably shared by other jurors. The jury would function as the voice of the community by applying the moral principles accepted by the community. If all jurors consider the same moral principles in sentencing, then sentences will be uniform and thus fair.

This pursuit of uniform and "purely moral" sentencing is destined to fail. For starters, the Court's exclusion of all emotional responses in the name of moral purification relies on the questionably rigid differentiation between emotional and moral responses. Moreover, it is unlikely that all, or even most, community members will show any greater agreement on a specific moral response than on a specific emotional response to a given set of facts. Studies suggest that agreement does not extend beyond very general propositions, such as that murder is more morally objectionable than theft.[83]

Finally, and for our purposes most importantly, *Parks* speaks of the Court's general exasperation with seeking to ensure accuracy in capital sentencing. *Parks* signals that the Court has decided to simplify the complex search for a constitutional death penalty with the help of bright lines that through their very brightness guarantee a principled treatment of all capital defendants, even if that treatment's uniformity should uniformly deprive all capital defendants of their rights. Death cases, however, are messy business, and categorical distinctions make for deceptively convenient signposts. The following sections explore one such distinction, that between emotional and moral responses. A case like *Parks*, where a death row inmate is denied the opportunity to have a federal court so much as review the merits of his federal constitutional claim, illustrates with particular urgency the draconian consequences of such ill-considered reliance on false categorical distinctions.

1. *Bright Lines Blurred.* The Court's decision in *Parks* turns on two categorical distinctions. The first contrasts limitations on the kind of evidence the sentencing jury may consider with limitations on the ways in which the jury may consider such evidence. Justice Kennedy claimed that Parks improperly cited cases pertaining to the former kind of limitations in support of his request for the establishment of a rule governing the latter kind of limitations.[84] The second distinction in *Parks* juxtaposes moral and emotional re-

83. *See, e.g.*, CATHERINE FITZMAURICE & KEN PEASE, THE PSYCHOLOGY OF JUDICIAL SENTENCING 60-80 (1986).

84. Saffle v. Parks, 494 U.S. 484, 490-91 (1990).

sponses.[85] Characterizing the capital sentencing hearing as a strictly moral affair, the opinion excludes all emotional responses. Both distinctions are as blurred as they are questionable.

The distinction between what evidence a jury may consider and how it may consider that evidence has already been discussed extensively in Justice Brennan's dissent in *Parks*.[86] For our purposes, it suffices to point out that the line separating "how" and "what" becomes particularly blurry in a case like *Parks*, where the only mitigating evidence presented—Parks's father's testimony about his son's deprived childhood—might evoke feelings of sympathy for the defendant.[87] A juror who feels sympathy for Parks on the basis of this mitigating evidence and who listens carefully to an instruction forbidding her in no uncertain terms to "avoid any influence of sympathy . . . when imposing sentence" might very well decide to disregard this evidence entirely, even though it is also relevant to Parks's blameworthiness, clearly a proper consideration in imposing sentence.[88] In such a case, not only would the distinction between what evidence a juror may consider and how she may consider it break down, but the instruction would also lead to the disregard of crucial mitigating evidence. In the end, only the waning of the Supreme Court's interest in sentencing accuracy accounts for its willingness to take a chance on a juror's ability to consider evidence both permissible and sympathy-inducing only for the permissible purposes, instead of instructing the juror to disregard that evidence altogether.

The distinction between moral and emotional responses has attracted less attention, but is of no less uncertain contours than the "how/what" distinction. The sharp division between emotions and moral judgments in death penalty jurisprudence crystallizes a distinction underlying much of Anglo-American law.[89] Professor Lynne Henderson has exposed and challenged what she calls the distinction between legality and empathy in the context of the constitutional jurisprudence of segregation, abortion, and homosexual pri-

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85. *Id.* at 491-95. For a critical discussion of this distinction as it appears in an earlier anti-sympathy instruction case, California v. Brown, 479 U.S. 538 (1987), and in *Parks*, *see* Ronald J. Allen, *Forward—Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: The Intriguing Case of* Walton v. Arizona, 81 J. CRIM. L. & CRIMINOLOGY 727, 748-51 (1991).

86. *Id.* at 495-515 (Brennan, J., dissenting).

87. Capital defendants often rely almost exclusively on evidence that might evoke the sentencer's sympathy. *See, e.g.*, Wilson v. Kemp, 777 F.2d 621, 622 (11th Cir. 1985); Bowen v. Kemp, 769 F.2d 672, 679 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449, 1457 (11th Cir. 1985); Potts v. Zant, 734 F.2d 526 (11th Cir. 1984).

88. *See* Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

89. For an example of the adoption of this schism in American legal scholarship on the death penalty, *see* Sundby, *supra* note 68, at 1199.

vacy.[90] Professor Samuel Pillsbury has discussed the distinction between reason and emotion in capital jurisprudence prior to *Payne* as a manifestation of the "culture of modern law" which "discourages informal, intuitive, personal, or passionate decisionmaking."[91]

In its attempt to neutralize the impact of emotions on the capital punishment decision, the Supreme Court has implicitly adopted a rationalistic and outmoded view of moral judgments that strictly distinguishes between long criticized and radical emotional responses or attitudes and moral judgments.[92] This dichotomy, sometimes said to be of Platonic origins,[93] arguably found its most influential exposition in Kant's moral philosophy of the categorical imperative.[94] Kant, however, responded to a competing view of morality

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90. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) [hereinafter Henderson, *Legality*]; *see also* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989). A recent exploration of sympathy as a crucial device for judging persons illustrates that sympathy plays a vital and sanctioned role in our legal system. *See* Note, *Sympathy as a Legal Structure*, 105 HARV. L. REV. 1961 (1992).

91. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 665 (1989); *see also* Sundby, *supra* note 68, at 1199.

92. Professor Pillsbury speaks of a philosophical tradition of contrasting reason with emotion and proceeds to outline a psychological account of emotion that incorporates rational elements. Pillsbury, *supra* note 91, at 674. It makes little difference whether one questions the exclusion of emotional responses from moral discourse because emotions have a cognitive component, and therefore can reflect moral principles, or because moral judgments have an emotional component. It is worth noting, however, that depending on one's view of moral judgments, emotions may or may not require a "cognitive element" to be morally significant.

93. While Plato is often associated with "intellectualism," *see, e.g.*, Pillsbury, *supra* note 91, at 674, some commentators suggest that emotions played a significant role in his vision of moral life. *See, e.g.*, MARY MARGARET MACKENZIE, PLATO ON PUNISHMENT 159-75 (1981).

94. Kant's view on the relationship between emotions and moral judgments is more complex than is often supposed. It is clear, however, that Kant, despite polemical passages to the contrary, did not espouse the unreflective distinction between emotions and moral judgments underlying the Court's new capital jurisprudence. For purposes of this paper it suffices to identify Kant as a commonly cited adherent to a rigid differentiation between emotions and moral judgments. Nevertheless, a brief comment on Professor Pillsbury's attempt to construct a "Kantian theory of retributive punishment" based on the Kantian "empathy obligation" is in order. Pillsbury, *supra* note 91, at 656, 693. Kant saw himself in opposition to English moral sense theory, as developed by Francis Hutcheson and Kant's great utilitarian motivator, David Hume. Kant notoriously grounded his moral theory in the categorical imperative. He postulated that an action was only truly moral if it sprang from the categorical imperative, *i.e.*, if it did not depend on the existence of a circumstance other than the common rationality of all moral beings, which was given *a priori*. In contrast, he dismissed all actions based on hypothetical imperatives, which include all actions premised on the experience of a certain emotion, as not truly moral. Kant viewed moral sense theory as a spurious attempt to gain intuitive access to rational moral knowledge. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 64-65 (A67) (Lewis White Beck trans., 1956) (1788) [hereinafter KANT, CRITIQUE OF PRACTICAL REASON]. He nevertheless acknowledged that every rational being possessed

expounded as early as 1725, when Francis Hutcheson first presented his moral sense theory.[95] Supposing *arguendo* that Plato subscribed to some version of the categorical separation of emotive and principled moral judgments, this separation has been questioned at least since Aristotle,[96] and, not surprisingly, is far from enjoying universal acceptance in Anglo-American philosophy today.[97] To mention two examples that are perhaps not immediately

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moral feeling, in the sense of a kind of moral satisfaction resulting from, but never leading to, action in accordance with the categorical imperative. *Id.* at 65 (A68); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 24 (AB19) (John Ladd trans., 1965) (1797) [hereinafter KANT, METAPHYSICS OF MORALS I]; IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 128-29 (Ak. 460) (H.J. Paton trans., 1964) (1785). He further believed that this moral feeling should be cultivated, as it might encourage people to act not only in accordance with, but also out of respect, and only out of respect, for the supreme moral law of the categorical imperative. IMMANUEL KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE: PART II OF THE METAPHYSICS OF MORALS 57-58 (A36-37) (James Ellington trans., 1964) (1797); KANT, CRITIQUE OF PRACTICAL REASON, *supra*, at 77-79 (A133-35). For a brief overview of Kant's views on emotion in moral theory, *see generally* ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 131-136 (1989). Considering this marginal (indeed, supplemental) role of emotions in Kant's moral theory, it is not clear, and Professor Pillsbury does not explain, how a "moral-emotive" theory of punishment with an emotion like empathy at its core could claim Kantian roots. Pillsbury, *supra* note 91, at 657.

95. FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE 165 (1971) (1726); *see also* ANTHONY ASHLEY COOPER, 3RD EARL OF SHAFTESBURY, CHARACTERISTICS OF MEN, MANNERS, OPINIONS, TIMES 135-37 (John M. Robertson ed., 1964) (1711); DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS (Peter Nidditch ed., 1975) (1777); John Stuart Mill, *Sedgwick's Discourse*, *in* X COLLECTED WORKS OF JOHN STUART MILL 31, 50-52 (John Robson ed., 1969) (1835); John Stuart Mill, *Utilitarianism*, *in* X COLLECTED WORKS OF JOHN STUART MILL 203, 228-33 (1861); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (D.D. Raphael & A.L. MacFie eds., 1976) (1759).

96. *See* ARISTOTLE, NICOMACHEAN ETHICS (David Ross trans., 1980) (1925); *see also* WILLIAM W. FORTENBAUGH, ARISTOTLE ON EMOTION (1975).

97. *See, e.g.*, ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 102-20 (2d ed. 1946); CHARLES L. STEVENSON, ETHICS AND LANGUAGE (1944); CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE 97-114 (1985); J.O. URMSON, THE EMOTIVE THEORY OF ETHICS (1968); *see generally* RONALD DE SOUSA, THE RATIONALITY OF EMOTION (1987). Contemporary continental thinkers continue a long tradition of what one may call emotional intuitionism, which postulates generally that we can access (moral) knowledge through our emotions. This important tradition includes Franz Brentano, Nicolai Hartmann, and Max Scheler. *See* FRANZ BRENTANO, THE ORIGIN OF OUR KNOWLEDGE OF RIGHT AND WRONG (Roderick M. Chisholm ed., Roderick M. Chisholm & Elizabeth H. Schneewind trans., 1969) (1889); NICOLAI HARTMANN, ETHICS (Stanton Coit trans., 1932) (1926); MAX SCHELER, FORMALISM IN ETHICS AND NON-FORMAL ETHICS OF VALUES: A NEW ATTEMPT TOWARD THE FOUNDATION OF AN ETHICAL PERSONALISM (Manfred S. Frings & Roger L. Funk trans., 5th ed. 1973) (1912-16); MAX SCHELER, THE NATURE OF SYMPATHY (Peter Heath trans., 1954) (5th ed. 1948). At least one commentator has suggested that even Kant "never entirely renounced his pre-Critical conviction that within strict limits, those British moralists were correct in saying that sentiment does play an essential role in human morality." SULLIVAN, *supra* note 94, at 9-10. As pointed out above, *see supra*

obvious, and that illustrate the widespread rejection of a categorical exclusion of emotions from moral discourse, John Rawls's liberal social and political philosophy turns on a moral theory that views every reasonable person as possessing a "sense of justice," and on a moral psychology that regards moral learning as the development of this moral sentiment.[98] Consider also Michael Moore's recent moral realist defense of retributive emotions as legitimate justifications for criminal punishment.[99] The latter example bears particular significance to capital jurisprudence, as the Court has embraced retribution as the primary purpose furthered by the imposition of the death penalty.[100]

The Supreme Court's attempts to categorically distinguish between emotional responses, on the one hand, and moral responses, on the other, therefore appear ill-founded and misguided. Moreover, even if one agrees that "the Court has carefully avoided constitutionalizing a theory of punishment,"[101] it has, in effect, adopted a particular view of the nature of moral judgments, a view that from its purported ancient Greek origins until today has been attacked as based on a false dichotomy.

Clearly, to question the categorical exclusion of all emotional responses from the realm of morality does not imply the moral significance of all emotional responses. The relevant distinction, however, lies not between emotional and moral responses, but between reasoned and non-reasoned emotional responses, or, as stated by Professor Pillsbury, between "those emotions which are morally appropriate [and] those which are not."[102] This claim finds support in Supreme Court precedent distinguishing reasoned moral responses from (presumably non-reasoned) emotional responses, thereby permitting the inference that reasonable emotional responses might be relevant sentencing considerations.[103] If all moral responses were by

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note 94, the correctness of this observation would depend entirely on what precise role sentiment plays in Kant's moral theory.

98. JOHN RAWLS, A THEORY OF JUSTICE 46-48, 453-512 (1971). Rawls emphasizes that "a moral view is an extremely complex structure of principles, ideals and precepts, and involves all the elements of thought, conduct, and feeling." *Id.* at 461.

99. Michael S. Moore, *The Moral Worth of Retribution, in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987). For another recent defense of retributive emotion as morally significant, *see* Andrew Oldenquist, *An Explanation of Retribution*, 85 J. PHIL. 464 (1988). Professors Jeffrie Murphy and Jean Hampton have explored the place of emotions like retributive hatred and mercy in criminal punishment. *See* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988).

100. *See infra* text accompanying note 185.

101. Pillsbury, *supra* note 91, at 658. *But see* Murphy, *supra* note 78 (arguing that Court has constitutionalized retributive theory of punishment).

102. Pillsbury, *supra* note 91, at 673.

103. *See* Saffle v. Parks, 494 U.S. 484, 493 (1990); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

definition reasonable, it would make little sense to continuously speak of reasoned moral responses. Moreover, the Supreme Court and other federal courts have long recognized the appropriateness of basing the capital sentencing decision on mercy,[104] compassion,[105]

104. *See* Morgan v. Illinois, 112 S. Ct. 2222, 2234 (1992) (holding that due process requires removal of capital juror to whom mitigating factors are irrelevant and referring to such a juror as "merciless"); *California v. Brown*, 479 U.S. at 562-63 (Blackmun, J., dissenting); Gregg v. Georgia, 428 U.S. 153, 199, 203 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 413 (1972) (Blackmun, J., dissenting); *see also* Stanley v. Zant, 697 F.2d 955, 961 n.4 (11th Cir. 1983) (quoting *Gregg*'s endorsement of mercy as a relevant sentencing consideration and remarking that "[t]he exercise of mercy, of course, can never be a wholly rational, calculated, and logical process") (quoting Washington v. Watkins, 655 F.2d 1346, 1376 n. 57 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982)), *cert. denied*, 467 U.S. 1219 (1984); Brooks v. Kemp, 762 F.2d 1383, 1405 (11th Cir. 1985) ("'Reason' alone cannot adequately explain a jury's decision to grant mercy to a person convicted of a serious murder because of that person's youth or troubling personal problems. . . . Empathy for a defendant's individual circumstance or revulsion at the moral affront of his crime, reactions accepted as bases for capital sentencing decisions, are not susceptible to full explanation without recourse to human emotion."), *vacated*, 478 U.S. 1016 (1986); *id.* at 1405 n.34 (arguing that "emotion is both appropriate and inevitable"); Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985) (arguing that "the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases" (citing *Woodson* and *Lockett*) and concluding that "[t]he Supreme Court . . . has demonstrated that mercy has its proper place in capital sentencing"), *cert. denied*, 476 U.S. 1153 (1986); *id.* at 626 (mercy "the most important component of a capital jury's discretion favoring capital defendants"); Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) (en banc) (suggestion that mercy is irrelevant for capital sentencing purposes is "fundamentally opposed to current death penalty jurisprudence"); Shelly Clarke, Note, *A Reasoned Moral Response: Rethinking Texas' Capital Sentencing Statute After* Penry v. Lynaugh, 69 TEX. L. REV. 407, 425 & n.144 (1990); Paul W. Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 395 & n.36 (1989); *cf.* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (improper to "exclude[] from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind"). Some states require the trial judge to instruct the jury on the availability of mercy as a basis for deciding against the death penalty. *See, e.g.*, GA. CODE. ANN. § 17-10-2(c) (Michie 1990) ("[T]he jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant."); Legare v. State, 302 S.E.2d 351, 354 (Ga. 1983) (capital sentencing jury must consider mercy). In Georgia, jurors have been instructed to exercise mercy with or without reason. *See, e.g.*, Wilson v. Zant, 290 S.E.2d 442, 453 (Ga. 1982), *cert. denied*, 459 U.S. 1092 (1982); Brief of Petitioner/Appellee at 17, 18, Presnell v. Zant, 959 F.2d 1524 (11th Cir. 1992) (No. 90-8770). Oklahoma juries more recently have been instructed on the relevance of mercy, *see* Fox v. State, 779 P.2d 562, 574 (Okl. Crim. App. 1989) ("[M]itigating circumstances are those which, in fairness and *mercy*, may be considered as extenuating or reducing the degree of moral culpability or blame.") (emphasis added), *cert. denied*, 494 U.S. 1060 (1990); Parks's jury apparently was not so instructed. Although the Supreme Court upheld the anti-sympathy instruction given to Brown's California jury on the ground that sympathy and mercy are easily distinguished, another California jury received the following instruction a few years earlier: "[T]he jury [is allowed] to consider pity, sympathy, and mercy as those factors may constitute a mitigating circumstance. . . ." Weisberg, *supra* note 11, at 372.

and retributive disapproval,[106] all emotional responses.[107]

Without implicitly distinguishing between various types of emotional responses, the Court clearly may not exclude sympathy from capital sentencing on the ground that it constitutes an emotional response, and, at the same time, continue to allow other emotional responses to influence capital sentencing. The Court itself therefore long ago blurred the seemingly bright line between emotional and reasoned responses that proved dispositive in *Parks*.

Once it is accepted that certain emotional responses have a place in capital sentencing, the focus shifts to distinguishing between appropriate and inappropriate emotional responses.[108] The basis for this distinction springs directly from the principle that every capital defendant has a right to an individualized sentencing determination.[109] As this article demonstrates, this principle has for no good reason lost much of its force lately. The Supreme Court nevertheless must reaffirm this precept of death penalty jurisprudence unless it has decided to abandon the enterprise of placing constitutional limitations on the administration of death sentences. The following discussion therefore proceeds on the assumption that the Court will attempt to salvage the constitutionality of the death penalty by firmly reestablishing the right to an individualized sentencing determination.

We begin with a look at the Supreme Court's attempt to distin-

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105. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Even if one splits hairs and distinguishes compassion from sympathy, as the Supreme Court did implicitly in *Parks*, 494 U.S. at 492-95, it can hardly be claimed that compassion is void of emotive content.

106. Arguably, the Court has endorsed only a non-emotional view of retribution in capital jurisprudence. Insofar as such a view is doctrinally defensible and practically feasible, the Court's endorsement of retribution need not imply an approval of emotional responses in capital sentencing. *But see* Dow, *supra* note 59, at 48-49 (arguing that the determination of retributive desert always relies, at least in part, on emotional factors); *see also* Moore, *supra* note 99 (presenting retributivism as founded on retributive emotions).

107. *See* Dow, *supra* note 59, at 48-49; Moore, *supra* note 99; JAMES F. STEPHENS, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 82 (1883) ("The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice in the most emphatic of such forms, stand to [these passions] in the same relation in which marriage stands to [sexual passion]."). For one among many who have suggested that retributive disapproval springs from a "non-reasoned" impulse, *see* Ossip K. Flechtheim, *Hegel and the Problem of Punishment*, 8 J. HIST. IDEAS 293, 305 (1946).

108. *Cf. Brown*, 479 U.S. at 550 (Brennan, J., dissenting) (speaking of "a directive that certain forms of emotion are permissible while others are not").

109. Professor Pillsbury has proposed a different distinction between relevant and irrelevant emotional responses in capital sentencing based on the recognition of what he calls "the empathy obligation." Pillsbury, *supra* note 91, at 709. Professor Pillsbury derives this obligation from an extended discussion of the complex psychological-philosophical concept of *agape*. The distinction outlined in this article arises directly from the fundamental tenets of the Supreme Court's capital jurisprudence and therefore does not require the importation of this obligation into capital jurisprudence.

guish between proper and improper emotional responses in *Brown*. There, the Court held that a state may instruct the sentencer to ignore emotional responses "that would be totally divorced from the evidence adduced at the penalty phase."[110] This attempt to weed out inappropriate emotional responses begs the question.[111] The relevant question is not whether the emotional response is somehow connected to the penalty phase evidence, but whether its consideration would violate the two precepts of death penalty jurisprudence: sentencer guidance and individualized sentencing. Some emotional responses that are triggered by (and therefore "not totally divorced from") the evidence, such as racial hatred, are clearly irrelevant for sentencing purposes. Conversely, the sentencer should be entitled to consider some emotional responses, such as those generated by appreciation of the unique dignity of the defendant as a human being, that may well be unconnected to any evidence introduced at trial. Even a death-qualified juror, who has no scruples about applying the death penalty as a general matter, may choose not to end a particular defendant's life once she has observed the defendant in court and has contemplated the specific and irremediable consequences of her decision in a particular case. Should one deny the sentencer the option of relying on this emotional response "totally divorced from the evidence," the death sentence would become mandatory in all cases where the defendant puts on no mitigating evidence and does not testify.[112]

Emotional responses should be excluded from capital sentencing not on account of their lack of foundation in the evidence, but on account of their irrelevance to the sentencer's "reasoned moral re-

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110. 479 U.S. 538, 542 (1987). Clearly this cannot mean that in the case where the same jury determines guilt and sentence, it must disregard what it heard and saw during the guilt phase when assessing the penalty.

111. *See* Allen, *supra* note 85, at 748-51. By eliminating all emotional responses from the sentencing process, *Parks* rejects this standard. Justice Brennan unwittingly predicted the Court's abandonment of this standard when, in his *Brown* dissent, he remarked that "[a]n average juror is likely to possess the common understanding that law and emotion are antithetical." 479 U.S. at 550 (Brennan, J., dissenting). Little did he know that the Supreme Court itself would wholeheartedly adopt this common misunderstanding only three years later.

112. This is not to say that the sentencer may impose a sentence based on considerations inconsistent with the evidence. While the sentencer may consider the defendant's potential for future accomplishments (just as she may consider the defendant's potential dangerousness) and, in this sense, is not restricted to weighing documented occurrences, she may not disregard her own findings of fact. If she finds that the defendant's victim died slowly and painfully, she may not impose a life sentence because the victim died a quick and painless death. Only if limited to this scenario can the Supreme Court's holding in *Brown*, that a State may prohibit the jury from considering emotional responses "totally divorced" from the evidence, be squared with a capital defendant's right to an individualized sentencing determination.

sponse"[113] independent of the evidence. On the one hand, one need not look to the evidence to know that racial hatred may not influence the sentencing determination. A death sentence imposed on the basis of the defendant's or the victim's race would violate not only the defendant's right to equal protection but also her right to a sentencing determination based on her individual characteristics,[114] not her membership in a racial group.[115] A death sentencing scheme which permitted the consideration of the defendant's and the victim's race would also run afoul of the requirement that the sentencer apply uniform principles that are considered appropriate bases for selecting those few who deserve the death penalty.[116]

On the other hand, the sentencer's consideration of the defendant's characteristics or potentials apart from those specifically developed in the evidence steers clear of both constitutional pitfalls. Consideration of these characteristics or potentials does not violate

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113. *Parks*, 494 U.S. at 493; *Brown*, 479 U.S. at 545.

114. It might be argued, however, that the sentencer should be entitled to consider the defendant's race because race constitutes an important aspect of the defendant's identity and is therefore relevant to a consideration of her unique individuality as a human being. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Similarly, the defendant's race may be relevant to an assessment of her culpability in that her experiences with racial discrimination may account in part for her disadvantaged upbringing or for her psychological or mental condition at the time of the crime. Like race, other factors may be both relevant and irrelevant to the capital sentencer's "reasoned moral response." Consider, for example, the defendant's gender, which may be relevant to the culpability assessment in the form of evidence of her suffering from battered woman syndrome. In response, it may be suggested that, even in these examples, race and gender only indirectly affect the sentencing decision insofar as they influence a relevant factor such as a particular psychological or mental condition. The ambivalence of factors like race and gender nevertheless raises the important question of how one could communicate to the sentencer the difficult distinctions between proper and improper sentencing factors and between the proper and improper emotions these factors may trigger. It may well be impossible to guide, with sufficient accuracy to meet the Eighth Amendment's heightened reliability requirement, not only the sentencer's consideration of the victim's and the defendant's attributes or the circumstances of the crime but also the sentencer's consideration of emotions that these attributes and circumstances might evoke. *See infra* note 127 and text accompanying notes 289-97.

115. Then-Justice Rehnquist's plurality opinion in Barclay v. Florida, 463 U.S. 939 (1983), is not to the contrary. There, the Court held that the sentencer could consider the defendant's racial hatred. *Id.* at 949. In the summer of 1974, Barclay and another member of a group called the Black Liberation Army murdered a young white man in Jacksonville, Florida. The trial judge overrode the jury's recommendation of life imprisonment partly on the basis of "Barclay's desire to start a race war." *Id.* Although the Court failed to address the most troublesome aspect of the case, namely the very real possibility that the sentencing judge responded to his own racial fears and prejudices in sentencing Barclay to death, the opinion does not, and could not, suggest that a sentencer's racial hatred may influence her decision.

116. *See* Zant v. Stephens, 462 U.S. 862, 878 (1983) (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).

the uniformity strand of death penalty law because there is nothing objectionable about the principle that the death sentence be imposed only on those individuals who do not possess characteristics and potentials that trigger in the sentencer the recognition that she cannot extinguish their lives.[117]

The individualized sentencing requirement not only permits but requires that the sentencer consider the very individual significance of the defendant's past and future life. It has long been clear that the sentencer must take into account all factors that may support a recommendation of life over death, whether these factors were included in a list of statutory mitigating circumstances or not.[118] An appreciation of the often unarticulable uniqueness that distinguishes the particular defendant's human life from every other, and the correspondingly incomparable and irreversible consequences of causing its termination, has rested at the core of the Supreme Court's death penalty jurisprudence from the very beginning. Accordingly, the sentencer must be permitted to choose life over death based on this appreciation in a specific case. Denying the sentencer the option of considering this realization therefore amounts to preventing her from considering all mitigating factors.

In death penalty schemes where the sentencer must identify the aggravating and mitigating circumstances present in a given case, a finding of no statutory or non-statutory mitigating factors may therefore be constitutionally infirm. Such a finding documents a violation of the defendant's right to an individualized sentencing determination if it reflects the sentencer's refusal to consider the most fundamental mitigating factor: the unarticulably unique quality of each defendant's life which complicates confident evaluation of her accountability for past deeds and predictions of her potential for good or bad acts in the future. This uncertainty constitutes a mitigating factor insofar as it may support a sentence of life over death. A finding that no mitigating factors are present does not violate the defendant's right to an individualized sentencing determination only if it represents a finding that no articulable mitigating circum-

117. *Cf. Zant*, 462 U.S. at 875 & n.13 (Georgia death penalty statute does not violate guidance principle even though "[t]he jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court") (citing the joint majority opinion and Justice White's concurring opinion in Gregg v. Georgia, 428 U.S. 153, 161, 165, 196-97, 206-07, 208, 218, 222 (1976)).

118. For the first enunciation of this principle, *see* Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion). Note, however, that this formulation of the individualized sentencing requirement could not justify the consideration of all factors and emotional responses that support sparing the defendant's life. For example, a white juror may not spare the life of a white defendant because the victim was black and therefore triggers the juror's racial hatred.

stances have been proved by the evidence. The absence of mitigating evidence, however, only implies the absence of mitigating factors if all mitigating factors must be directly connected to the evidence introduced during the guilt and sentencing phases, a requirement that improperly restricts a defendant's right to an individualized sentencing determination. Moreover, the inability of the sentencer to list the "subjective, unarticulable perceptions"[119] of the defendant that support a sentence other than death obviously does not authorize a state to prohibit the sentencer from considering these perceptions, as long as they do not spring from the irrelevant attributes identified below. Accordingly, a finding that no mitigating, and only aggravating, circumstances are present, if interpreted constitutionally, can never by itself foreclose the imposition of a life sentence.[120]

In the end, it is the defendant whose life is in the balance. It is the defendant as a complete person, not as a composite drawing of mitigating and aggravating evidence, who will suffer the ultimate penalty. The fundamental purpose of the capital sentencing hearing is to force the sentencer to view the defendant as a person, no matter how hard some prosecutors might try to describe the defendant as an animal or an inanimate object.[121] The capital sentencer does not decide upon a sentence on the basis of written reports on the defendant's character and behavior. The sentencer instead must consider the defendant's desert as a person in the defendant's presence. The law for centuries has recognized the importance of studying a witness's demeanor and of permitting the defendant to look her accuser in the face.[122] In capital sentencing, where the very existence of the person whose attributes are under scrutiny is at stake, the sentencer should not be barred from considering her response to facets

119. Stanley v. Zant, 697 F.2d 955, 960 n.4 (11th Cir. 1983) (quoting Washington v. Watkins, 655 F.2d 1346, 1376 n.57 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982)), *cert. denied*, 467 U.S. 1219 (1984).

120. As pointed out above, the defendant's right to an individualized sentencing determination requires this result. *See supra* text accompanying notes 117-19. Moreover, counsel's failure to introduce any mitigating evidence or to argue any mitigating circumstances at sentencing clearly would constitute ineffective assistance if the sentencer could not impose a life sentence without finding mitigating circumstances. Courts, however, have repeatedly upheld that strategy choice as a reasonable professional judgment. *See, e.g.*, Stevens v. Zant, 968 F.2d 1076 (11th Cir. 1992); Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983). Even if a finding of no mitigating circumstances, as opposed to a finding of no mitigating circumstances established by the evidence, could withstand constitutional scrutiny, the sentencer must always be entitled to not impose the death penalty if the aggravating circumstances "are insufficiently weighty to support the ultimate sentence." Barclay v. Florida, 463 U.S. 939, 963 n.7, 964 (1983) (Stevens, J., concurring).

121. *See, e.g.*, Pillsbury, *supra* note 91, at 699 & n.133.

122. *Cf.* Coy v. Iowa, 487 U.S. 1012 (1988) (screen obscuring defendant's view of accuser unconstitutional under Confrontation Clause of the Sixth Amendment).

of the defendant's person not framed (or framable) in evidentiary terms. Accordingly, the sentencer must scrutinize the defendant with all her attributes as a person, including her most fundamental attribute as a unique human being possessed of dignity on account of the rationality she shares with all of us. The right to an individualized sentencing determination requires no less.

Any attempt to separate appropriate from inappropriate emotional responses must therefore proceed from the proposition that any emotional response triggered by any of the defendant's attributes must be permitted to influence the sentencing decision. Inappropriate emotional responses should then be eliminated, not by prohibiting the sentencer from considering any emotional responses, but by identifying the limited group of attributes irrelevant for sentencing purposes, regardless of whether these attributes emerged from the evidence or not. Racial hatred, for example, may well arise from a single look at the defendant, or her relative, or perhaps her lawyer, rather than from a painstaking study of the evidence. The federal drug kingpin statute, for example, requires an instruction that the jury, in this case the ultimate sentencer,[123] "shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim," and that it may not recommend the death sentence "unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of defendant, or the victim, may be."[124] The federal statute further provides that each juror must sign a certificate that "consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be."[125] The illustrative list of impermissible bases for emotional responses might also include sexual orientation[126] of the defendant or the victim.[127]

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123. Although the judge actually imposes the sentence, she has no discretion to override the jury's sentence recommendation. *See* 21 U.S.C. § 848(o)(1) (1988).

124. *Id.*

125. *Id.*

126. *Cf.* Brecht v. Abrahamson, 944 F.2d 1363 (7th Cir. 1991), *cert. granted*, 112 S. Ct. 2937 (1992) (dismissing claim that evidence of defendant's homosexuality improperly influenced jury's guilt deliberation).

127. Should a state insist on permitting the introduction of victim impact evidence after *Payne*, such an instruction might help blunt the effect of this evidence. *See infra* note 280 (discussing similar suggestion by Justice Mosk of the California Supreme Court). This instruction, however, is unlikely to cleanse the capital sentencing decision of improper considerations. It has already been noted that factors such as race and gender

An instruction prohibiting the consideration of certain of the defendant's and the victim's attributes, of course, should not obscure the serious problem of sentencers nevertheless allowing these attributes, and race in particular, to influence their decision.[128] In particular, this instruction would not foreclose equal protection attacks on the discriminatory invocation, nor on the discriminatory imposition, of the death penalty.

Anti-sympathy instructions of the *Parks* and *Brown* variety obviously cannot separate appropriate from inappropriate emotional responses. They instead create the incorrect impression that any and all emotional responses are irrelevant to the capital sentencing decision.[129]

It is often pointed out that allowing the sentencer to consider any kind of sympathetic response would work to the detriment of capital defendants, because "sympathy is more likely to be aroused for the victim and his family than for a defendant."[130] There indeed appears to be no principled way to distinguish between allowing sympathy for the defendant and allowing sympathy for the victim, provided that the sympathy in both cases is based on relevant attributes. While the capital defendant may not be protected against sympathy based on relevant attributes, the risk of death sentences motivated by improper emotional responses should be minimized by limiting the scope of relevant evidence the government may present to the sentencer. In particular, the commitment to risk minimization in capital sentencing requires the exclusion of victim impact evi-

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may well be relevant in certain senses. *See supra* note 114. Moreover, any list of improper considerations is likely to be incomplete because it is impossible to identify beforehand and in abstraction from the particular case (and the particular sentencer) those improper considerations upon which a given sentencer may be tempted to rely. Consider, for example, a sentencer who considers the defendant's or the victim's geographic origin or residence, *see* Pillsbury, *supra* note 91, at 664-65 (discussing improper influence of this factor), or taste in clothes, or favorite pastime. Finally, even if an exhaustive list of proper or improper sentencing factors could be assembled, nothing would tell the sentencer what sorts of emotion triggered by proper factors she may consider. Should all "non-considered" emotional responses be excluded? Should an over-powering passion that would "threaten the rationality" of the sentencing decision suffer the same fate? If so, it would be difficult to determine—and for the sentencer to grasp—when an emotional response would become considered enough to gain moral significance and what, if any, passion (or compassion) the sentencer may consider.

128. *See, e.g.*, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 140-97 (1990); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984).

129. *See* California v. Brown, 479 U.S. 538, 550 (1987) (Brennan, J., dissenting).

130. People v. Easley, 671 P.2d 813, 831 (Cal. 1983) (Mosk, J., concurring); *see also* Fox v. State, 779 P.2d 562, 575 (Okla. Crim. App. 1989); Johnson v. State, 731 P.2d 993, 1004 (Okla. Crim. App. 1987).

dence. This question marks the point of contact between *Parks* and *Payne*, and, accordingly, will be treated in greater detail after a discussion of *Payne*.[131] At this point, it suffices to remark that *Payne*, by lifting the ban on victim impact evidence, has turned inside out the argument that anti-sympathy instructions must be permissible because victim impact evidence is not.[132] Now, the admissibility of victim impact evidence cuts against the propriety of anti-sympathy instructions.

Again, the Court has long recognized, if only implicitly, the significance of emotion in the capital sentencing decision. The open endorsement of emotional responses based on relevant attributes merely provides a more principled way of guiding the consideration of emotional responses in the very volatile setting of a capital sentencing hearing. Sentencing accuracy would be maintained by excluding emotional responses not based on relevant attributes, on the one hand, and by unequivocally permitting consideration of emotions of mercy, compassion, and retributive disapproval, long recognized as proper sentencing considerations, on the other. The proposed distinction between relevant and irrelevant emotional responses would also address the concern that sentencing decisions based on emotions are unreviewable.[133] Courts could review death sentences by reviewing the record for indications that the sentencer reasonably could have been swayed by irrelevant emotional responses or that the sentencer had not been properly instructed on the distinction between appropriate and inappropriate emotional responses, allowing the inference that she might have failed to consider all appropriate emotional responses.[134] Similarly, courts would of course continue to review death sentences to determine whether they were imposed under the influence of an arbitrary factor.[135]

2. *The Risk of Wrongful Execution.* In *Penry v. Lynaugh*,[136] the Court reaffirmed with much fanfare its continuing commitment to

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131. *See infra* text accompanying note 235.

132. *Compare* Parks v. Brown, 860 F.2d 1545, 1558 (10th Cir. 1988) (en banc), *rev'd sub nom.* Saffle v. Parks, 494 U.S. 484 (1990), *with Parks*, 860 F.2d at 1569 (Anderson, J., concurring in part and dissenting in part).

133. *See* Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (ruling that state must guide jury discretion by standards that "make rationally reviewable the process for imposing a sentence of death") (quoting Woodson v. North Carolina, 428 U.S. 280, 303 (1976)).

134. Arguably, the low tolerance for inaccurate sentencing determinations embodied in the outlined standard of review conflicts with the Court's recent decision in Boyde v. California, 494 U.S. 370 (1990). The choice of a different standard of review, however, does not affect the reviewability of a capital sentencing decision based on reasoned emotional responses.

135. *See, e.g.*, 21 U.S.C. § 848(q)(3)(A) (1988); Zant v. Stephens, 462 U.S. 862, 871-72 (1983) (quoting Georgia Supreme Court's explication of the Georgia death penalty scheme).

136. 492 U.S. 302 (1989).

the high principles announced in *Gregg* and *Lockett*:

> It is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be *sure* that the sentencer has treated the defendant as a "uniquely human being" and has made a *reliable* determination that death is the appropriate sentence.
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> . . .
>
> Our reasoning in *Lockett* and [*Eddings v. Oklahoma*[137]] thus compels a remand for resentencing so that we do not *"risk* that the death penalty will be imposed in spite of factors which may call for a less severe penalty." "When the choice is between life and death, that *risk* is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."[138]

One year later, *Parks* announced that the days are over when doubts were resolved in favor of the capital defendant in the name of the unique nature of the death penalty and the unique risk that its imposition entails.[139] *Parks*, however, not only unveils the Supreme Court's attempt to accomplish uniformity through bright lines. *Parks* also shows how misguided reliance on blurry distinctions translates into a disregard for accuracy in capital sentencing. Recall that in *Parks*, a "new rule" case, the Court refused to even reach the merits of a federal constitutional challenge to the petitioner's death sentence. Recall also that *Parks* reversed the decision of the Tenth Circuit en banc court which had reversed the district court's denial of the writ. In other words, the Supreme Court refused to even consider a claim that cast so much doubt on the accuracy of Parks's death sentence that a federal appellate court reversed his death sentence.

In *Parks*, the Supreme Court must have concluded that the very real possibility of an inaccurate capital sentencing determination could not outweigh the benefits of adhering to its project of bright line uniformity and of shutting the federal habeas door to state death row inmates in the name of federal-state comity and sentence finality. A quick look at these benefits demonstrates that they can hardly be said to justify taking a chance on the execution of

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137. 455 U.S. 104 (1982).

138. *Penry*, 492 U.S. at 319, 328 (emphasis added) (citations omitted).

139. *See* Murray v. Giarratano, 492 U.S. 1, 21 & n.9 (1989) (Stevens, J., dissenting) ("In death cases doubts such as those presented here should be resolved in favor of the accused.") (quoting Andres v. United States, 333 U.S. 740, 752 (1948)). *Parks*, of course, is not alone in its willingness to accept risks of wrongful executions previously held unconstitutional. *See, e.g.*, Coleman v. Thompson, 111 S. Ct. 2546, 2567 (1991) (capital defendant must "bear[] the risk . . . for all attorney errors made in the course of the representation").

a single undeserving person. The Court's different assessment of the relative weight of death sentencing accuracy, on the one hand, compared to uniformity, comity, and finality, on the other, reveals just how weak the Court's interest in accuracy has become.

Time and time again, the Supreme Court has recognized the special status of cases involving the death penalty.[140] The super due process protection for defendants subject to the death penalty has far exceeded that afforded defendants sentenced to a lesser sentence, including life imprisonment without possibility of parole. Only capital defendants have the constitutional right to an individualized sentence and to a process that guarantees such a sentence. This crucial distinction between capital and other defendants has only recently been reaffirmed in the rejection by every federal circuit of individualized sentence challenges to the Federal Sentencing Guidelines.[141]

This extra protection for capital defendants reflects two commonly recognized characteristics of the death penalty.[142] The death penalty traditionally has been viewed as qualitatively different from

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140. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 678 (1990) (Blackmun, J., dissenting); Clemons v. Mississippi, 494 U.S. 738 (1990) (Blackmun, J., concurring in part and dissenting in part); Murray v. Giarratano, 492 U.S. 1, 23 (1989) (Stevens, J., dissenting); Thompson v. Oklahoma, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting); Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring); Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) ("[T]he death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense."); California v. Ramos, 463 U.S. 992, 998-99 (1983); Barclay v. Florida, 463 U.S. 939, 958-59 (1983) (Stevens, J., concurring); Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Rummel v. Estelle, 445 U.S. 263, 272 (1980).

141. *See* United States v. Delibac, 925 F.2d 610 (2d Cir. 1991); United States v. Mills, 925 F.2d 455, 462 (D.C. Cir. 1991); United States v. Mondello, 927 F.2d 1463 (9th Cir. 1991); United States v. Dumas, 921 F.2d 650 (6th Cir. 1990); United States v. Grinnell, 915 F.2d 667, 668 (11th Cir. 1990); United States v. Ojo, 916 F.2d 388 (7th Cir. 1990); United States v. Sanchez, 917 F.2d 607 (1st Cir. 1990); United States v. Woolford, 896 F.2d 99 (5th Cir. 1990); United States v. Bolding, 876 F.2d 21 (4th Cir. 1989); United States v. Nunley, 873 F.2d 182 (8th Cir. 1989); United States v. Thomas, 884 F.2d 540 (10th Cir. 1989); United States v. Frank, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989).

142. *See* California v. Ramos, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *see also* Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."); Gholson v. Estelle, 675 F.2d 734, 737 (5th Cir. 1982) ("[I]t is precisely the inflexible and terminal nature of the death penalty that makes it a matter of exceeding consequence to assure that before such a condemnation is made the individual receives the full force of the protections and safeguards guaranteed by the Constitution.").

other criminal penalties because it is the only penalty that takes a life, whereas all other penalties merely restrict the enjoyment of life.[143] This "primacy of life" claim often forms the premise for an argument in support of the death penalty, which asserts that murder, as the willful and unjustified taking of a life, requires the imposition of the death penalty, as no other punishment would meet the retributive requirement of a more or less exact proportion of punishment and crime.[144]

The death penalty also differs from other penalties in the irreversibility of its execution. This characteristic results directly from the fact that only the death penalty involves the taking of a life. Ignoring the significant psychological and physical effects of prison life on many inmates, the taking of freedom and privacy can be interrupted, although the loss cannot be restored. The same obviously cannot be said of the taking of a life, or of any of the other mutilating penalties still common in Islamic law[145] and until fairly recently in the United States, in the form of forced sterilization of certain offenders.[146]

Considering the death penalty's unique characteristics, the cost of its imposition in a single inappropriate case would qualitatively differ from the cost of other inappropriate penalties, as the death penalty itself qualitatively differs from these other penalties. The Supreme Court has recognized the extraordinary significance of this cost by establishing its super due process jurisprudence, and this is the cost against which one should weigh the benefits of employing disputable distinctions to refuse federal habeas review to state death row inmates.

To start with the Court's pursuit of bright line uniformity, it is not even clear what sentence uniformity requires, especially in a purportedly individualized sentencing process. Does it require that all defendants convicted of the same crime deserve the same penalty? But what crime is identical to any other? Does the legal definition of a crime suffice to identify identical crimes? Perhaps uniformity merely requires that every defendant be sentenced according to her moral desert, which would imply that defendants with equal moral desert will receive equal penalties. But what two defendants

143. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, Stevens, JJ.) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.")

144. *See infra* text accompanying note 198.

145. *See* MATTHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION 42-45 (1988); JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 175 (1964).

146. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Buck v. Bell, 274 U.S. 200 (1927).

have committed the same harm with the same degree of culpability? Perhaps uniformity can be achieved only in the unlikely event that the search for individualized penalties according to moral desert uncovers two actors of identical moral desert.

The goals of sentence accuracy and uniformity are equally elusive. Accuracy, however, ensures uniformity, not vice versa. In retributive terms, a sentence must first accurately reflect the offender's moral desert before it even makes sense to compare it to the sentence imposed on another offender. Uniformity should be viewed as a by-product of accuracy, not its substitute. This is of particular importance in death cases, where the severity of the penalty prohibits, even more strongly than in other cases, the assignment of an excessive punishment for the sake of some nebulous requirement of uniformity with a similarly excessive punishment in another case.

Weighed against these goals are the benefits of refusing federal habeas review to state death row inmates: federal-state comity and finality. First, denying habeas review to state death penalties is said to be in the interest of federal-state comity.[147] While federal courts indeed should respect state court decisions and the integrity of state judicial systems in general, comity is surely not the only, or even the primary, concern underlying the federal habeas statute. One may disagree about how federal courts should go about exercising their supervisory powers under the federal habeas statute. For example, some have suggested that federal courts should not seek to rectify every instance of a federal constitutional error in state courts, but should view the habeas statute as a deterrent against future failures to enforce federal constitutional rights.[148] Regardless of how one believes the federal courts should discharge this duty under the federal habeas statute, however, the ultimate goal of the habeas statute and the federal courts' corresponding duty remains unambiguous: to protect federal constitutional rights in the state courts. Comity should be a concern if and only if lack of cooperation from indignant state courts endangers the full protection of federal constitutional rights. Comity in and of itself does not represent an interest at all. In abstraction from the protection of federal constitutional rights, the ultimate purpose of the federal habeas statute, the concern for comity appears as a highly inappropriate concern for preventing the disgruntled animosity of particular state courts. At a time when there is little indication that irked state court judges deny federal rights out of spite for federal habeas review of death sentences, the concern for comity appears at best irrelevant.

It is worth remembering here that *Parks* and the other "new

147. Teague v. Lane, 489 U.S. 288, 308 (1989).

148. For an overview of this debate, *see, e.g.*, Hoffmann, *Retroactivity, supra* note 51.

rule" cases do not merely prevent federal courts from issuing the writ with respect to death sentences. These cases prevent federal courts from even considering the merits of federal habeas petitions. Interestingly, the distinction between merely considering and granting a petition becomes irrelevant only if all petitions are meritorious. In any other scenario, the states can only have a negligible interest in preventing the consideration, as opposed to the granting, of federal habeas petitions. It should also be remembered that even if a federal court were to reach their merits, many capital habeas cases, as a practical matter, do not threaten to overturn a state conviction. Although almost all habeas petitioners on death row technically challenge both conviction and sentence they tend, not surprisingly, to be most concerned about having their sentences overturned. In the worst scenario for the state in most cases, the state would have to resentence the petitioner within a reasonable time, limiting the greatest possible alteration of the state proceeding's outcome to a reduction of a sentence of death to a sentence of life imprisonment.

Second, refusing federal habeas review on retroactivity grounds is said to promote the interest of finality in criminal judgments.[149] Like comity, finality is not a goal in and of itself. To start with, the finality concern might well be a misnomer given that the Supreme Court seems more concerned with brevity than with finality. It is the brevity of proceedings, not their finality, that saves judicial resources (and, in the case of defendants sentenced to death, also prison resources). Federal habeas review of state convictions and sentences draws criticism because it takes too long, not because it never comes to an end. The Supreme Court has focused on finality as a means of increasing the deterrent effect of punishment.[150] Endorsing finality for that reason obviously assumes that criminal punishment has a significant deterrent effect. Criminologists, however, agree that no such deterrent effect has ever been established.[151] Studies also agree that, even if punishment were to have some general deterrent effect in some cases, it has not been shown that in-

149. *Teague*, 489 U.S. at 308-09.

150. *Id.* at 309.

151. *See, e.g.*, THE CANADIAN SENTENCING COMMISSION, SENTENCING REFORM: A CANADIAN APPROACH 135 (1987); DAVID P. FARRINGTON ET AL., UNDERSTANDING AND CONTROLLING CRIME: TOWARD A NEW RESEARCH STRATEGY 135-37 (1986); PETER W. GREENWOOD & ALLAN ABRAHAMSE, SELECTIVE INCAPACITATION 4 (1982); RICHARD SINGER, JUST DESERTS 12 (1979); Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls, in* 5 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1, 10 (Michael Torry & Norval Morris eds., 1983); Daniel Nagin, *General Deterrence: A Review of the Empirical Evidence, in* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 95, 95-97, 135-36 (Alfred Blumstein et al. eds., 1978).

creasing punishment also increases its deterrent effect.[152] If anything might increase deterrence, it is an increase in the likelihood of some punishment, not in the severity of the punishment.[153]

As mentioned above, federal habeas review of a state death sentence will at most force the state to resentence the petitioner in accordance with the Federal Constitution. The petitioner would remain subject to at least a sentence of life imprisonment. Limiting federal habeas review of state death sentences therefore does nothing to increase the likelihood of the imposition of a severe punishment. Considering that, in cases like *Parks*, the conviction is not at issue and punishment is therefore certain, and that the threat of a harsher penalty than life imprisonment is likely to have a negligible effect on the deterrent effect of that inevitable punishment, limiting federal habeas review of state death sentences does nothing to advance the goal of deterrence.

After all is said and done, the purported benefits of refusing to review the merits of Parks's federal constitutional challenge against his death sentence cannot justify taking the chance that he might have been inappropriately condemned to die, a chance the Tenth Circuit was unwilling to take. One might reach a different conclusion, of course, if one elevates the threshold for what constitutes the acceptable risk of wrongful condemnation to a level approximating virtual certainty. In that case, non-capital sentences imposed under the Federal Sentencing Guidelines might well receive stricter scrutiny than state death sentences. Death uniqueness would then lead to fewer, rather than greater, protections for the capital defendant. As the following discussion of *Payne v. Tennessee* will show, it would not be the only time the Supreme Court has turned the "death is different" principle upside down and against the capital defendant.[154]

III. *PAYNE V. TENNESSEE*: INDIVIDUALIZING AND HUMANIZING THE CAPITAL VICTIM

While *Parks* disturbed a fundamental balance in capital jurisprudence—that of accuracy and uniformity—*Payne* established a different one: the balance of defendants' and victims' rights. Together, *Parks* and *Payne* illustrate the Supreme Court's new paradigm capital sentencing hearing. The defendant, whose guilt already has been established, faces her victim, equipped with

152. *See, e.g.*, THE CANADIAN SENTENCING COMMISSION, *supra* note 151, at 130.

153. *See, e.g.*, CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 58 (Henry Paolucci trans., 1963) (1764); JOAN PETERSILIA ET AL., CRIMINAL CAREERS OF HABITUAL FELONS 55 (1977).

154. *See infra* text accompanying notes 238-44.

matching rights, on equal terms. *Parks* frustrates a capital defendant's efforts to portray herself as an individual by depriving her of sympathy, often a capital defendant's main, if not only, access to the sentencer. *Payne* then transfers to the victim the right to individualization that *Parks* had taken from the defendant.

In contrast to *Parks*, which made its contribution to the new capital paradigm by allowing state and lower federal courts to take a peek at the Supreme Court's position on the merits of a claim it was by its own analysis prohibited to address,[155] *Payne* took a more direct approach to levelling capital sentencing's playing field. *Payne* unveiled a novel bifurcated approach to stare decisis and immediately put this innovation to work by overruling two recent Supreme Court cases.

Payne may have made its contribution to the new capital paradigm by different means than *Parks*. Nevertheless, *Payne*, like *Parks*, illustrates that the new paradigm is based on a disregard for the immeasurable risk of wrongful execution inherent in any capital sentencing procedure. As *Parks* cavalierly accepted the substantial risk of effectively depriving a capital defendant of mitigating evidence, so did *Payne* accept the risk of turning the capital sentencing hearing into an arena for the ventilation of the sentencer's personal hatred, fueled by inflammatory evidence about the victim's unique characteristics, including evidence about her benefit to the community. This individualizing evidence in turn creates the risk that a discriminatory sentencing decision will be based on a victim's societal worth. Much as in *Parks*, where the concern about a very real risk of wrongful execution was abandoned for the sake of dubious doctrinal distinctions, in *Payne* the principle of risk minimization was cast aside to make room for an undifferentiated endorsement of harm as a sentencing factor.

A. Payne *in Context: The Triumph of Victims' Rights*

Payne crowned the phenomenal success of the victims' rights movement in the United States. The vast majority of states and the federal government have by now adopted victims' rights legislation of one form or another.[156] This legislation often includes two hall-

155. *See* Dubber, *supra* note 19 (discussing *Parks*'s impact on capital jurisprudence in state and lower federal courts).

156. *See* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 233-34 (1991); Maureen McLeod, *Victim Participation in Sentencing*, 22 CRIM. L. BULL. 501, 507 (1986); Murphy, *supra* note 78, at 1303; David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 40 (1989); Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 200 (1988); *Murder Begets Grief and an Effort to Curb Murder*, N.Y. TIMES, Dec. 4, 1988, § 1, at 72;

marks: victim restitution[157] or compensation,[158] and victim participation in legal proceedings,[159] particularly through victim impact statements at sentencing.[160] While *Parks* marked the belated acceptance into capital jurisprudence of a uniformity-based approach to just desert theory that had long been adopted in the law of non-capital sentencing,[161] *Payne* signaled the delayed reception in capital jurisprudence of victims' rights long recognized in non-capital sentencing.[162] Both cases, in this sense, have eroded the traditional distinction between capital and non-capital cases. In capital cases before *Payne*, the victims' rights agenda had found its way only into Justice Scalia's dissenting opinion in *Booth v. Maryland*,[163] one of the cases *Payne* overruled.[164] In *Payne*, the victims' rights agenda entered the mainstream of capital jurisprudence. In the four years since *Booth*, Justice Scalia's dissent had been promoted to concurrence, which now proclaimed that the exclusion of victim impact statements "conflicts with a public sense of justice keen enough that

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D.C. Comes in Last, WASH. POST, July 8, 1988, at A22.

157. Restitution, unlike compensation, is paid by the offender to her victim. According to Professor Donald Hall, "[v]irtually every state grants authority to courts to order restitution." Hall, *supra* note 156, at 234 n.4.

158. Forty-five states have compensation provisions. Hall, *supra* note 156, at 234 n.3 (citing NATIONAL ORG. FOR VICTIM ASSISTANCE, VICTIM RIGHTS AND SERVICES, A LEGISLATIVE DIRECTORY (1987)).

159. Again according to Professor Hall, "[a]lmost every state allows for victim participation in sentencing." Hall, *supra* note 156, at 234 n.8.

160. *See* Hall, *supra* note 156, at 234 n.8; Markus D. Dubber, Note, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 197 & n.41 (1990); *see generally* Frank Carrington & George Nicholson, *Victims' Rights: An Idea Whose Time Has Come—Five Years Later: The Maturing of an Idea*, 17 PEPP. L. REV. 1 (1989). For a critical appraisal of the protection of the rights of crime victims by the victims' rights movement, *see* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985).

161. *See supra* text accompanying notes 80-82.

162. Chief Justice Burger perhaps was the first Justice to express his general sympathies with the victims' rights movement. *See* Morris v. Slappy, 461 U.S. 1, 14 (1982) ("[I]n the administration of criminal justice, courts may not ignore the concerns of victims.").

163. 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) (commenting on "outpouring of popular concern for what has come to be known as 'victims' rights'").

164. *Payne* left intact the portion of *Booth* that prohibited "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence" since "no evidence of [that] sort was presented" in *Payne*. 111 S. Ct. at 2611 n.2. *Payne* also did not rule on the admissibility of victim impact evidence presented at the guilt phase. *See* Russell v. Collins, 944 F.2d 202, 206 n.2 (5th Cir. 1991). Specifically, *Payne* held admissible "evidence and argument relating to the victim and the impact of the victim's death on the victim's family." *Payne*, 111 S. Ct. at 2611 n.2. Interestingly, a panel of the Tenth Circuit recently emphasized the limits of *Payne* in precluding a victim's relative from testifying about her wish not to have the jury impose the death penalty. Robison v. Maynard, 943 F.2d 1216, 1217 (10th Cir. 1991), *cert denied*, 112 S. Ct. 445 (1991).

it has found voice in a nationwide 'victim's rights' movement."[165]

Aside from questioning the continued vitality of the "death is different" principle, the uncritical extension of victims' rights from non-capital cases to capital cases is problematic. The first component of victims' rights legislation in non-capital cases, restitution or compensation, obviously cannot be imported into the capital context: there can be no restitution or compensation to a murder victim, either through the imposition of a fine or any other form of punishment, including the death penalty. The second component of non-capital victims' rights laws, participation of the victim in criminal sentencing, similarly finds no application in the capital context. By definition, the victim of a capital crime is not available to participate in sentencing. The two other functions of victim impact statements in non-capital cases, preventing the victim from feeling excluded from and neglected by the criminal process and allowing the victim to detail the harm the offender's conduct caused her,[166] cannot be fulfilled by non-victim impact evidence in a capital case. While the victim's perception of her treatment by the criminal justice system arguably should be of substantial interest to the legislature, the same cannot be said, or can be said to a far lesser extent, for the victim's relatives or friends. If victim evidence is not restricted to evidence provided by the victim, it would be difficult to distinguish between non-victims who would, and those who would not, be entitled to testify at a capital sentencing hearing on behalf of the State. Victims' rights laws generally do not provide for the participation of anyone other than the victim in non-capital sentencing.[167] Anything

165. *Payne*, 111 S. Ct. at 2613 (Scalia, J., concurring). Justice Scalia recently refined his populist approach to death penalty jurisprudence when he complained that the Supreme Court in Morgan v. Illinois, 112 S. Ct. 2222 (1992), "str[uck] a further blow against the People in its [the Court's] campaign against the death penalty." *Id.* at 2242 (Scalia, J., dissenting); *see also* Gey, *supra* note 25, at 120-30 (discussing Justice Scalia's view of capital punishment as an escape valve for community vengeance).

166. *See* McLeod, *supra* note 156, at 504-05. Another rationale for the adoption of victim participation provisions, that of increasing system efficiency through facilitating the cooperation of victims, has been questioned. *Id.* at 506-07.

167. *See, e.g.*, ALASKA STAT. § 12.61.015 (Supp. 1991); ARIZ. REV. STAT. ANN. §13-4424, 13-4426, 13-4427 (1992); ARIZ. CONST. art. 2, § 2.1(C) (amended 1991). If victims' rights laws permit the participation in non-capital sentencing proceedings of anyone other than "the person against whom the offense has been perpetrated," ALASKA STAT. § 12.61.015(a)(1), they do so only in cases where the victim has died, *see, e.g.*, D.C. CODE ANN. § 23-103a,(b) (1991); ILL. REV. STAT. ch. 38, para. 1403, § 3(a)(3) & para. 1404, § 4 (1991), or is otherwise mentally or physically incapable of participating in the proceedings, *see, e.g.*, ILL. REV. STAT. ch. 38, para. 1403, § 3(a)(3) (1991). These other persons are often permitted only to provide information regarding the harm or loss suffered by the victim, D.C. CODE ANN. § 23-103a(b) (1981). One victims' rights law, however, expands the concept of victim to include "the spouse, parent, child or sibling of a person killed as a result of a violent crime." ILL. REV. STAT. ch. 38, para. 1403, § 3(a)(3) (1991).

more than lip service to the commitment of exercising extraordinary caution to prevent the imposition of the death penalty based on inflammatory evidence compels the exclusion of non-victim impact evidence. As elaborated below, the mere availability of the qualitatively different sentence of death already captures the level of harm relevant for the capital sentencing determination.[168]

The unique nature of the capital sentencing hearing counsels against the importation of victim impact statements from the non-capital context. There can be little doubt that those making victim impact statements for the State could not testify on their desire to have the sentencer impose the death penalty. In a capital sentencing hearing, however, testifying for the prosecution on the impact of the murder is tantamount to expressing a preference for the death penalty. Unlike the judge in non-capital hearings, who often may choose from a wide range of possible sentences, the capital sentencer only has two choices, life or death. While it may be assumed that the defendant in a non-capital sentencing hearing will seek the most lenient punishment, a victim providing a victim impact statement in a non-capital case does not by her very appearance request the maximum penalty. The victim impact statement in non-capital cases, therefore, emphasizes a factor to be considered by the sentencing judge, while the victim impact statement in capital cases directly advocates the imposition of a particular penalty and thereby dramatically increases the significance of victim impact statements.

Even if the demands and successes of victims' rights advocates in non-capital cases should be adaptable to the unique requirements of death penalty jurisprudence, Justice Scalia's unreflective reference to the "public sense of justice keen enough that it has found voice in a nationwide 'victim's rights' movement"[169] suggests that *Payne* did not respond to the arguably legitimate concerns of crime victims as much as it reflected the exploitation of these concerns in a widespread crusade against the rights of criminal defendants in general, and against those convicted of capital crimes in particular. Professor Lynne Henderson has chronicled the transformation and eventual perversion of victims' rights claims in the hands of political campaigns and anti-crime zealots.[170] *Payne* dramatically illustrates such a transformation of a concern for victims' rights into a disman-

168. *See infra* text accompanying notes 197-98.

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

170. Henderson, *supra* note 160; *see also* Henderson, *supra* note 90, at 1651-52. Professor Vivian Berger convincingly argues that *Payne*'s focus on the victim's worth does the victims of capital crime and their survivors a great disservice by exposing the victim's life to scrutiny from both sides at the sentencing hearing. *See* Vivian Berger, Payne *and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992).

tling of defendants' rights.[171] While this tactic is highly disturbing when employed in the non-capital context by politicians eager for election,[172] it is absolutely inexcusable when employed by the Supreme Court of the United States in death penalty jurisprudence, where its impact is far greater and where the rights of defendants are so much more precious because the stakes are immeasurably higher.

The Supreme Court could hardly have picked a case more suitable than *Payne* for the entrance of victims' rights into death penalty jurisprudence. Consider the facts as told in their gory glory by Chief Justice Rehnquist:

> Inside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1700 cc's of blood—400 to 500 cc's more than his estimated normal blood volume. Charisse and Lacie were dead.
>
> Charisse's body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.
>
> Lacie's body was on the kitchen floor near her mother. She had suffered stab wounds on the chest, abdomen, back, and head. The murder weapon, a butcher knife, was found at her feet. Payne's baseball cap was snapped on her arm near her elbow. Three cans of malt liquor bearing Payne's fingerprints were found on a table near her body, and a fourth empty one was on the landing outside the apartment.[173]

This lengthy and detailed description of the murder scene could have served no other purpose but to arouse in the reader what Judge John T. Noonan has called the "natural desire to avenge the outrage

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171. Some months after *Payne*, the Supreme Court denied certiorari in a case that would have tested the Court's commitment to victims' rights in capital sentencing. In Robison v. Maynard, 943 F.2d 1216, 1217 (10th Cir.), *cert. denied*, 112 S. Ct. 445 (1991), a panel of the Tenth Circuit refused to read *Payne* as permitting the introduction of testimony by a victim's relative on an issue other than harm to the victim and victims' family. In *Robison*, a relative of the murder victim had wanted to testify that she did not want the jury to impose the death penalty. Ignoring the rights of the victim's relative, the court somehow convinced itself that her testimony "in no way . . . relate[s] to the harm caused by the defendant." *Id.* at 1218.

172. *See* Dubber, *supra* note 160, at 197-201.

173. *Payne*, 111 S. Ct. at 2602. The Chief Justice, however, showed more restraint than did the Tennessee Supreme Court. For a more detailed rendition of the gruesome facts of this case, *see* State v. Payne, 791 S.W.2d 10, 11-15 (Tenn. 1990).

and to eliminate its perpetrator."[174] The case presented neither a prejudice question nor any other issue whose resolution would have required an examination of the factual evidence adduced at trial. The Chief Justice, however, must have considered the statement of facts relevant to the sole question raised in *Payne*: the constitutionality of victim impact evidence in capital sentencing proceedings. His vivid account of blood, wounds, and malt liquor therefore sheds light onto the Chief Justice's motives for allowing the introduction of victim impact evidence, and thereby highlights the grave risk that victim impact evidence of the kind introduced at Payne's sentencing hearing will inflame the jury to the point of disregarding mitigating evidence presented by the capital defendant:

> The State presented the testimony of Charisse's mother, Mary Zvolanek. When asked how Nicholas had been affected by the murders of his mother and sister, she responded:
>
> "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie."[175]

Payne illustrates the awesome combined impact of an anti-sympathy instruction that deprives the defendant of any opportunity to appeal to the jury's sense of mercy and a barrage of victim impact evidence that opens the floodgates of compassion for victims and their family. The sentencing hearing pitted the testimony of Ms. Zvolanek and a police officer, who identified a videotape of the crime scene before it was shown to the jury, against the testimony of the defendant's parents, girlfriend, and a psychologist, who described the defendant as a kind person and as a polite interviewee, respectively.[176] The prosecutor's closing argument compounded the impact of the victim impact evidence presented in Ms. Zvolanek's testimony about Nicholas's grief and in the videotape of the effects of the crime.[177] In her excitement, the prosecutor committed two gross er-

174. Harris v. Vasquez, 943 F.2d 930, 967 (9th Cir. 1991) (Noonan, J., dissenting).

175. *Payne*, 111 S. Ct. at 2603.

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

177. In rebutting the defendant's closing argument, the prosecutor told the jury:
You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. . . . And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby. . . . [The defense attorney] doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. . . .

rors. First, she let it be known that "she couldn't agree with [her fellow prosecutor] more, if this isn't a case for death by electrocution, then I don't know what is."[178] Then, she illustrated the defendant's impact on the victims' lives by stabbing a hole through "Exhibit 24, a large diagram of Nicholas Christopher's body . . . with Exhibit 25, the butcher knife found between Charisse and Lacie's bodies."[179] This barrage of direct and raw appeals to the jurors' compassion for the victims and their family simply overpowered the appeals for mercy voiced by the defense witnesses, muted by the judge's anti-sympathy instruction.[180] The capital sentencing hearing deteriorated into a reenactment of the crime with the murder weapon, diagrams, and videotapes. This time, however, the tables had been turned. Now it was the defendant's life the butcher knife sought to extinguish, and it was his victim, vicariously through the State, that in a fit of misguided passion desired the defendant's death. The facts of *Payne* and its sentencing hearing leave one with the rotten taste that Tennessee's criminal justice system collapsed under the weight of undiluted and unreflective impulses, not principally unlike the disturbed excitement that motivated the brutal murder it was designed to process and adjudicate.

With this sense of system breakdown in mind, let us turn to the Court's justifications for giving constitutional imprimatur to capital sentencing in a highly combustible mixture of disgust and compassion. It is high time to scrutinize the rationale behind allowing a State to fashion its capital sentencing proceeding following *Payne*'s example.

B. *The Limited Relevance of Harm*

Payne rests on one doctrinal ground: the relevance of harm in criminal punishment.[181] Chief Justice Rehnquist's majority opinion

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Payne, 111 S. Ct. at 2603.

178. 791 S.W.2d at 20.

179. *Id.*

180. The judge instructed the jurors not to "have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict." *Id.*

181. *Payne* also appeals to a presumably intuitive sense of balance between a capital defendant's and her victim's rights. In sole support, the opinion quotes from a 1934 opinion written by Justice Cardozo that not only predates by several decades the advent of modern capital jurisprudence but also, at most, nicely captures the intuition of balance that *Payne* seeks to invoke: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." 111 S. Ct. at 2609 (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)). A closer look at the quoted passage reveals that Justice Cardozo did not even speak of a balance of defendants' rights and victims' rights. In the context of a harmless error analysis, he instead sought to distinguish between "[p]rivileges so fundamental

correctly points out that the harm caused by an offender's act has for some time been considered a relevant sentencing factor.[182] Interestingly, he illustrates the contemporary relevance of harm by citing to a 1988 treatise on (needless to say, non-capital) white collar crime.[183]

A comment on the general relevance of harm, however, does at most half the trick. *Payne* did not turn on the question of whether harm was relevant for sentencing purposes. It instead required the resolution of two far more specific issues: whether the sentencer in a capital sentencing proceeding may consider the harm caused by the offense, and, if so, whether victim impact evidence regarding the benefit derived by the family (or some wider community) from the victim is relevant to this consideration. Invoking the general relevance of harm does not settle either question.

Now that the issues in *Payne* have been properly identified, it becomes evident that the Court's capital jurisprudence bars the consideration of victim impact evidence for two reasons. First, even if the retributive foundation of the Court's capital jurisprudence permits the consideration of harm in certain limited senses, it prohibits distinctions between the lives of persons on the basis of their societal worth. Incapacitation and deterrence, the two supplementary capital punishment rationales recognized by the Court, do not con-

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as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men," *Snyder*, 291 U.S. at 122, and "securities of the constitution [that] depend upon . . . quiddities." *Id.* Justice Cardozo stressed that only the former procedural protections "will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof." *Id.* According to Justice Cardozo, enforcing lesser protections with the same blind determination "is to cheapen and degrade" the constitution and to strain "the concept of fairness . . . till it is narrowed to a filament." *Id.* These remarks merely support Justice Cardozo's finding of harmless error in the particular case at hand. They do not suggest that a defendant's right as fundamental as the right to an individualized sentencing determination could ever give rise to the State's right to have courts "keep the balance true." *Id.*

182. *Payne*, 111 S. Ct. at 2605-06. *But see* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974) (arguing against the consideration of harm in assessing criminal liability). For a recent endorsement of harm as a relevant sentencing consideration, *see* Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283 (1988); *see also* Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975). Interestingly, as *Parks's* choice of uniformity over accuracy reflected a trend in non-capital sentencing, so does *Payne's* infatuation with harm as a relevant sentencing factor. In a recent article, Professor Albert Alschuler convincingly argues that the Federal Sentencing Guidelines have yielded a shift to a harm-based penology. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

183. 111 S. Ct. at 2606 (quoting STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS (1988)).

sider the harm caused by the particular offense and therefore also do not look to the particular victim's societal worth. Second, the uniformity requirement of capital jurisprudence, which forces legislatures to limit the sentencer's discretion to permit the arbitrary imposition of the death penalty[184] removes harm considerations in general, and the consideration of a victim's societal worth in particular, from the sentencer's domain. As the Supreme Court in *Booth* and *Gathers* touched on the second point, this discussion focuses on the first.

Over the course of capital jurisprudence since *Furman*, the Court has settled on a generally retributive approach to capital sentencing.[185] According to the standard retributive theory[186] underlying the Court's capital jurisprudence, retributive desert falls into two components: moral culpability and harm.[187] Much of the Court's capital jurisprudence has focused on ensuring that the capital sentencer has an opportunity to properly assess the defendant's degree of culpability. The victim impact evidence cases raise the question of how a capital sentencing scheme should take into account the harm element of retributive desert.[188]

Despite the general retributive orientation of the Court's capital jurisprudence, the Court has on occasion suggested that the legislature and the sentencer may consider consequential factors such as deterrent and incapacitative effects. In its numerous dealings with the Texas death penalty scheme, which permits the sentencer to consider the offender's future dangerousness, the Court has recognized incapacitation as a relevant sentencing factor.[189] While it is unclear whether a particular death sentence may be imposed, even in part, on the basis of deterrent considerations, the Court has recognized general deterrence as a general justifying aim of death penalty statutes.[190]

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184. *See supra* text accompanying notes 61-62.

185. *See* Pillsbury, *supra* note 91, at 658, 661 n.13; Murphy, *supra* note 78, at 1333.

186. This theory represents only one among a multitude of shapes that the idea of retributive desert has taken and continues to take. *See* John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979).

187. *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 461 (1978); VON HIRSCH, *supra* note 74, at 79; ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363 (1981).

188. *Payne*'s emphasis on the consideration of harm provides another instance of the shift in capital jurisprudence from a defendant focus to a victim focus. While culpability analysis assesses the defendant's responsibility for the crime, harm analysis concentrates on the crime's effect on the victim.

189. *See* Barefoot v. Estelle, 463 U.S. 880 (1983); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion).

190. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (footnote omitted). For the distinction between general justifying aims and the distribution of specific penalties, *see* H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* THEORIES OF PUNISHMENT

The relationship between deterrence, incapacitation, and retribution in the Court's capital jurisprudence remains sketchy. As capital jurisprudence has tended to focus on the moral culpability element of the retributive desert determination,[191] the Court has had little occasion to consider the place of deterrence and incapacitation, neither of which concerns itself with the question of accountability. Retributive desert, however, clearly serves at least as a limiting principle in the Court's capital jurisprudence. This means that no defendant may receive the death penalty unless the sentencer has determined that the defendant possessed the requisite level of culpability to deserve the death penalty. It remains unclear whether the sentencer may rely on a factor offensive to the retributive desert assessment, but relevant for deterrent or incapacitative purposes. As will be shown below, the harm suffered by the community—however expansively or narrowly defined—on account of the victim's death arguably represents such a factor.

According to *Payne*, victim impact evidence helps the sentencer assess the harm caused by the capital offense.[192] From the standpoint of the version of retributive theory underlying the Supreme Court's capital jurisprudence, the harm caused by the offense equals the moral wrongdoing committed by the offender.[193] In the terminology of incapacitative and deterrent theory, harm equals the cost to the community resulting from the victim's death,[194] where this cost depends crucially, if not entirely, on the victim's societal worth.[195]

As a deontological theory, retribution assigns desert irrespective of any benefit a particular community—be it the victim's family, the victim's favorite charity, or society at large—might have derived or would have continued to derive from the victim. From a retributive standpoint, the taker of human life is no more deserving of death because the victim happened to be a proud father of five and a

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354 (Stanley E. Grupp ed., 1971).

191. *See* Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting) ("[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness."); Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.").

192. *Payne* also suggests that victim impact evidence permits the sentencer to appreciate the victim's uniqueness. *See Payne*, 111 S. Ct. at 2607.

193. *See, e.g.*, FLETCHER, *supra* note 187, at 461.

194. For our purposes, the community may be defined either narrowly (e.g., the victim's family) or broadly (e.g., society at large).

195. The victim's societal worth roughly equals the benefit derived by the community from the victim before the time of her death and that which would have been derived from the victim after that time. For purposes of this discussion it suffices to establish that the harm caused by the victim's death depends at least in part on the victim's societal worth.

pillar of the community, or because one victim is, to paraphrase George Orwell, "more unique" than another.[196] The Court's retributive approach to capital jurisprudence therefore prohibits consideration of the victim's societal worth at sentencing.

That is not to say, however, that retributive capital punishment schemes may not in other ways reflect the harm caused by the offense. First, the legislature considers the qualitatively different harm of a person's death in designating certain crimes as capital.[197] According to retributive theory, the taking of human life, and only the taking of human life, deserves the imposition of the death penalty.[198]

Second, the sentencer arguably may consider the specific nature of the harm caused by the defendant during the commission of the crime. All other things being equal, a person who causes another's slow and painful death may be said to deserve greater moral blame than a person who causes another's quick and painless death. Capital sentencing schemes accordingly list the exceptionally brutal commission of a crime as an aggravating factor.[199] Evidence relevant

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196. *Cf.* Loewy, *supra* note 182, at 314 (questioning whether "killing a good person is more harmful than killing a bad one"); Catherine Bendor, Recent Development, *Defendants' Wrongs and Victims' Rights:* Payne v. Tennessee, *111 S. Ct. 2597*, 27 HARV. C.R.-C.L. L. REV. 219, 238 (1992) (questioning whether the value of one human life can differ from the value of another). This point is different from, though consistent with, the argument that equal protection forbids the distinction between two defendants on the basis of the characteristics of their victims. *See, e.g., Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting); Hall, *supra* note 156, at 235; Jonathan Willmott, Note, *Victim Characteristics and Equal Protection for the Lives of All: An Alternative Analysis of* Booth v. Maryland *and* South Carolina v. Gathers *and a Proposed Standard for the Admission of Victim Characteristics in Sentencing*, 56 BROOK. L. REV. 1045 (1990); Bendor, *supra*, at 238-39. It also should not be confused with the claim that victim impact evidence should be inadmissible because it might lead to a sentencing determination based on emotion rather than reason. *Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting); Bendor, *supra*, at 236-37.

197. For purposes of this argument it is irrelevant whether the State limits the class of death-eligible defendants by narrowly defining the crime of capital murder at the guilt phase, as in Texas, by requiring the sentencer to find certain aggravating circumstances at the sentencing phase, as in Florida, or both, as in Louisiana. *See* Sawyer v. Whitley, 112 S. Ct. 2514, 2520-22 (1992) (discussing various death penalty statutes).

198. For a once classic exposition of this view, see GEORG W.F. HEGEL, PHILOSOPHY OF RIGHT 247 (addition to Z101) (T.M. Knox trans., 1971) (1821); *see also* Payne v. Tennessee, 111 S. Ct. 2597, 2612 (1991) (O'Connor. J., concurring) (murder "transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person").

199. *See, e.g.*, ALA. CODE § 13A-5-49(8) (1992); ARIZ. STAT. ANN. § 13-703(F)(6) (1992); CAL. PENAL CODE § 190.2(a)(14) (Deering 1992); FLA. STAT. ch. 921.141(5)(h) (1991); ILL. REV. STAT. ch. 38, para. 9-1(b)(7) (1992). These aggravating factors can also be interpreted as relating to the defendant's culpability in that evidence of the execution of a carefully planned torture-murder, the choice of a particularly painful murder weapon, or the con-

to the question of how the offense was committed therefore may not on its face be inconsistent with the retributive tenor of the Court's capital jurisprudence.[200]

It may be argued, however, that the details of a crime do not affect retributive desert in the capital sentencing context because retributive theory, as applied to the death penalty, recognizes only one type of harm, the qualitatively unique taking of a human life. The violent transformation of a human being possessed of the unique quality of life into a faceless quantity,[201] this "ultimate act of depersonalization,"[202] this "desecration of the human and divine realms,"[203] is the only harm that can expose an offender to the "ultimate act of depersonalization" in return. As Professor George Fletcher, a leading retributive theorist, wrote, "[t]he wrongdoing of homicide is causing human death."[204] The offender will be depersonalized for her wrongdoing upon a finding of the requisite level of moral culpability at the capital sentencing hearing.[205]

Harm considerations would therefore be excluded from the capital sentencing hearing, which would focus exclusively on the offender's moral culpability.[206] The *Booth* Court drew precisely this

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tinuous torture of the victim over an extended period of time can be viewed as evidence of the defendant's intent to cause the victim's death. *See infra* note 206.

200. This evidence, however, may well be inappropriate in particular sentencing hearings depending on the presentation of similar evidence during the guilt phase and the particular nature of the evidence. For example, the testimony of the victim's relative about her first arrival at the crime scene may duplicate other evidence in the form of police testimony or photographs (or even videotapes, as in *Payne*, *see supra* note 177).

201. *See supra* note 198.

202. *Payne*, 111 S. Ct. at 2612.

203. FLETCHER, *supra* note 187, at 341.

204. *Id.* at 462; *see also id.* at 341 ("In the law of homicide, the focal point is neither the act nor the intent, but the fact of death.")

205. A comparison of the role of victim impact evidence in non-capital cases might help make the point. *Cf.* text accompanying *supra* notes 166-68 (discussing other distinctions between victim impact evidence in capital and in non-capital cases); *Payne*, 111 S. Ct. at 2620 n.1 (Marshall, J., dissenting) (distinguishing victim impact evidence in non-capital cases from similar evidence in capital cases). In non-capital cases, no qualitatively unique punishment has been meted out for a qualitatively unique harm. The harm assessment in non-capital sentencing helps determine sentence quantity, not quality. By contrast, in capital cases, the legislature has identified a specific quality of harm, the termination of human life, that allows for a specific quality of punishment, the termination of human life. The qualitative leap from non-capital to capital punishment—from life imprisonment to execution—can only be justified by pointing to the qualitative difference between the termination of life and the harm caused by other offenses. There is no qualitative difference between the murder of a misanthrope and that of a philanthropist. Accordingly, the sentencer may not choose different qualities of punishment in the two cases.

206. As pointed out above, *see supra* note 199, evidence about the circumstances of the crime may be relevant to the defendant's culpability and, as such, would be admissible in a capital sentencing hearing designed to assess the defendant's culpability.

distinction, though without reference to retributive theory.[207] *Booth*, however, did mention the need to guide the sentencer's discretion through uniform principles. The exclusion of harm from the capital sentencing hearing guides sentencer discretion by forcing upon all capital sentencing schemes a uniform definition of harm, thereby preventing the execution of defendants on the basis of improper and possibly divergent harm considerations such as assessments of the victim's societal worth.[208]

Limiting harm assessments to the legislative aspect of capital punishment schemes obviously does not exclude harm considerations from capital punishment. Justice White's point in his *Booth* dissent,[209] reiterated by the Chief Justice in *Payne*,[210] that criminal sentencing has considered and should continue to consider harm, therefore misses the point. While harm plays a crucial role in the legislature's definition of capital crimes and aggravating circum-

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See Booth v. Maryland, 482 U.S. 496, 502 (1987) (acknowledging general relevance of evidence relating to the circumstances of the crime). One could argue more generally that all, and only, factors known—or perhaps reasonably foreseeable—to the defendant, including the effect of the crime on the victim and others, affects her culpability. While *Booth* acknowledged this distinction, *see* 482 U.S. at 505, *Payne* did not. *See Payne*, 111 S. Ct. at 2611 n.2 (approving without limitation "evidence and argument relating to the victim and the impact of the victim's death on the victim's family"). *Booth* nevertheless excluded victim impact evidence regarding factors known to the defendant on the ground that victim impact evidence "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." *Id.* Unimpressed with this risk, *Payne* refers capital defendants to the Due Process Clause of the Fourteenth Amendment as a mechanism for challenging the admission of inflammatory evidence or argument. *Payne*, 111 S. Ct. at 2608; *see also id.* at 2612 (O'Connor, J., concurring). Once again it becomes clear that the Court no longer cares to tell the States how to set up death penalty schemes that produce constitutional death sentences. Proceeding on the assumption that its Eighth Amendment regulatory work is done, the Court now limits itself to considering whether a particular death row inmate can meet the heavy burden of proving that her sentencing hearing was infected with more than harmless error (and whether a state appellate court succeeded in correcting that error). *See supra* note 73.

207. *See Booth*, 482 U.S. at 516 (White, J., dissenting). Professor Fletcher's descriptive observation that the law of homicide has historically revolved around the awesome fact of the taking of human life—as opposed to the taking of a particular human life—suggests that attempts to distinguish between the death of one person and that of another are not only futile but also inconsistent with the deep appreciation for the qualitative uniqueness of the taking of human life that has traditionally shaped the law of homicide. *See generally* FLETCHER, *supra* note 187, at 461-62. Assuming the degree of harm therefore does not vary with the victim's identity, Professor Fletcher's remarks, although admittedly not made in the context of a discussion of capital punishment schemes, provide a retributive blueprint for the *Booth* Court's sentencing model: "[T]he maximum level of punishment is set by the degree of wrongdoing; punishment is mitigated accordingly as the actor's culpability is reduced." *Id.* at 462.

208. For further discussion of societal worth comparisons, *see infra* text accompanying notes 223-34.

209. *See Booth*, 482 U.S. at 516 (White, J., dissenting).

210. *See Payne*, 111 S. Ct. at 2607-08.

stances, harm differentiation is irrelevant for the sentencer's decision whether a particular offender possesses the requisite moral culpability to die.[211]

Retributive theory and the requirement of uniform limitations on the sentencer's discretion therefore prohibit the consideration of harm at the capital sentencing hearing. Let us now consider the relevance of harm from the incapacitative and deterrent perspectives.

A firm commitment to retributive justice in capital punishment would prohibit harm considerations even if they were relevant for incapacitative or deterrent purposes. It has already been shown that retribution does not distinguish between the worth of one life and that of another. Retributive theory begins and ends with respect for the dignity of all persons,[212] including the capital defendant and her victim, and therefore cannot countenance a judgment that would value one life less than another.[213] Under this view of retributive

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211. If one assumes for the sake of argument that victim impact evidence is admissible because it guides the sentencer's harm assessment, it is not clear why evidence of harm should be limited to evidence regarding the impact of the victim's death on her immediate family. *Payne* itself speaks of "*evidence and argument relating to the victim* and the impact of the victim's death on the victim's family." *Payne*, 111 S. Ct. at 2611 n.2 (emphasis added). Since the Supreme Court has not explicitly abandoned the accuracy strand of capital jurisprudence, one might argue that once harm has become a relevant factor for the capital sentencing decision, the Eighth Amendment demands that the sentencing hearing provide the sentencer with any information that could render her harm assessment—and therefore ultimately her sentencing decision—more accurate. *Payne* entitles the prosecutor to present testimony by the hospital director detailing how many lives the victim, a surgeon, saved during her career, and by a group of former patients, all of whom escaped certain death because of the victim's operating skills. A particularly creative prosecutor might even introduce expert testimony on the subject of the victim's worth (although she might also run into serious qualification problems). Similarly, nothing would prevent the defense attorney from introducing evidence that the victim did not save nearly as many lives as did her colleague, was repeatedly sued for malpractice, and tended to show up drunk to work. Professor Vivian Berger has illustrated that this kind of public examination of the victim's worth may not be in the best interests of capital victims or their family members. *See* Berger, *supra* note 170.

212. *See* Radin, *supra* note 24.

213. In response, the Chief Justice in *Payne* suggests that "[a]s a general matter, . . . victim impact evidence is not offered to encourage comparative judgments of this kind . . . . It is designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from [her] death might be." *Payne*, 111 S. Ct. at 2607 (emphasis in original). Since we are not concerned with the prosecutor's state of mind, the crucial question is, of course, not whether the prosecutor introduces victim impact evidence in order to encourage comparative judgments, but whether victim impact evidence in fact encourages such judgments. As the quoted passage reveals, *Payne*, strictly speaking, does not even claim that victim impact evidence will not encourage the sentencer to compare the victim's worth to that of others, including the defendant. As a result of its preoccupation with the intended effect, as opposed to the actual effect, of victim impact evidence, *Payne* invites

justice, value calculations in the name of deterrence or incapacitation accordingly would be impermissible in capital sentencing.[214]

As *Parks* and *Payne* illustrate, however, this view of retributive justice based upon respect for the dignity of all persons may currently enjoy less than universal acceptance among the Justices. Here, as on other occasions,[215] Justice Scalia has bluntly expressed what some of his colleagues apparently have come to believe in

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defense attorneys to request a limiting instruction of the following type: "You may consider victim impact evidence only for the purpose of contemplating the victim's unique individuality, but you may not compare the victim's worth to that of others." Consideration of this instruction reveals its futility. It is difficult to consider a person's uniqueness not at least partly in terms of what distinguishes that person from other forms of existence, be they a rock, a flower, an animal, or the next door neighbor. Note that this instruction, even if it could prevent comparisons of worth, does not address the problem that worth assessments, comparative or isolated, have no place in the capital sentencing hearing. *See supra* text accompanying notes 206-11 and *infra* text accompanying notes 221-22.

Once the victim's uniqueness has become a relevant sentencing consideration, nothing could keep a prosecutor from presenting evidence of the victim's favorite toy, color, or show tune. If the point of victim impact evidence is, as *Payne* so strenuously argues, to balance the defendant's uniqueness evidence with the victim's uniqueness evidence, the State's evidence in aggravation should be no more restricted than the defendant's evidence in mitigation. After *Payne*, the State may "keep the balance true" by doing what the defendant has been able to do all along: present "a parade of witnesses [that] praise the background, character, and good deeds of [the victim], without limitation as to relevancy." 111 S. Ct. at 2609 (quoting State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990)).

As more and more victim impact evidence enters the capital sentencing hearing, the hearing will turn into a comparison of the defendant's and the victim's societal worth. The purpose of permitting a wide range of mitigating evidence, however, was not to establish the defendant's worth, but to assess her moral culpability. Once again, it becomes clear that the Supreme Court has abandoned the fundamental premise of capital jurisprudence: that the defendant is a human being, and therefore worthy of respect. The capital sentencer now may sentence a defendant to death because the victim's life was more valuable than is the defendant's. This value comparison is not only offensive to both the victim's and the defendant's dignity, but also obscures the main, if not the only, purpose of the capital sentencing hearing: to assess the defendant's moral culpability. Under the Court's new value comparison model, a defendant whose life is determined to be worth less than her victim's may be sentenced to death even though she was not morally culpable for her crime.

214. Consider also the appropriateness of intrapersonal, as opposed to interpersonal, societal worth comparisons. Should one find nothing objectionable about comparing one person's worth to that of another, one might envision comparing one person's worth at one point in time to that same person's worth at another point in time. While the calculation of compensatory tort damages may take into account the plaintiff's earning potential, it is questionable whether the societal worth fluctuations during a victim's life should influence a capital sentencer. It would seem inappropriate to punish a murderer differently depending on the date of the crime: in 1992 (when the victim is a three year old orphan), or sixty years later (when she is happily married, the proud mother of six and grandmother of five), or again thirty years later (when she lives in a nursing home, a widow, abandoned by her children and grandchildren).

215. *See supra* text accompanying notes 69 & 163-65.

quiet: retributive justice is more about (uniform) retribution than about (individual) justice. His view of retributive justice as "law and order" ideology extrapolates from the Court's waning appreciation for the moral core of retribution, the respect for all persons as fellow rational moral beings.[216] While other Justices on the Court have shown their limited view of retributive justice by displaying a growing willingness to tolerate wrongful executions, Justice Scalia has openly abandoned the individual sentencing requirement.[217] In one of the very few references to non-judicial writings on retributive theory in any Supreme Court opinion, Justice Scalia tellingly quotes Kant's infamous—and often misunderstood—passage about the necessity of executing all murderers.[218] Forgotten is Kant's stern admonition that the categorical imperative applies to the criminal law as it does to human interactions generally, and that therefore the criminal law may never treat a person only as a means.[219] Also forgotten is Kant's emphatic warning directed at punishment theorists to not abandon the moral core of his retributive theory by "dragging their bellies through the serpentine coils of consequentialism."[220]

Even if we assume that, given the Court's current cramped view of retributive justice, value differentiations between persons are not offensive, but only irrelevant, to the retributive desert assessment, deterrence and incapacitation would still not permit these distinctions. Incapacitation looks only to the likelihood that an offender will commit a (capital) crime in the future. According to incapacitation theory, the death penalty serves to incapacitate offenders who are likely to commit other (capital) crimes, because only execution incapacitates completely.[221] The harm caused by the present offense does not affect an offender's recidivist potential, and it is therefore irrelevant for incapacitative purposes.

Similarly, the deterrent effect of a given penalty does not depend on the harm caused by the offense. Deterrence looks to the effect that the threat of imposition of a certain punishment will have on potential offenders in the future. Relevant deterrence considerations in a capital sentencing hearing therefore include the relative

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216. *See* Radin, *supra* note 24; text accompanying *infra* note 275.

217. *See supra* text accompanying note 69.

218. Morgan v. Illinois, 112 S. Ct. 2222, 2242 (1992) (Scalia, J., dissenting) (quoting IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans., 1887) (1796)).

219. KANT, METAPHYSICS OF MORALS I, *supra* note 94, at 100 (A196/B226).

220. *Id.* The point here is not to suggest that Kant did not envision a role for consequentialist concerns in criminal justice. *See* B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 LAW & PHIL. 151 (1980).

221. *See generally* NOZICK, *supra* note 187.

deterrent effects on this particular offender of imposing the death sentence or a life sentence on that offender (specific deterrence) and the relative deterrent effects on other potential offenders of imposing the death sentence or a life sentence on this particular offender (general deterrence). The societal cost of the victim's death does not influence the specific or general deterrent effect of imposing a particular sentence on the person responsible for her death.[222] The only relevant harm for deterrent purposes is not the harm caused by the present offense, but the potential harm caused by offenses not yet committed or the harm likely to be caused by the sentencer's failure to impose one sentence rather than another. Unlike a retributive desert assessment, a deterrence calculus therefore does not consider harm that has already resulted from the commission of the present offense.

This is not to say that the legislature may not, within certain limits, base its definitions of capital murder or of aggravating circumstances on a consideration of potential societal harm.[223] The legislature, after all, makes exclusively prospective judgments—at least in the criminal law field, where retroactive laws are frowned upon—in that it establishes rules designed to affect future behavior, both on the part of the potential offenders (by deterring them from crime) and on the part of capital sentencers (by guiding their discretion). As many commentators, among them H.L.A. Hart[224] and John Rawls,[225] have pointed out, there exists an important distinction between justifying a death penalty statute and justifying a particular death sentence. While the legislature, in considering a death penalty statute, may well be entitled to consider the benefit derived by society from a certain class of persons, say police officers,[226] fire-

222. It may be argued that the identity of the victim can indirectly affect the deterrence calculus if the victim occupied a particularly visible role in the relevant community and thereby attracted exceptional public attention to the case. For better or worse, the murder of the mayor is likely to attract more attention than the murder of the lonely old man in apartment 113. The offender's identity may affect publicity in much the same way, as may the nature of the crime or other circumstances entirely unrelated to the victim's societal worth. Assuming the sentencer may consider the case's public significance—although she probably may not—this significance could better be established by quoting from the front page of the local paper than by having the victim's relatives testify about the impact the victim's death had on their lives.

223. For purposes of this discussion, it is assumed that the legislature may consider societal harm despite the irrelevance of societal harm for retributive purposes.

224. *See* Hart, *supra* note 190 (distinguishing general justifying aims of punishment from its distribution).

225. *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (distinguishing legislative rules regarding punishment from their application to particular cases).

226. *See, e.g.*, GA. CODE ANN. § 17-10-30(b) (1990) (statutory aggravator); MD. ANN. CODE art. 27, § 413(d)(1) (1991) (statutory aggravator); TEX. PENAL CODE ANN. § 19.03(a)(1) (1992) (capital felony definition).

fighters,[227] or Vice Presidents,[228] it does not follow that the sentencer may consider that benefit in imposing the death sentence on a particular offender.[229]

In a nutshell, the potential societal cost resulting from the future death of a person within a given class of persons may be relevant to the legislature's definition of a capital crime or of an aggravating factor. The actual societal cost created by the victim's past death, however, is irrelevant to the sentencer's decision about the relative deterrent effects of imposing a life sentence or the death penalty on a particular offender.[230]

Now that it has been established that the capital sentencer may not consider victim impact evidence, or any other evidence about the victim's societal worth, let us turn briefly to the legislative consideration of the victim's identity in defining capital murder or aggravating circumstances. While, for the reasons outlined above, the bar against considering the victim's societal worth at sentencing does not automatically prohibit the legislature from classifying the murder of one person as more egregious than the murder of another person, this "seriousness ranking" of murders nevertheless gives rise to concern. Initially, there remains something deeply disturbing about distinguishing between the seriousness of murders based on the victim's position in life.[231] In response, one may suggest that the legislative choice to threaten the death penalty for the murder of a police officer but not for the murder of a high school teacher does not reflect a legislative judgment that the life of a detective is worth more than that of a math instructor. Instead, one may argue, the legislature finds both murders equally morally reprehensible, and distinguishes between a police officer and a teacher only on the utilitarian ground that the murder of the former results in a greater cost to society than the murder of the latter. The murder of a police officer, one might say, would not only have the immediate effect of leaving an important societal function unattended, but would also discourage others from serving a similar function.

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227. *See, e.g.*, GA. CODE ANN. § 17-10-30(b) (1990) (statutory aggravator); TEX. PENAL CODE ANN. § 19.03(1) (1992) (capital felony definition).

228. *See* 18 U.S.C. § 1751 (1992).

229. Justice White's enumeration of legislative definitions of capital crimes and aggravating factors therefore does not establish the relevance of societal harm considerations at the sentencing hearing. *See* Booth v. Maryland, 482 U.S. 496, 517 & n.2 (1987).

230. More generally, concerns about individual justice also counsel against permitting utilitarian considerations to control the assignment of criminal penalties to particular offenders. *See* Rawls, *supra* note 225.

231. Distinctions made on the basis of the victim's vulnerability, however, would seem less morally objectionable. All other things being equal, the murderer of a defenseless mentally or physically disabled person or of a small child might deserve greater moral blame solely on the basis of her victim's exceptional vulnerability.

Assuming for the sake of argument that legislative distinctions between murders based on the victim's identity do not reflect a distinction between different levels of moral wrongdoing, distinctions drawn on the basis of the victim's societal worth will nevertheless seem dubious even to the most hardened utilitarian theorist.[232] Moreover, societal worth estimations cannot fully explain the ranking of murder victims in death penalty statutes. If societal worth were the determinative ranking factor, it is unclear why a legislature does not define capital murder as the murder of a nurse, a priest, or a grandmother of three. Society does not necessarily derive a greater benefit from a pencil pushing deputy than from a neurosurgeon. Legislatures do not threaten the death penalty for the murder of a person who performs a vital societal function but who is not a State official of some sort. The protected class instead includes members of Congress, Supreme Court Justices, Presidents, district attorneys, police officers, corrections employees, and firefighters. Perhaps it is thought that the murder of a firefighter or a district attorney shakes the public's confidence in the State's authority and therefore generates an additional, indirect societal cost which the murder of a neurosurgeon would not create.

It is more plausible that societal worth alone cannot explain the distinction between classes of persons in death penalty statutes. Professor Steven Gey has suggested that death penalty statutes treat the killing of a police officer as a rough indicator of future recidivism.[233] It is not clear, however, why the murder of a police officer should be a better indicator of future dangerousness than the murder of any other person.[234]

The limitation of the protected class to State officials may instead derive from a self-protective, if not retaliatory, impulse on the part of the State. The definition of capital murder and aggravating factors makes sense if one views State officials as seeking to protect one another, much like the members of some other social unit would do. Consider, for example, the deep retaliatory desires that the murder of a fellow judge, police officer, or prosecutor unleashes among State officials. However understandable these retaliatory desires

232. Even Judge Richard Posner, who has been known to occasionally take an unremittingly utilitarian stance on volatile policy issues, *see, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 141 (3d ed. 1986) (discussing efficiency implications of legalizing the sale of babies), has acknowledged that the utilitarian calculus may at times render results that run afoul of "the sense of justice of . . . modern Americans." *Id.* at 25; *see also id.* at 25-26 ("there is more to justice than economics").

233. Gey, *supra* note 25, at 116.

234. Perhaps one could suggest that the murder of a police officer demonstrates greater disrespect for the authority of the law, so that legal warnings in the form of a prison sentence are likely to remain fruitless.

are, it is questionable whether the members of one social unit should be permitted to act upon such desires while the members of other social units may not. The superior power of State officials suggests that the imposition of greater, rather than lesser, restraints on their ability to implement their retaliatory desires would be appropriate.

Ignoring once again retributive discomfort about considering societal effects of any sort, some legislative distinctions between murder victims may be defensible on deterrence grounds. The murder of corrections employees provides the best example. The legislature may find that corrections employees are particularly likely to be murdered. Threatening the death penalty for the murder of a corrections employee would therefore have a greater deterrent effect than threatening the death penalty for the murder of a neurosurgeon because, assuming for the moment the death penalty's deterrent effect, a greater number of potential murderers could be deterred from acting out their plans. While similar deterrence considerations could perhaps justify according special status to those police officers who are continuously exposed to similar danger, the same considerations would probably not apply to prosecutors or firefighters.

We now return to our investigation of *Payne*'s doctrinal basis. Since a general reference to the relevance of harm in criminal sentencing cannot justify the consideration of victim impact evidence, *Payne* remains without a convincing rationale. This, however, does not imply that victim impact evidence may not be admissible on other grounds. As suggested in the discussion of *Parks*'s mistakenly categorical distinction between emotional and moral responses, sympathy for the victim, if not based on the victim's irrelevant attributes, constitutes a proper sentencing factor.[235] The question of whether victim impact evidence should be admissible if the sentencer may consider reasoned sympathy for both the victim and the defendant turns on one's choice of the paradigmatic capital sentencing hearing.

Under the traditional risk minimization model, the distribution of risk between the defendant and the accuser strongly argues against the admissibility of victim impact evidence. The defendant and the State face the same risk: the jury's failure to properly distinguish between permissible and impermissible emotional responses. The jury might recommend death or life based on irrelevant emotions. The consequences of the first scenario, however, clearly outweigh the consequences of the latter,[236] as the defendant will be

235. *See supra* text accompanying notes 131-33.

236. *Cf.* Medina v. California, 112 S. Ct. 2572, 2589 (1992) (Blackmun, J., dissenting) ("The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the

wrongfully deprived of a life the accuser has already lost. Even if the risks should be equally distributed, the risk to the defendant would trump that of the accuser, considering that, under the traditional model, the defendant is the focus of the sentencing phase, and deadlocks are resolved in the defendant's favor.

Under the Court's new symmetry model, however, the capital sentencing hearing seeks not to minimize the risk of the defendant's wrongful execution but to establish a balance between defendant and accuser. Now the victim is entitled to whatever the defendant already has, and then some. The defendant may evoke the sentencer's sympathy by putting on mitigating evidence about her friendly disposition and her troubled childhood; to compensate, the accuser may appeal to the sentencer's sympathy by demonstrating the victim's community involvement as a Little League coach. The Supreme Court, of course, could not avail itself of this argument for two reasons. First, it explicitly and unequivocally considered victim impact evidence relevant only to harm. Second, it has vowed to exclude all emotional responses from capital sentencing, which would include sympathy for the victim. It cannot have its cake and eat it, too; it cannot exclude sympathy for the defendant in the name of non-emotional sentencing and, at the same time, permit sympathy for the victim.

Through its heavy reliance on the place of harm in non-capital sentencing and its failure to distinguish between the relevance of harm in non-capital and capital sentencing, the Supreme Court in *Payne* raises doubts about its continuing adherence to the principle that "death is different."[237] Ironically, the Supreme Court has apparently decided to turn this principle inside out. While death's unique quality once permitted the Court to grant capital defendants constitutional protections not available to other defendants, it has been transformed into a method for restricting the constitutional rights of capital and non-capital defendants alike.[238] The Supreme Court, as in *Payne*, furthermore disregards the principle when it considers constitutional claims by capital defendants[239] and affirms it when it

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state.") (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)).

237. *See generally* Aïda Alaka, *Victim Impact Evidence, Arbitrariness, and the Death Penalty: The Supreme Court Flipflops in* Payne v. Tennessee, 23 LOY. U. CHI. L.J. 581 (1992).

238. This is not the first time this principle has done a *salto mortale*. *See* Weisberg, *supra* note 11, at 343-44 (discussing the reversed "death is different" principle underlying Barefoot v. Estelle, 463 U.S. 880 (1983)).

239. For another example of the Court's recent willingness to abandon the "death is different" principle, *see* Walton v. Arizona, 497 U.S. 639 (1990) (capital defendant bears burden of proving mitigating evidence).

considers constitutional claims raised by non-capital defendants.[240] The recent case of *Harmelin v. Michigan*,[241] decided shortly after *Payne*, illustrates the latter point. There, the Court, in a lead opinion by Justice Scalia, rejected an Eighth Amendment proportionality attack against a mandatory sentence of life imprisonment without the possibility of parole for simple possession of 672 grams of cocaine.[242] *Harmelin* limited the Eighth Amendment's requirement of individualized sentencing to capital cases on the basis of "the qualitative difference between death and other penalties."[243] In a portion of the opinion joined only by the Chief Justice, Justice Scalia also limited proportionality review to capital cases, arguing that "proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."[244]

To summarize, death was not different enough to protect capital defendants against anti-sympathy instructions in *Parks* or against victim impact statements in *Payne*, but was too different to protect non-capital defendants against disproportionate sentences. The 'death is different' principle therefore provides yet another example of the dangers inherent in the Supreme Court's current quest for bright line distinctions. A bright line obviously fails as a bulwark against the "imposition of subjective values"[245] if its brightness fluctuates with the issue at hand.

C. *The Risk of Wrongful Non-Execution*

The disappearance from capital jurisprudence of concern about the risk of wrongful execution becomes painfully obvious if one compares the language in *Payne* with the language in the two cases it overruled, *Booth v. Maryland*[246] and *South Carolina v. Gathers*.[247] The Court in *Booth*, speaking through Justice Powell, held that the

240. The California Supreme Court recently put another misguided spin on the "death is different" principle by using it to justify the admissibility of victim impact evidence in capital sentencing hearings, while prohibiting the admission of such evidence during the guilt phase, and thereby in non-capital homicide cases. People v. Edwards, 819 P.2d 436, 467 (Cal. 1991).

241. 111 S. Ct. 2680 (1991).

242. The Michigan Supreme Court recently struck down the statute under the state constitution's ban on "cruel or unusual punishment." People v. Bullock, 485 N.W.2d 866 (Mich. 1992).

243. 111 S. Ct. at 2701-02.

244. *Id.* at 2701. Justice Scalia must have hesitantly invoked the "death is different" principle to affirm Harmelin's conviction, as he apparently does not subscribe to this principle. *See* Morgan v. Illinois, 112 S. Ct. 2222, 2235 (1992) (Scalia, J., dissenting).

245. *Id.* at 2697.

246. 482 U.S. 496 (1987).

247. 490 U.S. 805 (1989).

admission of victim impact statements "creates a constitutionally impermissible risk that the jury may impose the death penalty in an arbitrary and capricious manner."[248] Similar expressions of a sensitivity to the unique risks implicated in every capital case are strewn throughout the opinion. At the outset, the opinion reaffirmed the principle established in *Gregg v. Georgia*, that "a jury's discretion to impose the death penalty must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'"[249] Shortly thereafter, the opinion recognized "the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'"[250] The introduction of victim impact evidence was constitutionally impermissible because "it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner."[251] The opinion went on to argue that the "formal presentation of family members' opinions and characterizations of the crimes by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."[252]

Deciding a question left open in *Booth*, *Gathers* extended the exclusion of victim impact statements to a prosecutor's comments on the victim's personal characteristics, even though the prosecutor's statements contained information "relate[d] directly to the circumstances of the crime."[253] The Court, in an opinion by Justice Brennan, found an Eighth Amendment violation on the ground that "such statements *might be* 'wholly unrelated to the blameworthiness of a particular defendant.'"[254] The Court found it unacceptable that "'[a]llowing the jury to rely on [this information] . . . *could result* in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.'"[255]

In stark contrast, *Payne* nowhere as much as hints at the Court's constitutional duty to minimize the unique risk involved in capital cases. The opinion responds to arguments identifying the risk of imposing the death penalty on the basis of irrelevant considerations by making rough empirical approximations about what

248. 482 U.S. at 503.

249. *Id.* at 502 (quoting Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion)).

250. *Id.* (citing Zant v. Stephens, 462 U.S. 862, 885 (1983)).

251. *Id.* at 505.

252. *Id.* at 508.

253. South Carolina v. Gathers, 490 U.S. 805, 811 (1989) (quoting *Booth*, 482 U.S. at 507 n.10).

254. *Id.* at 810 (emphasis added) (quoting *Booth*, 482 U.S. at 504).

255. *Id.* at 811 (emphasis added) (quoting *Booth*, 482 U.S. at 505).

happens in the ordinary capital sentencing hearing. Confronted with the claim that the admission of victim impact statements may lead the sentencer to base its decision on an assessment of the victim's societal benefit, the opinion remarks that *"[a]s a general matter . . .* victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *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."[256] Later on, the opinion, in a quick two-step maneuver, disposes of the holding in *Booth* and *Gathers*, that victim impact evidence "creates a constitutionally impermissible risk that the jury may impose the death penalty in an arbitrary and capricious manner."[257] First, the opinion strips the *Booth-Gathers* holding of its basis in the mandate to minimize the risk of wrongful execution and mischaracterizes it as "stating that this kind of evidence leads [rather than "may lead"] to the arbitrary imposition of the death penalty."[258] Then, the opinion dismisses this incorrectly recast claim with a careless sleight of hand by taking judicial notice of the fact that *"[i]n the majority of cases . . .* victim impact evidence serves entirely legitimate purposes."[259]

Even assuming the correctness of these bold generalizations, it becomes obvious why *Payne* misses the point in *Booth* and *Gathers* as soon as one reintroduces the concern about risk into the holding in *Booth* and *Gathers*. The anything but certain fact that, in the majority of cases, victim impact evidence does not lead to a wrongful execution does not settle the question of whether in a single case it might have that effect. On the contrary, the declaration that only in the majority, but not in the totality, of cases, victim impact evidence does not result in a wrongful execution allows for, if not implies, the conclusion that in a minority of cases it does. *Payne*'s unsupported observations about the way things are therefore do not affect the analysis or the outcome in *Booth* and *Gathers*.

The turning point instead lies in the Supreme Court's abandonment of its fundamental desire to minimize the risk of a wrongful execution. Whereas the risk of a single wrongful execution was once constitutionally impermissible, the risk of wrongful executions in a minority of cases now is constitutionally acceptable. This loss of concern about the dangers of wrongful execution has been mirrored

256. *Payne*, 111 S. Ct. at 2607 (first emphasis added).
257. *Booth*, 482 U.S. at 503.
258. *Payne*, 111 S. Ct. at 2608.
259. *Id.* (emphasis added).

by an increase in the novel concern about the risk of improperly increasing the defendant's chances to avoid execution "by turning the victim into a 'faceless stranger at the penalty phase of a capital trial,"[260] thereby "depriving the State of the full moral force of its evidence."[261] In *Payne*, the Court only once shows concern about the possibility, as opposed to the overwhelming likelihood, of this impropriety: in its discussion of "the potential for [the] unfairness" created by a capital sentencing hearing without victim impact evidence. This potential, of course, is for unfairness to the State and the victim, not to the capital defendant.

Nowadays, the Court shudders at the prospect of a capital sentencer not viewing the deceased victim, rather than the defendant, as a unique human being. *Payne* therefore has turned upside down the Court's previous insistence on allowing capital defendants to portray themselves as "uniquely individual human beings,"[262] an insistence derived from the desire to minimize the likelihood of a capital sentencing hearing that "treats all persons convicted of a designated offense . . . as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[263] While the Constitution as the capital defendant's protection against undeserved execution once categorically prohibited the introduction of victim impact evidence, the Constitution in its new role as the accuser's foil now allows for victim impact evidence "to show . . . each victim's 'uniqueness as an individual human being.'"[264] The Supreme Court, instead of further shielding the allegedly overprotected capital defendant, now must "'keep the balance [between murderer and accuser] true.'"[265] It is this new sense of balance that can no longer tolerate the unfairness and the injustice[266] of "depriving the State of the full moral force of its evidence,"[267] by

260. *Id.* (quoting *Gathers*, 490 U.S. at 821 (O'Connor, J., dissenting)).

261. *Id.*

262. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). A recent district court opinion rejecting a challenge to the death penalty provisions of the federal drug kingpin statute illustrates another way in which *Payne* may be read as turning the individualized sentencing principle against the capital defendant. United States v. Pitera, 795 F. Supp. 546 (E.D.N.Y. 1992). *Pitera*'s broad reading of *Payne* does not focus, as the Supreme Court did in *Payne*, on the State's right to rebut the defendant's mitigating evidence in the adversarial setting of the sentencing hearing. Under this interpretation, *Payne* instead helps implement the right to an individualized sentencing determination by bringing the maximum amount of evidence, mitigating or aggravating, before the sentencer. *Id.* at 551-53, 562.

263. *Woodson*, 428 U.S. at 304.

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

265. *Id.* at 2609 (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)).

266. *See id.* at 2613 (Scalia, J., concurring).

267. *Id.* at 2608.

excluding victim impact evidence. *Payne*'s recognition of a "principle of broad rebuttal,"[268] permitting the State "to rebut [mitigating] evidence with proof of its own,"[269] simply rectifies what had been "a significantly imbalanced process."[270] Justice Blackmun's reminder that "the premise that a criminal prosecution requires an even-handed balance between the State and the defendant is . . . incorrect"[271] appears like a voice from a long forgotten past.

It becomes clear just how deeply troubled the Supreme Court is by the potential for unfairness to the capital defendant's accuser, and just how far the Supreme Court has left behind its fundamental concern to eradicate unfairness to the capital defendant, when the Chief Justice illustrates the new unfairness driving the Court's capital jurisprudence by quoting from the opinion of the Tennessee Supreme Court. The Tennessee Supreme Court's opinion on direct appeal openly defied the Court's unequivocal holdings in *Booth* and *Gathers* and reeks of the same raw disgust for Payne's admittedly gruesome deed that emanates from the Chief Justice's rendition of the facts in *Payne*:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of or the harm imposed, upon the victims.[272]

IV. CONCLUSION: STARE DECISIS AND THE RETURN TO TRUE HUMANITY AND CIVILIZATION

In *Payne*, the Supreme Court set out to bring its capital jurisprudence full circle, and such a minor obstacle as the doctrine of stare decisis would not stand in its way. While the Court's new retroactivity rule in *Teague* might cause concern about the continued ability of state death row inmates to challenge their sentences in federal court, the Court's neutralization of stare decisis on less than three full pages of the Supreme Court Reporter in *Payne* gives rise to despair.[273] It appears as a disturbing sleight of hand by a Rehnquist Court finally secure in the realization of its unchecked power to eradicate both the Warren Court's legacy of criminal defendants' constitutional protections and the Burger Court's attempts

268. Dawson v. Delaware, 112 S. Ct. 1093, 1099 (1992).
269. *Id.*
270. *Payne*, 111 S. Ct. at 2616 (Souter, J., concurring).
271. *Id.* at 2627 (Stevens, J., dissenting).
272. *Id.* at 2609 (quoting Payne v. State, 791 S.W.2d 10, 19 (Tenn. 1990)).
273. *See id.* at 2619-25 (Marshall, J., dissenting).

to develop a careful approach to the troubling issue of capital punishment. While *Parks* and its fellow retroactivity cases dismantle what many considered a cornerstone in the Warren Court's criminal procedure revolution, *Payne* unveils the Rehnquist Court's sharpest reactionary tool. In *Payne*, the Rehnquist Court unsheathed the sword with which to cut the Gordian knot of constitutional rights of criminal defendants that it had inherited from its predecessors. As an openly political tool, the Supreme Court's brash and bold crippling of stare decisis in *Payne* does not warrant jurisprudential analysis.[274] Instead, this conclusion briefly comments on the effects, rather than the doctrinal underpinnings of, the Supreme Court's recasting of stare decisis and places the Court's new balance model unveiled in *Payne* and *Parks* in historical context.

The Court's dismantling of stare decisis should not be misread as a general disregard for the teachings of history. This Court after all has paid substantial attention to eighteenth century views not only in *Payne*, but in a host of other opinions, including *Harmelin*. Instead of releasing the Court to break new jurisprudential ground, the reconstruction of stare decisis in *Payne* allowed the Court to replace the principles of recent capital jurisprudence with those of an earlier time. The disappearance of the stare decisis hurdle therefore effectively allowed the Court to choose its favorite period in the history of capital jurisprudence. In keeping with its preference for the old and true, the Supreme Court settled on a period vaguely spanning the period from the advent of capital jurisprudence eons ago to the beginning or perhaps middle of the twentieth century, a period that, at any rate, came to an abrupt end in the Supreme Court's first attempt to tackle the death penalty issue in the early to mid 1970s.

Now that the country's legislatures have turned back the noncapital sentencing clock to a time before the advent of this century, the Supreme Court's capital jurisprudence follows suit. Much as legislatures across the land have abandoned the great penological experiment of rehabilitative treatment that began in California with the new century, the Supreme Court has abandoned the even more ambitious penological experiment of identifying those, and only those, who deserve to die. More generally, the demise of rehabilitation has led commentators, legislatures, and courts alike to neglect the individualized focus of criminal liability that drives not only the

274. *But cf.* Ursula Bentele, *Chief Justice Rehnquist, the Eighth Amendment, and the Role of Precedent*, 28 AM. CRIM. L. REV. 267 (1991) (discussing the Chief Justice's approach to precedent in capital jurisprudence); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 129 (1991) (briefly commenting on *Payne's* stare decisis analysis). For a recent revitalization of stare decisis, *see* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-09 (1992).

rehabilitative, but also the retributive, approach to punishment.[275] Retribution no longer requires assessing the particular moral culpability of the particular offender before the court. It has lost its strong individualized core and has emerged as an application of broad principles of desert without regard to the dignity every individual offender deserves as a rational person. Now retribution, deterrence, and incapacitation stand side by side as punishment concerns that may sacrifice the individual offender's dignity for the sake of achieving goals that extend far beyond the individual case. Doubts about the condemnation of a particular offender must give way to the protection of a State with its back to the wall.

This view of the role of criminal law befits an unsettled society on the verge of universal lawlessness, where the courts see their duty as maintaining order and the authority of a State so weak that it feels seriously threatened by those disregarding its laws. In this position, courts would flirt with suicide if they allowed for the chance of failing to fully enforce the law against a convicted offender. In this atmosphere, courts cannot allow the risk of a wrongful application of the laws to influence their decisions. The State is not perceived as wielding awesome power over its subjects, as requiring checks of its might to protect the rights of individuals, even those convicted of capital crimes. Civilized judicial decisionmaking seeks to protect the weak against the strong. A court that regards itself as the last bastion against criminal chaos, as a bulwark against the proliferation of violent crime, as a frontline fighter for the innocent and their representative, the State, sees crime victims as the weak and criminal offenders as the strong.

From this perspective, death row inmates challenging their sentences personify the wicked and the powerful. They have been convicted of the most serious crimes against innocent members of a society in turmoil and do not even pretend to question their guilt. Consequently, a court of law will interpret its civilized duty as protecting the victim of capital crime against its violator, a violator who is strong not only because she has dared to threaten the security of society, but also because she has been equipped with a formidable arsenal of constitutional protections. The image of the isolated capital defendant who requires safeguards to protect her against the State's superior power or against the capricious hatred of her sentencer seems out of touch with the distribution of power in courtrooms and in the streets.

In earlier times the Supreme Court and commentators alike proceeded from the assumption that the State had an inherent advantage over the criminal defendant. Any balancing act was there-

275. *See supra* text accompanying notes 212-20; *see also* Radin, *supra* note 24.

fore aimed at increasing the defendant's leverage. Only two years ago, a commentator hoped to bolster a criminal defendant's protections by urging the recognition of a constitutional right to an "equality of arms" between defendant and State.[276] Nowadays, when the Court says it is finally time to even the score, it means something quite different. The Court's respect for "the careful balance that the Constitution strikes between liberty and order" today is bad news for capital defendants.[277] No longer concerned about the conflict between the individual defendant and the all-powerful State, but fixated on the defendant's struggle with her victim, the Court has signalled that the time has come to do one's civilized and humanitarian duty to protect the rights of the victims of crime, including the rights of their noble representative, the State, and to swiftly punish the troublemakers.[278]

The Supreme Court in *Parks* and *Payne* has shown that it is up to this monumental task of turning the tables on the capital defendant and inverting the paradigmatic power relationship between defendant and State. *Payne* ostensibly seeks to strengthen the accuser's arsenal in search of a novel balance between accuser and defendant at a time when *Parks* has already stripped the defendant of her most important weapon. *Payne* seeks to match the supposedly extravagant rights of the capital defendant by creating rights of the accuser, long after *Parks* has burnt this strawman of the hyper-protected defendant. *Payne*'s purported balancing act therefore creates a fundamental imbalance in favor of the State.

While *Payne* opens the door for evidence that, at the very least, creates a substantial risk of evoking the jury's sympathy for the victim, *Parks* neutralizes evidence designed to evoke sympathy for the defendant, thereby effectively depriving many capital defendants of all mitigating evidence. The need for a "reasoned moral response"[279] could not tolerate the risk of sentencers not imposing the death penalty out of sympathy for the defendant, but has happily tolerated the risk of sentencers imposing the death penalty out of sympathy for the victim.[280]

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276. Jay S. Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007.

277. Medina v. California, 112 S. Ct. 2572, 2576 (1992).

278. *Cf.* Friedman, *supra* note 43, at 821, 827 (Supreme Court seeks to rectify the balance between criminal procedural rights and the legitimate need of crime-fighting police forces and *Teague* as a "product of a society extremely concerned about crime and hostile to the rights of criminal defendants").

279. *Parks*, 494 U.S. at 493 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

280. Justice Mosk of the California Supreme Court recently sought to control this risk through a set of instructions "on the principles underlying the penalty determination." People v. Bacigalupo, 820 P.2d 559, 587-88 (Cal. 1991) (Mosk, J., concurring).

Arguably, an anti-sympathy instruction of the kind read in *Parks* prevents both scenarios: "You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence."[281] The risk of condemnation fueled by sympathy for the victim, however, clearly outweighs the risk of non-condemnation based on sympathy for the defendant. First, it appears unlikely that the jury would apply this instruction to its consideration of evidence pertaining to the victim. Instead, the jury will most likely view this instruction as pertaining to the subject of its attention: the defendant, whose sentence they were convened to determine and whose life rests in their hands. Second, even if the jury should regard victim impact evidence in light of this instruction and therefore disregard it insofar as it evokes their sympathy, the jury obviously would not run the risk of thereby disregarding it for purposes of mercy, clearly a permissible and most important sentencing consideration. In contrast, "a juror who reacted sympathetically to [mitigating] evidence [might very well] believe that he [or she] was not entitled to consider that evidence at all,"[282] even if that evidence would trigger mercy, often the crux of a capital defendant's case at sentencing.[283]

Payne and *Parks* make it clear that the time has come to unveil the Warren and Burger Courts' notions of civilization and humanity as the outright security risks the Supreme Court believes them to be and to dispose of interpretations of the requirements of civilization and humanity such as the following excerpt from a 1978 Supreme Court opinion:

> In capital cases, the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[284]

In the Supreme Court's view, the time finally has come to recover true meaning of civilization and humanity, as succinctly captured by the Georgia Supreme Court in 1873:

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281. *Parks*, 494 U.S. at 487.

282. *Id.* at 499 (Brennan, J., dissenting).

283. *See supra* note 87 and accompanying text.

284. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)). For an even more drastic example of one justice's interpretation of civilization and humanity before *Parks* and *Payne*, note the following passage from Justice Marshall's opinion in *Furman*: "We achieve 'a major milestone in the long road up from barbarism' and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment." Furman v. Georgia, 408 U.S. 238, 371 (1972) (citations omitted).

> We have . . . no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. This is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which bloody deed occur.[285]

Judge Isaac C. Parker of the federal court in Fort Smith, Arkansas, who between 1875 and 1896 sentenced 144 men to hang from the gallows on the front lawn of his courthouse, surely would have been pleased with this reemergence of traditional civilization and humanity orchestrated by his admirer, Chief Justice William Rehnquist, who recently quoted Judge Parker's parting words:

> I never hanged a man. It is the law. The good ladies who carry flowers and jellies to criminals mean well. There is no doubt of that; but what mistaken goodness! Back of the sentimentality are the motives of sincere pity and charity, sadly misdirected. They see the convict alone, perhaps chained in a cell; they forget the crime he perpetrated, and the family he made husbandless and fatherless by his assassin work.[286]

After *Parks* and *Payne*, the Supreme Court remains firmly committed to the Eighth Amendment as a means of confining criminal punishment "within the limits of civilized standards."[287] It is the Court's approach to determining civilized standards that has changed. Death penalty jurisprudence no longer strives to reflect the "evolving standards of decency that mark the progress of a maturing society,"[288] but excavates the revolving standards of decency that mark the regress of a society yearning for the imagined simplicity of its youth.

Unfortunately, there is nothing simple about deciding who should and who should not die. With the two support structures of accuracy and uniformity badly shaken, death penalty jurisprudence is in a shambles.[289] Judge Patrick E. Higginbotham of the Fifth Circuit recently referred to current death penalty law as a perverse

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285. Eberhart v. Georgia, 47 Ga. 598, 610 (1873); *see also* KANT, METAPHYSICS OF MORALS I, *supra* note 94, at 104-05 (A202/B232) (ascribing Beccaria's opposition to the death penalty as "moved by sympathetic sentimentality and an affectation of humanitarianism").

286. Uelmen, *supra* note 43, at M8.

287. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

288. *Id.* at 101.

289. *See* Clarke, *supra* note 104, at 416-19; Howe, *supra* note 68, at 323-24.

conceptual puzzle.[290] Similarly, Justice Scalia recently expressed his bafflement at the "byzantine complexity"[291] and the "fog of confusion"[292] of contemporary death penalty jurisprudence. Tellingly, Judge Higginbotham commented on the failure of the Supreme Court to devise a workable *uniformity* requirement,[293] while Justice Scalia reiterated his dissatisfaction with the Court's adherence, however nominal, to an *accuracy* requirement.[294]

The current disarray in capital jurisprudence accurately reflects the uneasy compromises that must plague any system designed to accommodate our compassion for the victims of capital crimes while preserving the dignity of those whose lives it puts at stake. The precarious balance of capital jurisprudence, from the outset strained by the tension between accuracy and uniformity, finally has collapsed with the addition of an awesome new weight, the loss experienced by the victims of capital crime, their families and, ultimately, society.

Capital sentencing law is in a state of acute system overload. The unrestricted clash of defendant and victim at the sentencing hearing symbolizes a system that has thrown up its hands in frustration with its inability to accommodate all relevant interests within a framework of meaningful rules. While the Supreme Court has chosen to ignore the tension between accuracy and uniformity by removing the focus of the capital sentencing hearing away from the defendant onto the victim, it may not make room for the victim's interests by violating the interests of the defendant beyond a point where the system no longer recognizes the defendant's dignity as a person. After *Parks* and *Payne*, capital sentencing schemes may cross this threshold in accordance with the Federal Constitution. The capital defendant's rights, however, cannot be preserved in a comparison of the defendant's desert of mercy and the victim's desert of compassion, as the latter does not affect the former.

Parks and *Payne* mark the nadir of a gradual evisceration of the essential rights of capital defendants. Ironically, it is at this moment of triumph for those who wish to see the death penalty applied more frequently that the futility of the capital enterprise reveals itself most clearly. The time finally has come to recognize that the great experiment of a principled system for identifying

290. Graham v. Collins, 950 F.2d 1009, 1036 (5th Cir. 1992) (en banc) (Higginbotham, J., dissenting), *cert. granted*, 112 S. Ct. 2937 (1992).

291. Sochor v. Florida, 112 S. Ct. 2114, 2130 (1992) (Scalia, J., concurring in part and dissenting in part).

292. Morgan v. Illinois, 112 S. Ct. 2222, 2242 (1992) (Scalia, J., dissenting).

293. *Graham*, 905 F.2d at 1036 (Higginbotham, J., dissenting).

294. *Sochor*, 112 S. Ct. at 2130; *Morgan*, 112 S. Ct. at 2242; *see also supra* text accompanying notes 69-70.

those too despicable to live that began twenty years ago with *Furman v. Georgia* has failed.[295] Paraphrasing Justice Harlan, who, in *McGautha v. California*,[296] alerted the Supreme Court one year before *Furman* of the insurmountable difficulties of ensuring uniformity by channelling sentencing discretion, to safeguard the dignity of the capital defendant by ensuring accurate sentencing determinations while detailing the capital victim's cry for accurate retaliation and the community's demand for consideration of the unique harm it and the victim have suffered,

> [t]o identify before the fact those characteristics of criminal homicides and their perpetrators [and victims] which call for the death penalty [and of emotions which may influence the choice between life and death], *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.[297]

295. Justice Blackmun appears to have reached the same conclusion in view of the "ever-shrinking authority of the federal courts to reach and redress constitutional errors. . . ." Sawyer v. Whitley, 112 S. Ct. 2514, 2529-30 (1992) (Blackmun, J., concurring).

296. 402 U.S. 183 (1971).

297. *Id.* at 204 (emphasis added); *see also supra* notes 114 & 127.