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Capital Concerns: The Death Penalty in America

***471 NOTIONS OF SYMMETRY AND SELF IN DEATH PENALTY JURISPRUDENCE (WITH IMPLICATIONS FOR THE ADMISSIBILITY OF VICTIM IMPACT EVIDENCE)**

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I. Introduction

The jurisprudence of death is rife with expressions of concern for symmetry, for putting prosecutors and defense attorneys on equal footing at capital trials. Nowhere is this more evident than in the debate over the admissibility of victim impact evidence. Three of the four Justices writing opinions in *Payne v. Tennessee*, [FN1] concurring with the result that victim impact evidence is not per se inadmissible under the Eighth Amendment, relied at least in part upon symmetry as a basis for their judgment. [FN2] Scholars defending the decision have advanced the same rationale. [FN3] Some lower courts have interpreted this as the main lesson of *Payne*. [FN4] In simplest terms the argument is that since defendants are able to introduce any and all mitigating evidence, no matter how attenuated its connection might be to an evaluation of culpability, surviving victims should be able to do the same. [FN5]

This notion of symmetry has been largely unexamined. Critics of *Payne* have generally argued that balancing is not a worthwhile goal, tacitly accepting *472 the notion that admitting victim impact evidence is analogous to allowing unrestricted mitigating evidence to enter trials. [FN6] But it is not symmetrical at all. The policy objection to unrestricted mitigating evidence is that, antithetical to the principles of *Furman v. Georgia* [FN7] and *Gregg v. Georgia*, [FN8] it introduces an element of arbitrariness to death sentencing. *Gregg* requires the consideration of aggravating evidence to be structured. Contrarily, in the view of some, [FN9] the rule announced in *Lockett v. Ohio*, [FN10] derived in part from *Woodson v. North Carolina*, [FN11] requires that the defendant be permitted to offer any and all mitigating evidence, no matter its quality or relevance. Arbitrariness results--a jury may idiosyncratically credit some irrelevant mitigating evidence and, thus, spare a defendant deserving of death. This is unjust from a retributive standpoint, a windfall to the defendant. The defendant has received less punishment than he deserves. [FN12]

*473 Defenders of victim impact evidence say that if the defendant is allowed to offer mitigating evidence of questionable relevance, the surviving victims should be able to offer aggravating victim impact evidence, even if it is of questionable relevance. [FN13] Victim impact evidence carries with it its own risk of arbitrariness: a jury may credit some irrelevant testimony and, as a result, sentence an undeserving defendant to die. [FN14] So be it, proponents say, what is good for the goose should be good for the gander, an argument en-

dorsed by the Supreme Court. Victim impact evidence has been deemed constitutional as a symmetrical response to a defendant's mitigating evidence, a justification upon which state supreme courts have repeatedly relied in upholding victim impact evidence against state constitutional claims. [FN15] But they are apples and oranges. Defenders of victim impact evidence respond to the objection to mitigating evidence not by diminishing the arbitrariness that mitigating evidence supposedly introduces, but by introducing a different kind of arbitrariness into the sentencing phase. Mitigating evidence and victim impact evidence are not symmetrical in any way. They rely on fundamentally different kinds of inferences, their misapplication leads to different kinds of error, and they embrace different views of human nature.

Conventional mitigating evidence is premised upon an inference that runs forward in time; something in the defendant's past suggests that he is less culpable for a future act. Most victim impact evidence is premised upon a backward-looking inference; future events--the effects of the crime upon surviving family members--retroactively enhance the culpability of the defendant. [FN16]

In his famous concurrence in *Walton v. Arizona*, Justice Scalia announces that he "will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted." [FN17] The concern again is symmetry. "The [Furman] doctrine," he writes, "exists for the purpose of introducing certainty and stability into the law." [FN18] But "the Woodson-Lockett principle has frustrated this very purpose from the outset--contradicting the basic thrust of much of our death penalty jurisprudence." [FN19] Justice Scalia's argument is often favorably cited in lower court decisions, without critical examination. [FN20] The claim on symmetry is again flawed.

***474** Aggravating circumstances and mitigating evidence serve different purposes; the errors generated by their putative misapplication are different in kind, not degree. The argument against the unstructured consideration of aggravating evidence, the argument Gregg credited, is that some defendants not deserving of death may receive the death penalty, a retributive injustice. The argument against the unstructured consideration of mitigating evidence--Justice Scalia's concern--is that some defendants deserving of death may not receive the death penalty. This is also a retributive injustice, but a qualitatively different retributive injustice. The two errors are categorically distinct, analogous to the distinction between the conviction of the innocent and the release of the guilty. It is unhelpful to treat these injustices as analogous.

In whole or in part, the principle of retribution guides those who support the death penalty on policy grounds and who defend it against constitutional challenges. [FN21] Retribution is the idea that people should get what they deserve, no more and no less. The concept is simple; the practice is more complicated. The Supreme Court has offered conflicting answers on basic aspects of how this calculation is to be made, its inconsistency nowhere more evident than in the context of victim impact evidence and appeals to symmetry.

The issue of calculating how much punishment a particular defendant deserves is complicated by two practical problems. First, a temporal problem: crimes and trials do not occur in an instant. Suppose a year passes between the crime and the trial. In the year, the defendant claims to have found God and to have talked a fellow inmate out of committing suicide. How much weight if any should be afforded to his reformation? What if thirty years passes between a crime and its discovery and in the interim the defendant, a doctor, has devoted his life to the care of the needy in a third-world country? Answering these questions requires the expression of a basic view about the nature of self: Is the person an indivisible unit or can he change over time? Can he evolve into someone as distinct from one of his younger selves as he is from his siblings or parents?

Second, there is a corporeal problem: judges and juries are fallible. Retribution might allow, in theory, for the precise calculation of desert on the basis of the defendant's act, his mens rea, and certain mitigating factors. In the real world the computation would be complicated by problems of proof. It may not be possible to know with complete certainty the defendant's mental state at the time of the crime. And if the weighing of the evidence is to be left to juries, as it often is, some may reach mistaken conclusions; that is, sentences may differ from the ideal quantum of punishment calculated by the omniscient judge. Some juries may sentence undeserving people to die; others may spare *475 deserving defendants. It is possible, as is routinely done in criminal trials in the assessment of guilt, to shape the rules to reduce one type of error at the expense of the other. So the question presents itself: Which type of error should count more?

Payne offers unequivocal answers to these questions. With respect to the risk of error, the possibility of imposing an undeservedly harsh punishment is to be treated no different than the possibility of imposing an undeservedly lenient punishment. And Payne embraces an evolved view of the victim: the defendant should be held accountable not just for the qualities of the victim known to him, but for all of the victim's characteristics and for the subsequent indirect effects of the crime, whether foreseeable to the defendant or not.

The Court offers conflicting, sometimes internally contradictory, answers to these questions in dealing with mitigating evidence. The Court's basic premise with respect to mitigating evidence is that the defendant must be allowed to present any and all evidence he deems relevant. This suggests a view of the self as an indivisible unit. If it were possible for a person to evolve, it would seem reasonable for states to exclude certain classes of mitigating evidence. Just as one cannot be held accountable for something done in the distant past, the argument would proceed, one's culpability cannot be diminished by something that happened during childhood. The Court rejects this approach.

If the Court had taken a hard and fast rule against the admissibility of post-crime evidence it would be easy then to condemn the Court's tolerance of victim impact evidence as fundamentally inconsistent, but the jurisprudence of mitigating evidence is not so clear on this temporal issue. Under *Skipper v. South Carolina*, [FN22] defendants are allowed to offer post-crime, pre-trial mitigating evidence, such as adjustment to prison. *Ford v. Wainwright* [FN23] precludes the execution of the insane, even if the defendant was sane at the time of the offense. These cases suggest a world view that defendants can evolve and that they should be punished on the basis of who they are at the time of punishment, not who they were at the time of the crime. But the Court has also said that a defendant is not entitled to habeas relief on the basis of evidence discovered after trial--even if that evidence disproves the sole aggravating factor upon which he was sentenced and even if it proves his innocence. [FN24] Too much can be made of any of these cases. Insanity is a special case, even for retributivists. The habeas decisions may be driven more by process concerns than substance. It seems fair, though, to say this: the Court has not expressed a consistent world view on the nature of self and the relevance of post-crime evidence, and the answers that the Court has offered on *476 these questions with respect to mitigating evidence are in tension with the answers it has offered with respect to victim impact evidence.

The overall picture is a universe riddled with basic contradictions, one that seeks to punish people on the basis of what they deserve without agreement about how that calculation is to be made. Should punishment be determined based upon the defendant as constituted at the time of the offense, at the time of trial, or at the time of punishment? Is the relevant victim the person as known to the defendant at the time of the crime or as known by those the victim left behind? How should the risk of erroneously answering these questions be weighed? Is the error of executing a man who deserves less punishment than death equivalent in magnitude to failing to execute a man who deserves to die? Arguments for symmetry ring hollow in the absence of agreement on answers

to these fundamental questions. Such arguments are commonplace in the jurisprudence of death, but they are rarely symmetrical in truth. Without consensus on premises, real congruity can never be established. Perhaps it is possible to reconcile these inconsistencies. Perhaps the inconsistencies further suggest the conclusion that Justice Blackmun and so many have reached before: retribution may not be a workable basis for determining punishment and, furthermore, no mechanism exists that can determine with certainty who deserves to die and who does not. [FN25]

Part II of this article demonstrates the significance of symmetry to the Supreme Court's decision in *Payne*. Three of the four Justices writing in concurrence with the result in *Payne* relied in part on symmetry. The other main argument offered is that victim impact evidence is relevant to impress upon the jury the magnitude of the defendant's crime--but the Court recognizes and does not preclude the use of victim impact evidence to invite comparisons among victims. In light of the inadequacy of the other arguments advanced, symmetry is arguably the guiding rationale of the decision. At the very least, it invites the suggestion that if symmetry had been differently understood, the outcome of the case might have been different.

Part III sets out a framework for evaluating arguments of symmetry. The Part categorizes the different inferences that might be drawn into the culpability of the defendant based upon when the conduct occurs, who engages in the conduct, and whether the inference to be drawn looks forward or backward. Four time periods are potentially relevant: the entire period before the crime, *477 the moment of the crime, the period between crime and trial, the period after trial and before execution of the sentence. Within all of these time periods two sets of actors are relevant: the defendant and the victim and, after the victim's death, those affected by the death of the victim. Both backward- and forward-looking inferences can be drawn from certain conduct. A defendant's religious transformation following the crime may suggest that she is retrospectively less responsible since she had the capacity for contrition and prospectively suggests that she is less of a future threat. Part III also sets out the Supreme Court's approach to each category of evidence and, where appropriate, objections that have been made to these approaches.

Part IV examines the symmetry arguments in detail and identifies truly symmetrical responses to the concerns with mitigating evidence. If defendants are allowed to introduce all mitigating evidence, the argument goes, prosecutors should not be restricted from introducing other kinds of aggravating evidence. One problem is that defendants cannot respond to victim impact evidence symmetrically: they cannot introduce negative evidence about the victim. [FN26] More significantly, this argument responds to the criticism that mitigating evidence introduces arbitrariness into sentencing by introducing more arbitrariness still. A truly symmetrical response to mitigating evidence would be to allow the prosecution to introduce pre-crime, defendant-based aggravating evidence not just for rebuttal purposes, but as part of its case in chief. If the defendant is allowed to argue that he is less responsible because of his poor parenting, the prosecutor in an appropriate case should be allowed to argue that a defendant is more responsible because of his good upbringing. Whether the problematic case *Skipper* is philosophically sound or not, the symmetrical response is clear: if the defendant is allowed to introduce post-crime, pre-trial mitigating evidence, the prosecution should be allowed to offer post-crime, pre-trial aggravating evidence. If a defendant can argue that his adjustment to prison mitigates his culpability, a prosecutor should be allowed to argue that the defendant's failure to adjust to prison aggravates his culpability.

These responses directly counter the arbitrariness that mitigating evidence allegedly introduces, rather than introduce a new kind of arbitrariness. The argument against mitigating evidence is that it gives defendants a windfall by sparing some death-deserving defendants. Introducing victim impact evidence counters this by admitting irrelevant evidence that will lead to the execution of some defendants who do not deserve to die; a sym-

metrical response counters by diminishing the number of people that enjoy the windfall.

The difference between these two approaches--between responding to arbitrariness by countering it directly or by introducing another kind of arbitrariness that works in favor of the other party--is qualitative. This is the intuition that undermines Justice Scalia's argument in *Walton* that structuring mitigating evidence is the symmetrical response to structuring aggravating *478 evidence. The arbitrariness resulting from each leads to different risks: with unstructured mitigating evidence, there is the risk that a deserving defendant will be spared, and with unstructured aggravating evidence, the risk is that an undeserving defendant will be executed. These risks are not of equivalent significance.

So it is questionable whether victim impact evidence produces symmetry. Still another concern, and the subject of Part V is whether symmetry is a virtue. Generally speaking, symmetry is not a goal of the criminal justice system. Evidentiary rules do not put prosecutors and defendants on equal footing; in some instances this inequality is constitutionally required. If asymmetry is embraced as it is in the determination of guilt, it is not apparent why it should be prohibited in the determination of sentence. An excessive punishment is just as much a retributive injustice as the conviction of an innocent person. This Article concludes with some thoughts on the inconsistencies in the Court's view of self, and suggests that for a penalty premised upon giving defendants as much and no more than they deserve, the inability to answer basic questions about symmetry should cause great pause.

II. The Significance of Symmetry

The Supreme Court first considered the use of victim impact evidence in *Booth v. Maryland*, [FN27] holding that in capital sentencing the Eighth Amendment barred consideration of the emotional impact of the crime on family members and the family members' opinions of the crime and the defendant. In *South Carolina v. Gathers*, [FN28] the Court extended *Booth* to prohibit prosecutorial comment on a victim's individual qualities. Following the retirement of Justice Powell, the author of the *Booth* opinion, and Justice Brennan, the Court reconsidered the admissibility of victim impact evidence in *Payne*, reversing its decisions in *Booth* and *Gathers*. [FN29]

In *Payne* the concern for balance is ubiquitous. Writing for the majority, Justice Rehnquist argues that the Court's decision in *Booth* to exclude victim impact evidence

unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering "a quick glimpse of the life" which a defendant "chose to extinguish," or *479 demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide. [FN30] Justice Rehnquist offers *Payne's* own case as an example for the potential unfairness:

The capital sentencing jury heard testimony from *Payne's* girlfriend that they met at church; that he was affectionate, caring, and kind to her children; that he was not an abuser of drugs or alcohol; and that it was inconsistent with his character to have committed the murders. *Payne's* parents testified that he was a good son, and a clinical psychologist testified that *Payne* was an extremely polite prisoner and suffered from a low IQ. None of this testimony was related to the circumstances of *Payne's* brutal crimes. In contrast, the only evidence of the impact of *Payne's* offenses during the sentencing phase was Nicholas' grandmother's description--in response to a single question--that the child misses his mother and baby sister [T]he testimony illustrated quite poignantly some of the harm that *Payne's* killing had caused;

there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant. [FN31] The Tennessee Supreme Court expressed the same view. Upholding Payne's conviction, the court wrote:

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. [FN32]

Symmetry was an important consideration for the individual Justices. Concurring in the judgment in Payne, Justice Scalia writes: "The Court correctly observes the injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence." [FN33] Justice Souter repeats the symmetry concern in his own concurrence: "Indeed, given a defendant's option to introduce relevant evidence in mitigation, sentencing without such evidence of victim impact may be seen as a significantly imbalanced process." [FN34] Though he did not write an opinion in Payne, Justice White expressed a concern for symmetry in Booth. [FN35] State supreme court judges have relied upon the *480 symmetry claim to defend victim impact evidence against state constitutional challenges. [FN36] Commentators defending Payne have likewise pointed to balancing as an essential rationale of the decision. [FN37]

Though symmetry is arguably the essential rationale of the decision, it is certainly not the only argument advanced. The majority and concurring justices rely upon considerations of federalism [FN38] and the practical impossibility of eliminating victim character evidence at the guilt phase. [FN39] It is difficult to imagine either of these considerations as the ratio decidendi of Payne. Only the relevance argument may be considered to have weighed as heavily on the Justices' decisions as concerns of symmetry. The argument advanced is that harm, generally speaking, is relevant. [FN40] This concern was articulated by Justice Rehnquist in Booth when he argued that victim impact evidence is relevant for offering the jury "a quick glimpse of the life which a defendant chose to extinguish." [FN41] The intuition is that such evidence is relevant to impress upon the jury the magnitude of the taking of a human life and is fair to admit because, as Justice Souter argues, the consequences of a murder to a surviving victim are reasonably foreseeable to the defendant. [FN42]

It seems fair to say that the majority was not entirely comfortable with this argument. Moreover, the notion that ensuing harm is categorically relevant has been widely criticized. [FN43] The use of victim impact evidence to impress the magnitude of the crime upon the jury presents a practical concern and an evidentiary issue. The practical concern, as Payne himself argued, [FN44] is that it allows for the possibility that juries will treat more harshly defendants whose victims were assets to their community than those whose victims made lesser contributions. This concern was central to the Court's decision in Booth. [FN45] The *481 Payne Court responds by saying that victim impact evidence is, "[a]s a general matter . . . not offered to encourage comparative judgments of this kind." [FN46] The Court does not say, however, that such judgments will not be made or that it is impermissible for a jury to make them. In fact, many state courts have allowed judgments of this kind. [FN47]

This invites the evidentiary question whether the unfair prejudicial value of victim impact evidence substantially outweighs its relevance. Payne can be read, most clearly through Justice Souter's concurrence, as rejecting a blanket proclamation of this kind by the Supreme Court. [FN48] But if victim impact evidence is offered solely to offer a glimpse into the life of the victim--and not to invite comparative judgments--its probative value is miniscule, if it has any at all. Justice Stevens said precisely this in his dissent: "The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support." [FN49]

If the Payne Court believed that victim evidence was relevant in the conventional sense, it would have been

unnecessary to even mention symmetry. One does not often read a court decision saying relevant evidence will be admitted because of considerations other than relevance. It is either relevant or it is not. The fact is that victim impact evidence is not relevant in the conventional sense, and even if it is relevant, it is highly problematic because of the comparative judgments it inevitably invites. It is thus not surprising that the majority opinion in Payne and two of the three concurring opinions explicitly appeal to symmetry as a justification for the admissibility of victim impact evidence. These arguments invite the question whether Payne might *482 have been decided differently but for arguments of symmetry. At the very least they suggest that the notion of symmetry should be closely examined.

III. Classifications Of Inferences Into Culpability

Symmetry is not defined in Payne. It is presumably the notion that because certain kinds of evidence are admitted as bearing on the defendant's culpability, other analogous kinds of evidence should also be admitted. Evidence is analogous if the nature of the inference from the evidence to the defendant's culpability is of the same kind. This Part characterizes the nature of the different inferences that might be drawn into the culpability of the defendant, classifying these inferences based upon the time period and actor from which they are drawn.

Four time periods are relevant: all time before the moment of the crime, the moment of the crime, time between the moment of the crime and trial, and time between trial and the execution of the sentence. Two actors are relevant: the defendant and the victim. [FN50] All inferences are either aggravating or mitigating; that is, they either enhance or diminish the culpability of the defendant. Inferences can look either forward or back in time.

Figure 1. Relevant Time Periods in Death Sentencing

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The concern of this Part is not what inferences a jury actually draws; rather, this Part seeks to define the universe of actions from which the sentencer might reasonably draw inferences into culpability. It is axiomatic, for example, that actions taken by the defendant at the moment of the crime are relevant in assessing the blame of the defendant. This is not to say that a jury should find a particular item of evidence aggravating or mitigating, just that it belongs to a class of evidence from which inferences into culpability might reasonably be drawn.

*483 Consider this situation: a masked defendant, armed with a knife, robs a neighborhood convenience store manned by a single attendant. The perpetrator has not contemplated the killing of the store manager in advance of the crime. On the contrary, he specifically prefers that the robbery be carried out without harm to others. In the course of the robbery, the perpetrator's mask becomes dislodged. The perpetrator is known to the store manager. Realizing that the store manager will now be able to identify him, the perpetrator decides that, regrettably, the manager must be killed. He slices the carotid artery of the store manager, killing him instantly.

Different juries might reach different conclusions about the manner in which the defendant killed the store manager. A jury might conclude that the callousness of the act showed that the defendant possessed low regard for human life. At the same time, another jury might conclude that the swiftness of the murder suggested that the defendant, though a killer, did not desire for the victim to suffer and hence possessed greater regard for human life than the average murderer. Either of these inferences is permissible. The issue is not which of these conclusions juries would or should draw. The issue is whether the information is of a type from which juries might reasonably draw inferences into the culpability of the defendant. The manner of the killing is indisputably such

an instance.

By contrast, suppose unbeknownst to a killer, his victim has decided to donate all of the profits from the operation of his store to a charitable organization that fights AIDS in Africa. Some juries might find the defendant more morally blameworthy based upon these additional facts. The inference would not be reasonable, though, since the victim's munificent decision was not known or reasonably foreseeable to the defendant. The information is not of a kind that juries could reasonably rely upon in assessing the culpability of defendants. Identifying and classifying the situations in which such reliance is reasonable is the subject of this Part.

A. Inferences to Be Drawn from the Moment of the Crime

1. The defendant.

The most direct inference to be drawn into the culpability of the defendant is from the defendant's actions at the time of the crime. It may not be clear whether rapists deserve to be treated more or less harshly than murderers, or whether all murderers deserve to die or only some, and if only some murderers deserve to die which ones do and which ones do not. [FN51] But it is not seriously disputed that the defendant's state of mind and the criminal act itself are the most important factors to be considered in assessing the culpability of the *484 defendant. Many statutory aggravating factors are based upon the nature of the act committed. [FN52] In some jurisdictions, more than three quarters of murder convictions resulting in death sentences involve aggravating evidence derived from the nature of the act committed. [FN53]

In Florida, for example, seven out of fourteen statutory aggravating factors stem from the defendant's conduct at the moment of the crime. [FN54] Three go to the defendant's motive in committing the crime: “[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody,” “[t]he capital felony was committed for pecuniary gain,” and “[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.” [FN55] Three aggravating factors derive directly from the defendant's conduct: “[t]he defendant knowingly created a great risk of death to many persons,” “[t]he capital felony was especially heinous, atrocious, or cruel,” and “[t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.” [FN56] Florida law also includes a broad contemporaneous felony aggravator. [FN57]

Some scholars have justifiably criticized several of these aggravating factors as either too broad or as insufficiently aggravating to merit inclusion as a statutory death-qualifying factor. [FN58] But these arguments address whether *485 particular aggravating factors are consistent with the goals of the Supreme Court outlined in *Furman* and *Gregg*; that is, whether they help to curtail arbitrariness in death sentencing. The issue is whether the consideration of behavior incident to the crime can be channeled in a manner to generate consistent sentences. [FN59] No scholar has taken the position that behavior incident to a crime is irrelevant to assessing culpability.

Nor is behavior incident to the crime relevant only by virtue of its relationship to a statutory aggravating factor. The federal government [FN60] and some states [FN61] allow the sentencing authority to consider non-statutory aggravating factors, that is, potentially aggravating evidence deemed relevant by the judge in an individual case but not listed in the jurisdiction's death penalty statute. Some scholars have criticized the admissibil-

ity of non-statutory evidence as increasing arbitrariness in death sentencing, [FN62] but again that concern is based upon consistency, not relevance. The risk is that juries will inconsistently interpret non-statutory aggravating evidence. No commentator has taken the position that such evidence does not bear on culpability.

2. The victim.

From a moral standpoint, the status of the victim at the moment of the crime is of no apparent relevance. A defendant who kills a police officer is no more culpable by virtue of the status of his victim unless he knew, or it was foreseeable to him, that the victim was or might be a police officer. All that can be seen as bearing on the culpability of the defendant is the defendant's beliefs about the victim. [FN63] If a defendant believed a person to be a priest or a police officer and nevertheless killed the person, these beliefs might be seen as enhancing the culpability of the offender. Conversely, if the defendant believed the victim to be a genocidal maniac, his culpability might be mitigated. This is true even if the belief were mistaken, so long as the mistaken belief was not entered into recklessly or negligently. All other things being equal, we would presumably judge less harshly the murderer who reasonably but mistakenly believed his victim to be an international terrorist than we would the murderer who thought he was killing an ordinary shopkeeper, but who unbeknownst to him and through sheer good luck, for him and the world, killed an international terrorist. All that is relevant is the defendant's belief. The jury could reasonably *486 see the defendant's belief about the nature of the victim as bearing on the defendant's culpability. The accuracy of that belief is purely a matter of moral luck.

This answer appears to be different from a legal and constitutional standpoint. Consider the killing of a peace officer, one of the most common aggravating circumstances. [FN64] Twenty-five state statutes include an aggravating circumstance of this kind. [FN65] It would seem that the victim's status as a peace officer would only be relevant if it were known to the defendant. [FN66] Yet, only seven of the twenty-five statutes require that the offender knew or reasonably should have known that the victim was a peace officer. [FN67] From a retributive standpoint, a better argument could be made for punishing more harshly a defendant who mistakenly believed he was killing a peace officer than one who unknowingly killed a peace officer.

The tempting response is that victim-status aggravators may be based upon considerations other than retribution: these populations are at special risk and hence require special protection. But the deterrence argument is unpersuasive. If the defendant could not reasonably have known that his victim was a peace officer, the extra penalty based upon the status of the victim is of no deterrent value. [FN68]

The peace officer aggravating factor is not an isolated circumstance. A dozen states have aggravating circumstances based upon the victim's young age or old age, infirmity, or other trait suggesting the victim to have been unusually vulnerable. [FN69] Delaware's aggravating factors include that the victim was more than sixty-two years old, [FN70] was severely handicapped or disabled, [FN71] or was pregnant. [FN72] None of these factors require that the defendant knew or should have known of the qualifying circumstance. [FN73] Absent a requirement of *487 actual or constructive knowledge, no justification for victim-status aggravating circumstances can be found in retribution or deterrence. Yet such circumstances abound and no constitutional challenge has been offered against them.

It bears noting that the effect of this anomaly is unidirectional: a defendant may receive the death penalty by virtue of the victim's status, even if the status is unknown to the defendant; but no defendant is spared the death penalty by virtue of the victim's status. [FN74] One is not spared the death penalty because, unknown to him, he has killed a terrorist or a murder suspect. This point has important implications for the discussion of symmetry

that follows below.

In summary, it seems fair to say that evidence arising from the crime itself is almost universally accepted, though this may include some aggravating evidence--for example, victim status, if unknown to the defendant--that is of no relevance. The result is depicted in Figure 2 below. In this diagram and those that follow, evidence admissible against or in favor of the defendant based upon his own actions is represented by a triangle, and evidence admissible against the defendant by virtue of the victim's actions or status is represented by a circle. Figure 2 depicts an incongruity: the defendant's time-of-crime actions are admissible both for aggravating and mitigating inferences; the victim's status can only enhance culpability. [FN75]

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Figure 2. Admissibility of Evidence from Moment of the Crime

***488** It bears noting that the crime creates a new universe of relevant actors. From the moment of the crime on, the victim is no longer an actor, but his murder creates a host of new indirect victims: the victim's survivors, who may or may not be relevant.

B. Inferences Drawn from Events Preceding the Moment of the Crime

1. The defendant.

a. Pre-crime mitigating evidence.

Most mitigating evidence concerns events occurring prior to the moment of the crime that a jury might see as diminishing the culpability of the defendant. Such evidence characteristically includes hardships the defendant endured, such as abuse or lack of moral guidance, or physical events, such as brain injuries, addictions, or the like. The inference is that because of the adversity suffered by the defendant, he was and is less able to reason morally or to control his impulses, and hence might be regarded as less culpable than another defendant who did not have these obstacles to overcome.

The inference to be drawn from events of this kind is forward-looking; the notion is that whatever damage is caused by these events affects the defendant on an ongoing basis. A traumatic childhood injury damaging the frontal lobe of a defendant (the portion of the brain that regulates impulse control) is relevant only on the assumption that the injury affects the behavior of the defendant in perpetuity. If it were possible to cure brain damage, and a defendant were in fact cured, the injury would be of no relevance in assessing culpability, unless the act of suffering and recovering from the injury were in some way traumatic.

It is possible to imagine three broad ways in which mitigating evidence might be incorporated at the sentencing phase of a trial. One option would be to statutorily assign weight to a variety of mitigating factors and leave it to the jury to determine factually whether the factors are present in a particular case. The second option would be to statutorily define what kinds of mitigating evidence are relevant and leave it to the jury to decide how much weight the evidence should be afforded in a particular case. The third is to allow the unstructured consideration of mitigating evidence, leaving it to the jury to decide what factors do in fact mitigate and how much weight to be assigned to each.

The first view has appeal from the standpoint of reducing arbitrariness, but suffers from a serious practical flaw. Under this approach it would be possible at any moment in time to brand each and every human being with a culpability score by which their responsibility for their criminal acts would either be discounted or enhanced, as appropriate. In calculating the culpability index, childhood abuse might receive some mitigating consideration, brain damage still more; citizens who attended the best schools and had stable childhoods might receive a culpability-enhancing score, on the theory that they should *489 have known better than the average person. Scores might change over time as conditions become exacerbated or abated.

But even if it were possible to develop a model for this hypothetical culpability index, it would not do to reveal the culpability assessments made under it to the public. The practical consequence of this openness would be to undermine the deterrent effect of the law. Citizens with low culpability indices would have less incentive to conform with the law since they would know that their responsibility--and hence their sentence--would be discounted. Consider, for example, the behavior of a would-be criminal--a victim of extensive child abuse--contemplating a crime punishable by death. If the potential defendant knew that abuse victims had been prejudged to be less responsible than ordinary citizens and hence less deserving of the death penalty, the threat of the death penalty would deter him that much less since he could count on the benefit of his mitigating culpability factors. [FN76] From the standpoint of deterrence, it is better to leave it uncertain to the defendant whether a mitigating factor will be present in his case, and whether the jury will find the factor to diminish his culpability. [FN77]

The practical options are thus for the legislature to define what mitigating evidence is relevant and leave it to the jury to decide how much weight the evidence should be afforded in a particular case, or to allow all potentially mitigating evidence to be considered, leaving it to the jury to decide what factors do in fact mitigate and how much weight to be assigned to each. Either approach leaves it to individual juries to assign how much weight mitigating evidence should be afforded. This opens the door to two potential sorts of error: the risk that a jury will mistakenly find a factor to diminish culpability, and the risk that a jury will mistakenly fail to attribute weight to mitigating evidence that did in fact diminish the defendant's culpability.

In death sentencing, the Supreme Court has placed great weight on minimizing the second kind of error. *Lockett v. Ohio* [FN78] holds that the Eighth Amendment guarantees a death-charged defendant the right to present any evidence that he or she believes might be perceived by the jury as mitigating, regardless of whether the state legislature and the judge believe the evidence is of a kind from which juries might reasonably draw inferences. [FN79] *Lockett* derives *490 from the rule in *Woodson v. North Carolina*, [FN80] ruling mandatory death sentences unconstitutional on the grounds that fairness requires the individual circumstances of the defendant's case to be considered. [FN81]

By its holdings in these cases, the Supreme Court has expressed a clear preference for the third approach over the second: states may not restrict the types of mitigating evidence that a defendant may offer. Some state statutes amount to a hybrid of the second and third approaches. The Texas death sentencing statute, approved by the Court in *Jurek v. Texas*, [FN82] makes no explicit reference to mitigating evidence. The jury is required to answer three questions in the sentencing process, the second of which is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." [FN83] The question offers the only mechanism through which a defendant may offer mitigating evidence. The Court upheld the statute despite the narrow lens through which mitigating evidence might be considered since the second question, despite its narrowness, allowed the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show. [FN84] It is thus constitutional for a state to structure the manner in which

the jury considers mitigating evidence, but it may not restrict the quantity and quality of mitigating evidence that the defendant may offer to inform that consideration, no matter how narrow the lens through which it is viewed might be. [FN85]

The Supreme Court's approach to mitigating evidence, and the subject of mitigating evidence generally, is the source of some controversy. One line of criticism is that the Lockett requirement reintroduces arbitrariness into death sentencing. Justice Scalia argues that the Furman-Gregg principle of guided discretion and the Woodson-Lockett principle of individualized sentencing are fundamentally incompatible. [FN86] The point seems irrefutable and most commentators have conceded it. [FN87] The significance of this limitation to the *491 Supreme Court's approach to mitigating evidence is the subject of Part IV.B below. [FN88]

Another line of criticism is that not all types of mitigating evidence should be admissible. Some observers express skepticism about whether certain kinds of events, regularly offered by defendants, truly bear on culpability. [FN89] Child abuse is horrible and undoubtedly has a serious effect on its victims, but the inference that abuse as a child makes one less criminally responsible is too attenuated to be reasonable. A third line of criticism goes a step further--even if certain kinds of events do diminish impulse control and moral reasoning ability the conditions do not diminish culpability since the offenders retain the basic ability to distinguish right from wrong. [FN90] On this view, only the criminally insane should be excused. Mitigating evidence should be inadmissible unless it suggests the defendant lacks the capacity to tell right from wrong.

b. Pre-crime aggravating evidence.

Certain types of behavior that precede the crime may be admissible as aggravating evidence against the defendant. Several state statutes make commission or conviction for a prior offense an aggravating circumstance. [FN91] The Model Penal Code [FN92] and several states [FN93] count as an aggravating circumstance that "[t]he murder was committed by a convict under sentence of imprisonment." These aggravating circumstances look exclusively at prior behavior by the defendant.

Though constitutional, the link between such aggravating circumstances and the culpability of the offender is less clear. Aggravating factors of this kind are generally defended on grounds of incapacitation [FN94] or general deterrence. [FN95] Some have argued that they might also be defended on retributive grounds, the argument being that someone who has been punished before, and hence is on specific notice of the wrongfulness of his actions, is more culpable than a first-time offender. [FN96] But this argument only has force if the offender repeats the *492 exact crime for which he was previously punished. Some commentators have reasonably questioned whether offender characteristic aggravators are properly seen as bearing on culpability. [FN97]

Pre-crime behavior may also be admissible as non-statutory aggravating evidence. As noted above, the federal government and several states allow the sentencing authority to consider aggravating evidence not specifically enumerated in the jurisdiction's death penalty statute. [FN98] The Supreme Court approved the use of non-statutory evidence in *Barclay v. Florida*. [FN99] Although a death sentence "may not rest solely on a non-statutory aggravating factor," information not directly related to statutory aggravating and mitigating factors is admissible "as long as that information is relevant to the character of the defendant or the circumstances of the crime." [FN100] In *Barclay*, the trial judge considered the defendant's criminal record--pre-crime behavior--as a relevant non-statutory aggravating factor, a practice the Supreme Court condoned. [FN101]

2. The victim.

It is not seriously argued that prior behavior of the victim is admissible for the mitigating inference that might be drawn into the defendant's culpability. A defendant cannot practically argue that because a victim was a bad person that he (the defendant) should be deemed less responsible. [FN102] Some victim impact statutes, however, may be broad enough to allow certain positive past victim *493 behavior to be offered as enhancing the culpability of the offender. These points are taken up in greater detail in the discussion of victim impact evidence below. [FN103]

3. Summary.

Pre-crime behavior on the part of the defendant is generally admissible both for the aggravating and mitigating inferences that might be drawn from it. This is true despite the fact that the link with culpability is, in most instances, far more attenuated than with time-of-crime behavior. It is also true despite the fact that the consideration of all mitigating evidence, required by Lockett, and all aggravating evidence, permitted by Barclay, introduces arbitrariness into sentencing.

But for victim impact statutes, pre-trial behavior on the part of the victim would be inadmissible as reflecting on the defendant's culpability.

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Figure 3. Admissibility of Evidence Preceding the Crime

C. Inferences Drawn from Behavior of the Defendant Occurring Between the Moment of the Crime and the Trial

Classifying inferences becomes more difficult when the mitigating behavior in question arises subsequent to the moment of the crime. Consider *Skipper v. South Carolina*. [FN104] A South Carolina jury convicted Skipper of capital murder and rape. During the sentencing phase, the State introduced evidence of Skipper's history of sexual assault. [FN105] As part of the mitigation case, Skipper and his former wife testified that Skipper had comported himself well during his seven and one half months in jail between arrest and trial. *494 Skipper further testified that he had earned the equivalent of a high school diploma during his time in jail and that, if sentenced to life imprisonment, he intended to behave well and work so that he could contribute money to help support his family. [FN106] The trial court excluded, however, the testimony of two jailers and a "regular visitor" to the jail who would have testified that Skipper had made a "good adjustment" to prison. [FN107]

One could imagine drawing both forward- and backward-looking inferences from Skipper's adjustment to prison. The backward-looking inference is that because Skipper adjusted well to prison he is a better person than we otherwise knew and is hence less culpable for the crime. The forward-looking inference is that because Skipper adjusted well to prison he is less likely to be a threat to the prison community in the future. Though this was not an aggravating factor upon which South Carolina relied, during closing arguments the prosecutor contended that Skipper would pose disciplinary problems and might rape other prisoners. [FN108]

In a 6-3 decision, both the majority and dissent agreed that, on the facts of the case, due process required that Skipper should have been given the opportunity to rebut the prosecution's charge. [FN109] Since in his closing comments the prosecutor emphasized and exaggerated petitioner's misconduct in prison after his arrest, Skipper should have been allowed to offer evidence of his good behavior in prison. The majority and dissent differed in the other permissible uses of Skipper's proffered evidence.

The dissent drew a distinction between the forward- and backward-looking inferences. On the dissent's view, it would be legitimate for the defendant to introduce evidence of good behavior in jail if and only if the issue were injected into the case by the prosecution. Absent such an argument by the prosecution, evidence of adjustment to prison should be excluded since it “has no bearing at all on the ‘circumstances of the offense,’ since it concerns the defendant's behavior after the crime has been committed.” [FN110] In other words, only the forward-looking inference is permissible, and then only if relevant to the case. [FN111]

*495 The majority held that Skipper's adjustment to prison was admissible for all purposes. The Court premised its decision on the doctrine of Lockett and Eddings, writing, “Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be ‘mitigating’ in the sense they might serve ‘as basis for a sentence less than death.’” [FN112] The Court added,

Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: “any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.” The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an “aggravating factor” for purposes of capital sentencing. Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration. [FN113]

The Court thus held that both possible inferences to be drawn by the jury from Skipper's adjustment were permissible. The jury could properly conclude that Skipper's adjustment reflected positively on his character and hence diminished his responsibility. It could also properly conclude that his adjustment made him, prospectively, less likely to be a threat to the prison population.

The consideration of post-trial mitigating evidence introduces a further ambiguity into the sentencing scheme: Should the culpability of the defendant be assessed on the basis of the defendant's desert as calculated at the time of the crime or at the time of trial? Derek Parfit offers an example to illustrate this dilemma: a man, age ninety, after deservedly receiving the Nobel Peace Prize, confesses to injuring a police officer in a drunken brawl when he was a teenager, more than seventy years ago. [FN114] Parfit suggests that given the changes he has undergone, the Nobel Peace Prize winner no longer deserves to be punished for what he did: “Just as someone's deserts correspond to the degree of complicity with some criminal, do his deserts now, for some past crime, correspond to the degree of psychological connectedness between himself now and himself when committing the crime.” [FN115]

Parfit's view is that it does not make sense to regard a human being as a single entity over the course of its lifetime. Rather, he conceives of humans as *496 horizontal slices of themselves--the twenty-year-old me, the thirty-year-old me, and so on. These entities may be quite different from one another. Humans are capable of change; their changed selves deserve to be treated individually.

But Parfit's view is not the prevailing conception of desert. The conventional retributivist view is that the Nobel Peace Prize winner deserves to be punished for his crime, no matter what may have happened in the interim. [FN116] No doubt mixed in with this is a practical skepticism that if Parfit's view were adopted, criminals would routinely feign contrition or reform to gain favor in punishment. [FN117]

So retributivists would favor punishing the Nobel laureate for his crime, and retributivism is a significant, if not the major, aspect of the Supreme Court's defense of the death penalty, yet Skipper seems to take the side that the ninety-year-old Nobel winner, not his younger self, is the morally relevant entity for sentencing. If behavior subsequent to the crime is deemed admissible, it must be so on the theory that the relevant moral agent is the defendant as constituted at the time of trial. Skipper's adjustment to prison is irrelevant to assessing his culpability at the time of the crime; it is useful only for its forward-looking inference--in offering insight into the culpability of Skipper at the time of the trial.

The counterargument could be offered that Skipper's adjustment to prison is being accepted as evidence for the backward-looking inference that might be drawn into the culpability and future dangerousness of the time-of-the-crime Skipper. Indeed, during the closing arguments, the prosecutor contended that "petitioner would pose disciplinary problems if sentenced to prison and would likely rape other prisoners." [FN118] Because a relevant aggravating factor in the case is itself forward-looking, it becomes problematic to identify the self that the Court is regarding as relevant for sentencing: Skipper's adjustment to prison is either admissible to show that time-of-the-crime Skipper is not as much a future threat, or that time-of-the-trial Skipper was (in retrospect) less of a future threat. The distinction is subtle and likely academic since little time passes between the crime and trial, and the Court does not address it.

Other evidence from the opinion, though, suggests that the Court, consciously or not, is adopting the view that the time-of-trial defendant is the relevant self for assessing culpability. The majority opinion made clear that the evidence of Skipper's adjustment to prison was admissible not only because future dangerousness was at issue in the case, but also for its insight into the defendant's character. [FN119] Justice Powell argues in his concurrence that *497 Skipper's adjustment to prison could offer no insight into his character at the time of his offense. [FN120] The point seems fair.

Two possibilities are imaginable in Skipper's case: he is sincere in his adjustment to prison or he is acting well only in the hopes of securing more favorable treatment at trial. [FN121] If his adjustment is honest, it offers at most attenuated insight into his time-of-crime character since Skipper may have changed. On the other hand, if Skipper is contriving good behavior, it offers no positive insight into his character at any time. He may have had an epiphany or a moral awakening, or may have otherwise been rehabilitated. All of these events reflect well on the time-of-the-trial Skipper, but say nothing about the time-of-the-crime Skipper. Without disproving these possibilities, if they are capable of being disproved, Skipper's adjustment to prison offers no insight into his time-of-the-crime self. The only fair inference that might be drawn from his adjustment is into the character of the person he is at the time of trial.

While some ambiguity exists, the fairest reading of Skipper is that the time-of-the-trial defendant is the relevant moral agent. Under this view, post-crime, pre-trial mitigating evidence is admissible both for the prospective and retrospective inferences it may offer into the character of the defendant. The question is whether Skipper is the exception in its world view or the rule. [FN122]

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*498 Figure 4. Admissibility of Defendant-Based Evidence Between Crime and Trial

D. Inferences Drawn from Behavior of the Defendant Occurring After the Trial and Before the Execution of the Sentence

While the Court in Skipper required that a defendant be allowed to offer mitigating evidence arising subsequent to the crime and before trial, the Court has been generally reluctant to extend this requirement to mitigating evidence arising subsequent to trial.

The notable exception to this trend is evidence of insanity arising subsequent to trial and conviction. In *Ford v. Wainwright*, [FN123] the Court held that the Eighth Amendment prohibits a state from executing a prisoner who is insane at the time of the execution. There was no evidence that Alvin Ford was incompetent at the time of his offense or his trial and conviction for murder in 1974. [FN124] It was only eight years later that he began to manifest changes in behavior suggesting psychosis. Starting in 1982, Ford developed an obsession with the Ku Klux Klan and a delusional belief that the Klan and others had targeted him in a complex conspiracy designed to force him to commit suicide. [FN125] Ford began referring to himself as the Pope and reported having nine new justices appointed to the Florida Supreme Court. [FN126] One doctor concluded that Ford suffered from “a severe, uncontrollable, mental disease which closely resembles ‘Paranoid Schizophrenia With Suicide Potential’--a ‘major mental disorder . . . severe enough to substantially affect Mr. Ford’s present ability to assist in the defense of his life.’” [FN127] Another examining psychiatrist further concluded that there was “no reasonable possibility” that Ford was *499 dissembling. [FN128] Finding that no state permitted execution of the insane, the Court concluded that evolved standards of decency did not permit such executions. [FN129]

One could argue that in reaching this conclusion the Court again resolves the question whether the relevant self for purposes of calculating punishment is the defendant as constituted at the time of the crime, or some later point, in favor of the evolved defendant. The traditional retributivist position would be that Ford’s insanity subsequent to the crime is irrelevant to assessing his culpability. Ford deserves the death penalty if he was sane at the time of his offense and death is the deserved punishment for his crime. On this reading of *Ford*, the Court is implicitly accepting the Skipper view of self.

Some compelling reasons suggest, though, that Ford may not offer significant insight into where the Court stands on the time-of-the-crime-self/future-self debate. For one, insanity, uniquely among mitigating evidence, can arise subsequent to the crime. The Court has held the death penalty disproportionate for several classes of offenders--the very young, [FN130] the insane, [FN131] and the mentally retarded. [FN132] Unlike insanity, individuals could not fall into these other classes post facto; one cannot suddenly become young or retarded. Insanity is also unique in that it completely undermines the rationale for punishment from the standpoint of the offender. All but the most severely retarded [FN133] and the very, very young [FN134] are capable of distinguishing right from wrong and understanding what is about to be done to them. Ford did not know why he was being executed, made no connection between his crime and the impending punishment, and sincerely believed that he would not ultimately be executed because he could control the Governor through mind waves. [FN135] Some retributivists also believe that insanity is a special case since the executed defendant cannot understand what is being done to him. [FN136]

It is most important, though, in assessing the significance of *Ford*, that no state took the position that only the defendant’s state of mind at the time of the *500 crime mattered. To the contrary, no state permitted the execution of the insane. Thus, it was not necessary for the Court to address the problematic philosophical issue, as it did in *Skipper*. Under the Court’s essentially empirical approach to proportionality, the Court was obligated to preclude the execution of the insane on the basis of the existing consensus, regardless of whether the consensus was intellectually consistent.

Evans v. Muncy [FN137] suggests a greater skepticism by the Court toward post-trial mitigating evidence.

The facts of Evans are unusual. In March 1984, a Virginia jury sentenced Evans to death on the basis of a single aggravating factor: that if allowed to live, Evans would pose a serious threat of future danger to society. [FN138] Evans was incarcerated at Mecklenberg Correctional Facility. On May 31, 1984, six death row inmates attempted to escape. The inmates armed themselves with makeshift knives and took hostage twelve prison guards and two female nurses. The hostages were stripped and bound. Evans stepped in to calm the riot. According to witnesses he saved the lives of several hostages and prevented the rape of one of the nurses. Ricardo Holmes, one of the officers taken hostage said, "It is my belief that had it not been for Evans, I might not be here today." [FN139] Officer Harold Crutchfield testified that during a period when the attempted escapees left the hostages unattended, Evans attempted to open the door of the closet where the hostages were being held and free the guards. By all accounts, Evans' actions during the riot were consistent with his exemplary behavior during some ten years on death row. [FN140]

Following the riot, Evans sought a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, urging that his sentence be reconsidered in light of his conduct during the riot. Evans argued that these events undermined the factual finding upon which his death sentence had been predicated. The District Court stayed the execution and ordered a hearing. [FN141] The Court of Appeals reversed and vacated the stay. [FN142] Without opinion, the Supreme Court declined to impose the stay. Justice Marshall dissented.

Without a majority opinion it is difficult to know what informed the majority's decision. Justice Marshall's dissent, though, suggests that at least part of the debate focused on whether post-conviction mitigating evidence bore on the culpability of the defendant. He clearly held the view that it did:

***501** It may indeed be the case that a State cannot realistically accommodate postsentencing evidence casting doubt on a jury's finding of future dangerousness; but it hardly follows from this that it is Wilbert Evans who should bear the burden of this procedural limitation. In other words, if it is impossible to construct a system capable of accommodating all evidence relevant to a man's entitlement to be spared death - -no matter when that evidence is disclosed--then it is the system, not the life of the man sentenced to death, that should be dispatched. [FN143]

But just as too much could be made of Ford, too much can be made of Evans. The absence of a majority opinion makes it impossible to know the guiding rationale. And the hypothesis that the majority found Evans' subsequent behavior irrelevant to assessing his culpability is not the only possible explanation for the decision. Evans may simply be a creature of habeas jurisprudence. It is not entirely clear what inference Evans urged to be drawn from his conduct; we could imagine both forward- and backward-looking inferences. The forward-looking assessment is that Evans, perhaps a changed man, perhaps not, is, in either case, no longer a threat to society. The backward-looking inference is that the jury's assessment of the threat Evans presented to society was mistaken. In assessing future dangerousness, the jury made a prediction. Now with the benefit of time having passed, it is no longer necessary to rely on that prediction: it is known, at least for the time that has passed since trial, whether that prediction was in fact accurate.

One could imagine several objections to the backward-looking inference. That Wilbert Evans did not commit a crime does not prove that he was not a threat; it just proves that in the conditions under which he was incarcerated, he did not commit a crime. It is impossible to know what might have happened otherwise or what might happen in the future. Such is the nature of all predictions. That things turned out in a certain way does not undermine the quality of the prediction. The issue is whether a reliable process generated the prediction.

If Evans were decided the other way--that is, if evidence of subsequent behavior were required to be con-

sidered--the process of assessing future dangerousness would effectively be wait-and-see. Legitimate objections can be raised to the use of future dangerousness as an aggravating factor-- virtually all murderers present some risk of being a future threat; arguably the factor does not narrow at all. [FN144] But once the factor is adopted, the wait-and-see approach presents some obvious difficulties. For one, the logical extension of the approach is to wait to execute the defendant until the last moment before he dies, thus obtaining the maximum amount of information possible about the *502 actual risk of danger he presents. This result seems absurd since it would undermine the asserted justifications for the death penalty and extend what proponents claim is the already unconscionably long period of time it takes to carry out executions. The only answer is to make a determination of guilt and desert at some point in time, do the best that can be done to ensure that the determination is accurate, and live with the consequences. The argument would continue that the determination of risk made at the time of trial is more reliable than a post-conviction reevaluation. As Justice Powell suggested in *Skipper*, death row inmates would be highly incentivized to be on their best behavior in jail. Their subsequent conduct might suggest very little about the true threat that they pose.

This objection parallels the concern of the Court in *Herrera v. Collins*, [FN145] which held that evidence of actual innocence is not, by itself, a constitutional basis to bring a habeas corpus claim. The *Herrera* Court raised the analogous *reductio ad absurdum* to *Evans*: if innocence, like desert, were a matter that could be continually reevaluated, the defendant would be entitled to infinite trials. [FN146] The best that can be done is to ensure that the determination of guilt is as reliable as possible and live with the consequences. [FN147] The argument continues that the determination of guilt made at trial is more reliable than one made subsequently: memories fade, witnesses disappear. The process of reassessing guilt, like the initial determination, like any determination, is imperfect. If one accepts the premise that all processes are fallible, then it makes sense to demand that procedural determinations be at some point treated as final. [FN148]

So the backward-looking inference to be drawn into guilt or desert from post-trial behavior is unsatisfying or unworkable. And the forward-looking inference is unreliable because of the risk of insincerity on the part of the defendant. Who is to say how he will behave, or what threat he will pose, when he is not under threat of execution?

It seems fair to say, in sum, that the Supreme Court has expressed explicitly in *Herrera* and implicitly in *Evans* a general skepticism about the *503 relevance of post-conviction mitigating evidence, though it is impossible to say whether that skepticism is grounded in a particular view of the relevant self or in a practical desire for finality in procedural adjudications. *Ford* creates an exception to this rule for evidence of subsequent insanity, which may be a justifiably exceptional case.

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Figure 5. Post-Trial Evidence

E. Victim Impact Evidence

Victim impact statutes characteristically allow or require--either through a pre-trial statement based upon interviews or through testimony--the admission of evidence describing the personal characteristics of the victim (victim character evidence), the emotional impact of the crimes upon survivors (family impact evidence), [FN149] and the survivors' opinions and characterizations of the crime and the defendant (family opinion evidence). [FN150] Each of these kinds of evidence presents different issues.

***504** Victim character evidence is pre-crime behavior by the victim that bears on the defendant's culpability. It is admissible for the forward-looking inference that might be drawn from it: that because the victim was a good person during his life, the culpability of the defendant is greater. Gathers offers a representative example of victim character evidence. Gathers brutally murdered and sexually assaulted Richard Haynes, a mentally unstable homeless man. [FN151] Inferring from some religious articles and a voter registration card found on Haynes at the time of his death, the prosecutor argued at closing that Haynes had been a man of faith who cared about his community. [FN152] The Court found this evidence irrelevant in Gathers, but reversed itself in Payne.

Family impact evidence is post-crime, pre-trial behavior by the surviving victims offered for the backward-looking inference that the defendant's culpability is greater because of the consequences of his crime. For example, at Pervis Payne's trial, the prosecution offered the testimony of Mary Zvolanek, the mother of Chrissy Christopher. Payne brutally and repeatedly stabbed Christopher and her two-year-old daughter Lacie. Christopher's three-year-old son Nicholas was present during the murders. Talking about Nicholas, Zvolanek testified,

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. [FN153]

Family opinion evidence is the surviving family's opinion of how the defendant should be punished. It is opinion evidence, not direct evidence, and hence, not classifiable in the same manner as the other kinds of victim impact evidence.

Victim character and family impact evidence are almost certainly admissible only for the aggravating inferences that might be drawn from them. [FN154] Theoretically, victim impact evidence could be rebutted either through impeaching the State's witnesses or by offering direct countering evidence. Some victim impact statutes allow for the possibility of rebuttal. [FN155] It is difficult to imagine circumstances under which a defense attorney would dare to ***505** impeach such a witness or offer rebuttal evidence that the victim was a bad person or somehow deserving of death.

In the case of victim character evidence it is possible, though, to imagine a scenario under which a court might allow evidence of a victim's poor character. If the poor character were known to the defendant, this might arguably mitigate the defendant's culpability. With victim impact evidence, the unrebuttability issue is absolute. A defendant cannot offer victim benefit evidence; that is evidence to show that the surviving family members' lives have been improved by the death of the direct victim. Such evidence would irreparably damage the client's interests, and would almost certainly be inadmissible.

But for victim impact statutes, victim impact evidence would almost certainly be inadmissible. Victim impact evidence raises questions of relevance. Booth and Gathers were premised upon the notions that only evidence bearing on blameworthiness is relevant to sentencing and that evidence of harm to the surviving victims does not bear on blameworthiness. [FN156] Payne held that evidence of resulting harm does bear on blameworthiness. [FN157] Victim impact evidence is admissible to impress upon the jury the full magnitude of the defendant's crime, to show each victim's "uniqueness as an individual human being." [FN158] The Payne Court rejected the concern expressed in Booth that victim impact evidence invited a jury to find that "defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy." [FN159] The Payne Court wrote, "As a general matter . . . victim impact evidence is not offered to encourage comparative judgments of this kind . . ." [FN160] The Court did not say, however, that this inference was impermissible; it implied merely that it was undesirable. Thus, victim impact evidence is ad-

missible because its primary aim is to show the uniqueness of the victim, despite the possibility that a jury might compare the value of one human life to another.

It seems possible then, if not likely, that the Court would argue that victim impact evidence is admissible only unidirectionally. Some lower courts have reached this conclusion. [FN161] A defendant offering negative victim character evidence or surviving victim benefit evidence would be offering such evidence only to invite the inference that the victim's life was less valuable than the life of a good person and hence mitigate the culpability of the defendant. Though this inference is not impermissible under Payne, the evidence would be inadmissible since its exclusive aim would be to invite this kind of inference. Negative victim character evidence and surviving victim benefit evidence do not in any way bear on the fullness or less-than-fullness of a human life.

*506 Victim impact evidence runs through, but not past, the moment of trial. If pre-trial victim impact evidence is relevant, it follows that post-trial victim impact evidence would be relevant too. But no mechanism exists through which such evidence might be introduced. [FN162]

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Figure 6. Victim Impact Evidence

IV. Notions of Symmetry Examined

This Part examines the claims on symmetry articulated in Payne and in Justice Scalia's concurrence in Walton. Payne creates a false symmetry: the analogous response to the concern with mitigating evidence is to allow pre-crime aggravating evidence about the defendant. Scalia's position is also a false symmetry: the unrestricted use of mitigating and aggravating evidence presents categorically different policy considerations.

A. Good-for-the-Goose Symmetry

Proponents of victim impact evidence argue that if a defendant is allowed to present unlimited mitigating evidence, some or much of which is of questionable relevance, then the prosecution should not be precluded from offering victim impact evidence, even if that evidence is of questionable relevance. What is good for the goose should be good for the gander.

So is this the symmetrical response? Proponents of victim impact evidence argue that it rebalances the scales unfairly tipped by the admission of unlimited *507 mitigating evidence. But even if admitting unlimited mitigating evidence is wrong, the admission of victim impact evidence is not a wrong that counteracts the other wrong. It is just another wrong.

Recall the three main objections to the Supreme Court's approach to mitigating evidence: (1) that the requirement of Lockett reintroduces arbitrariness into death sentencing, (2) that not all mitigating evidence bears on culpability, and (3) that even if certain kinds of mitigating evidence do bear on culpability, they are irrelevant unless they suggest that the offender lost the basic ability to tell right from wrong. [FN163] Victim impact evidence is not responsive to the third concern; it does not in any way bear on the defendant's ability to distinguish right from wrong. The first and second concerns merge in some sense. The practical concern with allowing all mitigating evidence is that it will lead to increased arbitrariness. Some distinctive features of the second concern are addressed below. [FN164] It seems fair to say that the basic objection to mitigating evidence is that it increases arbitrariness. Thus, the question is whether victim impact evidence counters this effect.

The simple answer is that victim impact evidence only increases arbitrariness in death sentencing. The concern with mitigating evidence that juries will have different reactions to mitigating evidence and hence may not treat like cases alike is present in the same way with victim impact evidence. Juries may have idiosyncratic reactions to victim impact evidence. The resulting unpredictability may be more insidious in the case of victim impact evidence than with mitigating evidence. The inference from mitigating evidence runs forward in time, while the inference from victim impact evidence runs backwards. Victim impact evidence is a lottery in every sense; subsequent events are used to retrospectively reflect upon the culpability of the defendant. While it may be foreseeable to a murderer that his crime will have potentially devastating consequences, the precise results cannot be foreseen. They, hence, have no bearing on the culpability of the defendant. [FN165] Moreover, at least some kinds of mitigating evidence bear on the culpability of the defendant.

The arbitrariness concern is only remedied by victim impact evidence if the objection to mitigating evidence arbitrariness is that the resulting uncertainty is one-sided in favor of the defendant. No defendant will receive the death penalty who otherwise would not by virtue of a jury idiosyncratically crediting mitigating evidence that does not truly bear on culpability; that is, there is no risk of Type I error. All that could happen is that a defendant will be unjustly spared (call this Type II error). This point is discussed at greater length in Part IV.B below. Victim impact evidence will not increase Type II error; it will not affect the number of defendants unjustly spared. It will only lead to an increase *508 of Type I error; some defendants will be sentenced to die whom otherwise would have been spared. Victim impact evidence does not diminish arbitrariness; it increases it, though the resulting additional arbitrariness will be one-sided in favor of the prosecution.

It seems doubtful that increasing arbitrariness to balance the resulting mistakes is a legitimate aim of punishment, though some parts of the Court's opinion in *Payne* hint at precisely this point. How exactly does victim impact evidence work to balance the scales? The *Payne* Court cites Justice White's dissent in *Booth*:

[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. [FN166]

The most direct response to the concern that mitigating evidence creates arbitrariness would be to curtail the arbitrariness by allowing state legislatures to classify the kinds of mitigating evidence that might be presented at trial. But what if one proceeds on the presumption that *Lockett* precludes this course of action? [FN167] The symmetrical response would be to allow pre-crime defendant-based aggravating evidence. Mitigating evidence is offered for the inference that because of the defendant's upbringing or physical condition, he is less responsible than the average criminal defendant. Pre-crime aggravating evidence would be offered for the inference that because of the defendant's upbringing or physical condition he is more responsible than the average criminal defendant. A prosecutor could point to a defendant's good schooling and parenting and argue that the defendant should have understood better than the average person the immorality of his actions. Contra-mitigating evidence is admissible now for rebuttal purposes. The argument here is that the symmetrical response would be to allow prosecutors to offer pre-crime defendant-based aggravating evidence as part of their case in chief at the sentencing phase.

The relationship between mitigating evidence and pre-crime defendant-based aggravating evidence is far more symmetrical than between mitigating evidence and victim impact evidence. Mitigating evidence and pre-crime defendant-based aggravating evidence are both offered for a forward-looking inference, that because of the defendant's particular personal history he is more or less responsible for the crime than the average person.

Put another way, there is x-axis symmetry between mitigating evidence and pre-crime defendant-based aggravating evidence. (See Figure 7 below.)

***509** The objection to both kinds of evidence is identical: the relationship between certain past events and the crime may be too attenuated to credit; certain types of personal history events should not be relevant at all. The objection to mitigating evidence is that it puts the defendant's character at issue, when some aspects of his character are not relevant to culpability. Pre-crime defendant-based aggravating evidence puts the defendant's entire character at issue. It directly addresses the concern with Type II error--fewer defendants will undeservingly be spared the death penalty by virtue of irrelevant character evidence--and it creates no additional risk of Type I error.

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Figure 7. Symmetry of Responses to Pre-Crime Mitigating Evidence

Pre-crime mitigating evidence and victim impact evidence are apples and oranges. Conventional mitigating evidence is offered for a forward-looking inference. Victim impact evidence is offered for a backward-looking inference. Though some conventional mitigating evidence is surely irrelevant, it all concerns a relevant moral actor, the defendant. Victim character evidence concerns a relevant actor only if the victim is a member of a class that triggers a statutory aggravating circumstance. No family impact evidence concerns any relevant moral actor.

One could imagine the response that this mischaracterizes the breadth of mitigating evidence that is offered on behalf of the defendant. The defendant is not only able to offer pre-crime evidence for its forward-looking mitigating inference. Skipper and Ford suggest that the defendant is also able to offer post-crime evidence for its backward-looking mitigating inference. Even if Ford is viewed as an aberration, there is still Skipper to answer for. Skipper seems to suggest that the defendant is able to offer evidence that he is a changed person since the time of the crime and that a jury might reasonably rely upon such evidence in assessing the defendant's culpability. Skipper adopts an evolving view of self: people change over time and the culpability of their different selves should be assessed separately.

Victim impact evidence, the argument might go, responds to this evolved view of self by adopting an evolved view of the victim. Just as post-crime, pre-trial evidence about the defendant is admissible for the mitigating inference that ***510** might be drawn from it, post-crime, pre-trial victim impact evidence should be admissible for the aggravating inference that might be drawn from it. The response has facial appeal, but it is not symmetrical.

The symmetrical response to the requirement that defendants be allowed to offer post-crime, pre-trial Skipper-type evidence would be to admit post-crime, pre-trial aggravating evidence about the defendant. Under this rule, a prosecutor could argue that a defendant's poor adjustment to prison or his lack of contrition enhanced his culpability. This evidence would be admissible not just to rebut a defendant's claim that he had adjusted to prison or was contrite, but as part of the prosecution's case in chief at the sentencing phase. [\[FN168\]](#)

The relationship between Skipper-type evidence and post-crime, pre-trial defendant-based aggravating evidence is symmetrical. The relationship between Skipper-type evidence and victim impact evidence is not. Both Skipper-type evidence and post-crime, pre-trial defendant-based aggravating evidence are offered for backward-looking inferences: that the defendant's culpability should be diminished or enhanced because of the person into whom he has evolved. [\[FN169\]](#) Put another way, there is x-axis symmetry between Skipper-type evidence and

post-crime, pre-trial defendant-based aggravating evidence. (See Figure 8 below.)

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
Figure 8. Symmetrical Response to Skipper-Type Evidence

***511** If the concern with Skipper-type evidence is that it adopts an improper view of self and increases arbitrariness by allowing irrelevant mitigating evidence to be considered, admitting post-crime, pre-trial defendant-based aggravating evidence is the most direct possible response. Post-crime, pre-trial defendant-based aggravating evidence will reduce Type II error without increasing Type I error. The relationship between Skipper-type evidence and victim impact evidence is one between apples and oranges. Skipper evidence concerns the defendant; victim impact evidence the victim. There is at least a conceivable view of self under which Skipper evidence should be admissible: people evolve, they should be sentenced on the basis of whom they are, not whom they have been. There is no comparable argument to be made with victim impact evidence. Admitting victim impact evidence is only a counter to arbitrariness if the concern with arbitrariness is, again, that defendants get too few death sentences.

One further argument might be offered that the scales are asymmetrically tilted in favor of the defendant: Ford-type evidence allows the defendant to offer mitigating evidence in perpetuity. If Ford is viewed as an endorsement by the Court that selves constantly evolve and must be reevaluated in appropriate circumstances, there is no possible symmetrical response. In theory, the symmetrical response would be to allow the prosecution to seek re-sentencing on the basis of subsequent aggravating behavior--for example, the defendant proved to be a bad prisoner or remained indignant about his crime. Such evidence would be barred by the Double Jeopardy Clause. No such asymmetry exists. As argued above, evidence of subsequent insanity is best viewed as a special case. [\[FN170\]](#) The prevailing view as expressed in *Evans* is that post-crime mitigating evidence is not relevant.

B. Structured Aggravating/Structured Mitigating Symmetry

Implicit in arguments defending the admissibility of victim impact evidence on grounds of symmetry is the notion that aggravating and mitigating evidence should be treated in the same manner. This point is starkly raised in Justice Scalia's famous concurrence in *Walton v. Arizona* in which he declared that he would not "in this case or in the future vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted." [\[FN171\]](#)

Justice Scalia's concurrence presents a somewhat different claim on symmetry than does the argument for victim impact evidence. His argument is that if the defendant is allowed to introduce irrelevant evidence, the prosecution should be able to as well. He claims that if the State can structure the sentencer's consideration of aggravating evidence, it should similarly be able to ***512** structure its consideration of mitigating evidence. The claim on symmetry is more compelling on its face, but still flawed for a reason alluded to above: aggravating and mitigating evidence serve different purposes and their unstructured consideration lead to different, asymmetrical risks. The conflation of these risks by Justice Scalia and proponents of victim impact evidence suggest a misunderstanding of the aims of retributive justice.

Arizona's death penalty statute defined mitigating circumstances as any factors "relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities, or record and any of the circumstances of the offense including but not limited to" five specified factors. [\[FN172\]](#) The statute placed on defendants the burden of proving the existence of mitigating circumstances sufficiently

substantial to call for leniency. [FN173] Walton contended that the statute violated Lockett by precluding the sentencer from considering mitigating circumstances not proved by a preponderance of the evidence.

The problem is as follows: "A trial judge might be 49% convinced as to each of 10 mitigating circumstances; yet he would be forced to conclude, as a matter of law, that there was no mitigation to weigh against the aggravating factors." [FN174] This would preclude the sentencer from giving effect to the individualized circumstances of the defendant's case. Of course, it is also true that if the sentencer were 49% convinced as to each of ten aggravating circumstances he would be precluded from imposing the death penalty. The majority upheld the Arizona statute because of an absolute principle: it did not "lessen the State's burden . . . to prove the existence of aggravating circumstances." [FN175] Justice Scalia's concurrence is premised upon symmetry, upon the seeming incompatibility of the principles of Furman and Woodson-Lockett. [FN176] Since Justice Scalia announces that he will not vote to uphold any Eighth Amendment claim based upon restrictions of the sentencer's discretion, it seems fair to say that Justice Scalia would similarly vote to uphold a *513 sentencing statute that allowed the sentencer to credit only certain statutorily defined mitigating circumstances. [FN177]

Justice Scalia's argument has facial appeal. If the state is required to define the aggravating circumstances a jury may rely upon in sentencing someone to death, it seems reasonable to say the state may define the mitigating circumstances a jury may rely upon in sparing a defendant otherwise deserving of death. This is the crux of the philosophically interesting issue, the reality of which is not so neat. Sentencers may consider non-statutory aggravating evidence; however, they may not rely upon such evidence exclusively in sentencing a defendant to die. [FN178] Also the consideration of mitigating evidence may be structured; Lockett has been interpreted to require only that the defendant be allowed to offer all mitigating evidence, though it need not all be given weight. Even if the consideration of aggravating and mitigating evidence were structured in parallel manners, the claim on symmetry would still be flawed. The structuring of aggravating and mitigating evidence safeguards against different kinds of error.

Retributivists say people should receive as much punishment as they deserve. The difficulty is determining the quantum of punishment that is deserved. In answering this, retributivists have turned most often to the argument that punishments should be distributed proportionately, so that the most culpable crime receives the most serious penalty, the second most culpable crime receives the second most serious penalty, and so on down the line to the least serious offense. [FN179] This still leaves open the question of how to determine in practice the severity of wrongs and punishments. In the case of the death penalty, this question is most often answered by the jury: a defendant is punished by death if the jury says that it is what is deserved. [FN180]

*514 Retributivism poses an objective inquiry: the defendant should receive as much punishment as they are deemed to deserve. Leaving the calculation to the subjective assessment of a jury leads to the two possible kinds of error discussed above: an undeserving defendant may be sentenced to die (Type I error) or the jury might fail to sentence a defendant deserving of death (Type II error). The unstructured consideration of aggravating and mitigating evidence leads to different kinds of potential error. The unstructured consideration of aggravating evidence runs the risk that a jury may sentence to die a defendant who belongs to a class of offenders that does not deserve death. If aggravating circumstances are structured, Type I error will be reduced, though some Type II error may also result. If the universe of behavior covered by aggravating circumstances is defined too narrowly, some defendants deserving of death may not be sentenced to die.

The unstructured consideration of mitigating evidence creates a risk of Type II error exclusively. A jury may fail to sentence to die a death-deserving defendant, but no defendant will be sentenced to die by virtue of the un-

structured consideration of mitigating evidence.

Justice Scalia's argument conflates these risks. His argument, familiar from the earlier discussion of victim impact evidence, reduces to this: if states are compelled to reduce Type I error at the cost of some Type II error, they should be permitted to structure their statutes such that the consideration of mitigating evidence diminishes Type II error. The tacit assumption is that Type I error and Type II error are equally undesirable.

If this argument were offered in the context of determining criminal guilt it would seem patently wrong. Setting the burden of proof in criminal cases at proof beyond a reasonable doubt as opposed to, say, proof by a preponderance of the evidence, decreases Type I error at the expense of an increase in Type II error. This tradeoff is not questioned and, in fact, is constitutionally required. No one argues that because the state bears this daunting burden of proof, that the prosecution should be compensated with some offsetting advantage. Type II error is more tolerable than Type I error.

Presumably, the argument is that sentencing is different because the defendant has already been judged to be guilty and is, hence, deserving of punishment. But retributivism contains a negative component equally as significant as its positive component: a defendant should receive as much punishment as he deserves, and no more punishment than he deserves. To a retributivist, the imposition of excessive punishment is as much an injustice as the imposition of too little punishment. [FN181] In death sentencing, the magnitude of *515 the disparity between Type I error and Type II error is even greater than in guilt sentencing. Type I error is worse in the death penalty context since such errors cannot be reversed following the execution of the defendant. Type II error is less serious. In the context of guilt determination, Type II error leads to a deserving defendant being spared punishment entirely; whereas, in death sentencing the defendant will still be punished, in most cases severely by life imprisonment. If it makes sense to prioritize minimizing Type I error in guilt determination, it makes even more sense to minimize such error in sentencing. The argument for reducing Type II error is not equally compelling. [FN182]

If Type I and Type II error are of equal importance, then Justice Scalia's argument has appeal. If aggravating evidence is required to be structured by the legislature, mitigating factors should be too. Perhaps victim impact evidence should be structured too, with the legislature determining what types of evidence should count and which do not bear on culpability. But if Type II error is less significant than Type I error, or if it is not of concern at all, then the argument evaporates. The claim that mitigating evidence should be structured in the same manner as aggravating evidence is of no force since the errors generated by their unstructured consideration are different in kind.

V. Conclusion

“A foolish consistency is the hobgoblin of little minds,” [FN183] so it seems fair to ask why it should be a goal of death sentencing. Criminal procedure abounds with disparities between the treatment of the defense and the prosecution. [FN184] *516 Many are constitutionally required [FN185] and justifiably so. Symmetry is not a goal by itself; it is only useful if it vindicates some other legitimate objective. [FN186]

The consistency advocated in Payne is of the most foolish kind. It is, first of all, not consistency in any meaningful sense. The objection to breadth of mitigating evidence introduced at capital trials is that much of it has no bearing on culpability and hence creates arbitrariness in sentencing. The symmetrical response would be to allow prosecutors to introduce aggravating evidence from the defendant's background. This is evidence from

the same time period, offered for the same kind of inference, objectionable for the same reasons as mitigating evidence. Victim impact evidence responds to the objection to mitigating evidence by introducing a whole new kind of evidence into capital trials: backward-looking, after-the-fact evidence that may or may not have been foreseeable to the defendant. This creates symmetry in the most trivial sense: it responds to arbitrariness that favors the defendant by introducing arbitrariness that favors the prosecution.

The arbitrariness resulting from victim impact evidence is different in kind from that alleged to result from mitigating evidence. The unstructured consideration of mitigating evidence creates the risk that a defendant deserving death will be excused. The unstructured consideration of aggravating evidence, including the consideration of victim impact evidence creates a categorically different kind of risk: that an undeserving defendant will be sentenced to die. From the standpoint of retribution, this risk is greater than or equal to the risk resulting from the unstructured consideration of mitigating evidence. It is wrong to say that admitting victim impact evidence is a symmetrical response to mitigating evidence. It is dubious to claim that symmetry would even be desirable.

But what about Skipper? If a defendant has the constitutional right to offer post-crime mitigating evidence on his behalf, then surely it must be permissible for a state to allow the prosecution to offer post-crime evidence of the impact of the crime upon the victim's family. Again, though, the claimed symmetry is false. The symmetrical response to Skipper would be to allow the prosecution *517 to offer post-crime aggravating evidence of the defendant's behavior. And again, more importantly, it is not at all obvious why symmetry would be desirable.

The real significance of Skipper is the insight it offers into the fundamental confusion in death penalty jurisprudence over the nature of self. The Court's approach to ordinary mitigating evidence views the person as a consonant individual. The criminal defendant is the product of who he was in the past. Skipper and arguably Ford take an evolved view of self: people can change, and they should be held to answer for who they are, not who they have been. Evans and Herrera suggest a skepticism about this view: evidence developed subsequent to trial is irrelevant, and all that matters is the determination made at the time of trial, whether demonstrably inaccurate or not. There is no consistent world view to be discerned in the case law.

One could imagine different valid answers to the question of which is the proper view of self, but the Court has failed to articulate any coherent notion. The death penalty persists almost entirely on the basis of appeals to retributive justice. Retributivists purport to give criminals what they deserve--no more, no less. To do so, they must offer a formula; they must articulate a mechanism or a permissible range of mechanisms by which desert may be calculated. In this light, the inability to answer the most rudimentary question corollary to this inquiry--from what point in time is desert to be calculated--is damning.

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[FN1]. 501 U.S. 808 (1991).

[FN2]. See *infra* notes 30-35 and accompanying text.

[FN3]. See *infra* note 37 and accompanying text.

[FN4]. See, e.g., *Livingston v. State*, 444 S.E.2d 748, 755 (Ga. 1994) (Carley, J., concurring specially) (“[T]he

very purpose of victim impact evidence is to counteract that very broad range of mitigating evidence which the defendant is authorized to introduce ...”).

[FN5]. See *infra* Part IV.A.

[FN6]. See, e.g., Joshua D. Greenberg, *Is Payne Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 *Ind. L.J.* 1349, 1379-80 (“Like the overtly political arguments for victim-impact evidence offered by many victims' rights advocates, the ‘balancing’ argument considers factors properly extrinsic to the capital sentencing decision as justifications for admitting it.”). Justice Stevens' dissent in *Payne* also tacitly concedes the symmetry between mitigating evidence and victim impact evidence. *Payne*, 501 U.S. at 860 (Stevens, J., dissenting) (“The premise that a criminal prosecution requires an evenhanded balance between the State and the defendant is ... incorrect.”). Professor Jeffrey Kirchmeier is an exception, though the asymmetry he points to is different from that discussed in this Article.

The Court's analogy--that victim impact evidence should be admitted because mitigating evidence is admitted--fails. It is difficult for jurors to understand why a person would commit a horrible murder. Mitigating factors introduced by the defendant help to attempt to explain what led the defendant to commit the crime. Because of jurors' natural revulsion to such crimes, it is necessary to allow the defendant the full opportunity to explain his actions and their causes Victim impact evidence, however, is different. Such evidence is highly emotional and, naturally, causes people to have an automatic desire for revenge.

Jeffrey Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 *Wm. & Mary Bill Rts. J.* 345, 384-85 (1998).

[FN7]. 408 U.S. 238 (1972) (finding the Georgia death statute unconstitutional as violative of the Eighth Amendment based on concerns over arbitrariness in the sentencing scheme).

[FN8]. 428 U.S. 153 (1976) (holding the reformed Georgia sentencing statute, providing for a scheme of aggravating factors, bifurcated trials, and proportionality review, constitutional).

[FN9]. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) (“To acknowledge that ‘there is perhaps an inherent tension’ between this line of cases and the line stemming from *Furman*, is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing ‘twin objectives,’ is rather like referring to the twin objectives of good and evil. They cannot be reconciled.” (citations omitted)).

[FN10]. 438 U.S. 586, 604-05 (1978).

[FN11]. 428 U.S. 280 (1976) (prohibiting mandatory death penalty schemes).

[FN12]. See Immanuel Kant, *The Metaphysical Elements of Justice* 100 (John Ladd trans., Bobbs-Merrill 1965) (“Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated as a means to the purposes of someone else and can never be confused with the objects of the Law of things.”); see also *id.* at 102 (“Even if a civil society were to dissolve itself by common agreement ... the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth.”).

[FN13]. The question of whether victim impact evidence is relevant is discussed *infra* Part II.

[FN14]. The concept of death deservingness is discussed *infra* Part III.

[FN15]. See *infra* note 36 and accompanying text.

[FN16]. The exception is evidence of the victim's characteristics. These characteristics exist at the time of the offense, though they may not have been known to the defendant.

[FN17]. *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring).

[FN18]. *Id.*

[FN19]. *Id.*

[FN20]. See, e.g., *Neal v. Puckett*, 286 F.3d 230, 241 n.7 (5th Cir. 2002).

[FN21]. See, e.g., Laurie Anne Whitt et al., *Innocence Matters: How Innocence Recasts the Death Penalty Debate*, 38 *Crim. L. Bull.* 670, 674-75 (2002) (“Retentionists increasingly recognize that utilitarian arguments--whether appealing to cost or deterrence--undermine their position, and are turning to retributivist rationales to defend capital punishment.” (citations omitted)).

[FN22]. 476 U.S. 1 (1986).

[FN23]. 477 U.S. 399 (1986).

[FN24]. See *infra* notes 137-42 and accompanying text.

[FN25]. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored--indeed, I have struggled--along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

Id.

[FN26]. See *infra* notes 154-62 and accompanying text.

[FN27]. 482 U.S. 496 (1987).

[FN28]. 490 U.S. 805 (1989).

[FN29]. The history of this reversal by the Supreme Court and the significance of considerations of *stare decisis* has been discussed extensively in the literature. See, e.g., David R. Dow, *When Law Bows to Politics: Explaining Payne v. Tennessee*, 26 *U.C. Davis L. Rev.* 157 (1992); Ranae Bartlett, Note, *Payne v. Tennessee, Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 *Ark. L. Rev.* 561 (1992); Brian J. Johnson, Note, *The Response to Payne v. Tennessee: Giving the Victim's Family a Voice in the Capital Sentencing Process*, 30 *Ind. L. Rev.* 795, 796-800 (1997).

[FN30]. *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (citation omitted).

[FN31]. *Id.* at 825-26.

[FN32]. *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990).

[FN33]. *Payne*, 501 U.S. at 833 (Scalia, J., concurring) (citations omitted). Justice Scalia relied upon symmetry in dissenting from the decision in *Booth*. See *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) (“To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring ... that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of capital punishment with one side muted.”).

[FN34]. *Payne*, 501 U.S. at 839 (Souter, J., concurring) (citations omitted).

[FN35]. *Booth*, 482 U.S. at 517 (White, J., dissenting) (“If anything, I would think that victim impact statements are particularly appropriate evidence in capital sentencing hearings: the States has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in.” (citation omitted)).

[FN36]. See, e.g., *Livingston v. State*, 444 S.E.2d 748, 755 (Ga. 1994).

[FN37]. See, e.g., Richard A. Posner, *Legal Narratology*, 64 U. Chi. L. Rev. 737, 745 (1997) (reviewing *Law's Stories: Narrative and Rhetoric in the Law* (Peter Brooks & Paul Gewirtz eds., 1996)) (noting that with respect to emotion-evoking testimony at the sentencing phase “what is sauce for the goose should be sauce for the gander”); Johnson, *supra* note 29, at 825 (“As Justice Cardozo noted over sixty years ago: ‘But justice, 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.’” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934))).

[FN38]. *Payne*, 501 U.S. at 824-25.

[FN39]. *Id.* at 839-41 (Souter, J., concurring).

[FN40]. *Id.* at 819 (“Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause different amounts of harm.”).

[FN41]. *Id.* at 822 (citation and internal quotation marks omitted).

[FN42]. *Id.* at 837-38 (Souter, J., concurring).

[FN43]. See, e.g., 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).

[FN44]. *Payne*, 501 U.S. at 823-24.

[FN45]. *Booth v. Maryland*, 482 U.S. 496, 506 n.8 (1987) (“We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions.” (citation omitted)).

[FN46]. *Payne*, 501 U.S. at 823.

[FN47]. See Jonathan H. Levy, Note, [Limiting Victim Impact Evidence and Argument After Payne v. Tennessee](#), 45 *Stan. L. Rev.* 1027, 1028 (1993) (“[T]he Payne Court failed to create coherent, comprehensive guidelines for when victim impact evidence and argument may be used in capital sentencing hearings. A diverse group of observers ... have interpreted Payne[] ... as making victim impact evidence automatically admissible.”). Jonathan Levy persuasively argues that jurors cannot help but make comparative judgments.

Jurors confronted with such evidence ... are usually empowered to make a simple binary decision: Either they sentence ... the defendant to death, or they do not. Common sense dictates that jurors will assume that the evidence presented at this stage should affect their decision. Thus, evidence indicating that the victim was a model citizen and exemplary human being must logically influence jurors to vote for death while evidence that the victim was an evil person would influence jurors to vote against the death sentence.

Id. at 1044 n.137; see also Vivian Berger, [Payne and Suffering --A Personal Reflection and a Victim-Centered Critique](#), 20 *Fla. St. U. L. Rev.* 21, 46 (“Whatever the state's purpose, however, the predictable effect of relying on such proof is ... to enhance certain victims by identifying them as worthier than others of society's highest measure of concern.”).

[FN48]. See [Payne](#), 501 U.S. at 837-38 (Souter, J., concurring).

[FN49]. *Id.* at 866 (Stevens, J., dissenting); see also Levy, *supra* note 47, at 1045 (“Given the narrow purposes for which victim impact evidence may be introduced ... the probative value of such evidence will be vastly decreased.”).

[FN50]. Victim is defined here, in the broadest possible sense, as the direct victim of the crime itself and those affected by the crime including, but not limited to, the family of the direct victim. Distinctions between evidence of the victim's character and the impact of the victim's death on surviving family members are discussed *infra* Part III.E.

[FN51]. Retributive theory seems more apt for a determination of who deserves to be punished than it is for an assessment of how much punishment should be given. This point is discussed *infra* Part IV.B.

[FN52]. See James R. Acker & C.S. Lanier, “Parsing This Lexicon of Death”: Aggravating Factors in Capital Sentencing Statutes, 30 *Crim. L. Bull.* 107, 121 (1994).

[FN53]. See David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 *Stetson L. Rev.* 133 (1986). Professor Baldus and his colleagues consider the “contemporaneous offense” and “vile murder” aggravators to be the “two most important aggravating circumstances” in death penalty laws. David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 22 (1990).

[FN54]. See generally [Fla. Stat. ch. 921.141\(5\)\(a\)-\(n\)](#) (2001).

[FN55]. *Id.* ch. 921.141(5)(e), (f), (g).

[FN56]. *Id.* ch. 921.141(5)(c), (h), (i).

[FN57]. *Id.* ch. 921.141(5)(d) (“The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in

great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.”).

[FN58]. See, e.g., Acker & Lanier, *supra* note 52, at 122 (“It is not self-evident, though, why an aggravating circumstance based on a drug-related killing or a killing committed during flight after a robbery, for example, ‘provides a morally acceptable instrument for making decisions between life and death.’” (quoting Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the American Agenda* 80 (1986)); Acker & Lanier, *supra* note 52, at 130 (“As written, [heinous, atrocious, or cruel] factors are detrimental to legislative capital punishment policies. Not only are they insufficiently specific to promote the presumed objective of singling out ‘particularly horrible murders’ for enhanced punishment, but their vagueness invites abuses of sentencing discretion.” (citation omitted)); see also Carol S. Steiker & Jordan M. Steiker, [Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment](#), 109 *Harv. L. Rev.* 355 (1995).

[FN59]. See Steiker & Steiker, *supra* note 58.

[FN60]. See 18 U.S.C. § 3592(c) (2000) (“The jury, or if there is no jury, the court, shall consider whether any other aggravating factor for which notice has been given exists.”).

[FN61]. See Kirchmeier, *supra* note 6, at 375 & n.203.

[FN62]. See, e.g., *id.* at 375 (“Although at least one statutory aggravating factor also must be present before a defendant may be sentenced to death, the consideration of nonstatutory aggravating factors increases the potential for arbitrariness in capital cases by allowing an unlimited number of considerations to be presented to the sentencing authority.”).

[FN63]. Souter might say the foreseeability makes it relevant, but I take him to be saying this is an evidentiary argument about how the prosecution may make its case.

[FN64]. See Acker & Lanier, *supra* note 52, at 143. These aggravating factors are sometimes worded generally to apply to law enforcement officers, firefighters, and correctional officials. *Id.*

[FN65]. See *id.* (collecting citations).

[FN66]. See *id.* at 145 (“Nor can a convincing case for heightened punishment be made on retributive grounds when a murderer was unaware that his victim was a law enforcement officer.”).

[FN67]. See *id.* at 144 & n.202 (collecting citations).

[FN68]. See *id.* at 145 (“The state’s interest in deterring the murder of law enforcement officers is not served when the offender could not reasonably have known in advance of a killing that his victim in fact was a peace officer.”). Professors Acker and Lanier further note that researchers have not found evidence that the threat of capital punishment deters the murder of police officers. *Id.* at 145 n.204.

[FN69]. See *id.* at 149.

[FN70]. [Del. Code Ann. tit. 11, § 4209\(e\)\(1\)\(r\)](#) (2001).

[FN71]. [Id. § 4209\(e\)\(1\)\(q\)](#).

[FN72]. *Id.* § 4209(e)(1)(p).

[FN73]. The response might be that in the case of the very young or the very old, or the handicapped, the condition is apparent. But one could easily imagine a 62-year-old who looks to be merely fifty or a handicap that is not immediately apparent upon observation.

[FN74]. Some courts have interpreted *Payne* to specifically preclude the defendant from offering (positive) victim impact evidence for its mitigating inference. See *infra* note 161 and accompanying text.

[FN75]. The notion that victim status and time of crime behavior is generally inadmissible for its mitigating inference may have one exception. The Texas death penalty statute asks the jury to answer three questions in determining whether a death-qualified defendant should be sentenced to life or death. See *Jurek v. Texas*, 428 U.S. 262 (1976). Question three asks: “if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.” *Id.* at 269. This suggests that the behavior of the victim at the time of the crime may be relevant, although the focus seems to be more on the objective reasonableness of the response than on the provocation by the victim.

[FN76]. The irony is that this is exactly what happens. Death penalty proponents attribute rationality to defendants, but these proponents do not believe defendants know that they belong to groups that will be seen as less responsible.

[FN77]. In the face of uncertainty, the rational course of action for the defendant would be to exercise an excess of care. For an analysis of the behavior of actors in the face of uncertainty in the law, see, for example, John E. Calfee & Richard Craswell, *Some Effects of Uncertainty of Compliance with Legal Standards*, 70 Va. L. Rev. 965 (1984).

[FN78]. 438 U.S. 586 (1978).

[FN79]. The sentencing authority must “not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death.” *Id.* at 604; see also *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) (stating that the sentencer must not “refuse to consider, as a matter of law, any relevant mitigating evidence ... [including] evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance”).

[FN80]. 428 U.S. 280 (1976).

[FN81]. See *id.* at 304 (“[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.”).

[FN82]. 428 U.S. 262 (1976).

[FN83]. *Id.* at 269.

[FN84]. *Id.* at 276.

[FN85]. See generally Kirchmeier, *supra* note 6, at 393-94.

[FN86]. [Walton v. Arizona](#), 497 U.S. 639, 656 (1990) (Scalia, J., concurring) (“[The mitigation requirement] quite obviously destroys whatever rationality and predictability the [requirement that states channel the sentencer's discretion with clear and objective standards] was designed to achieve.”).

[FN87]. See, e.g., [Kirchmeier](#), *supra* note 6, at 362-63 (“Justice Scalia is correct that the requirement of unlimited mitigating factors does allow a great deal of sentencing discretion. As the Court has noted in the context of racial discrimination in capital sentencing, ‘Of course, the power to be lenient [also] is the power to discriminate.’” (citations omitted)).

[FN88]. See *infra* Part IV.B.

[FN89]. See, e.g., Alan M. Dershowitz, *The Abuse Excuse* (2000).

[FN90]. See, e.g., Barry Latzer, *Misplaced Compassion: The Mentally Retarded and the Death Penalty*, 38 *Crim. L. Bull.* 327 (2002).

[FN91]. See [Acker & Lanier](#), *supra* note 52, at n.30 and accompanying text.

[FN92]. *Model Penal Code and Commentaries* § 210.6(3)(a) (1980).

[FN93]. See [Acker & Lanier](#), *supra* note 52, at 116.

[FN94]. See, e.g., Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 84 (1976) (“[T]he more often someone has offended in the past, the more likely he is to do it again - and hence ... the greater reason for restraining him.”).

[FN95]. See *id.* at 85 (“[H]aving continued to commit crimes despite previous punishments, repeaters might as a class require a greater penalty to induce them to desist.”).

[FN96]. See *id.*

In assessing a first offender's culpability, it ought to be borne in mind that he was, at the time he committed the crime, only one of a large audience to whom the law impersonally addressed its prohibitions. His first conviction, however, should call dramatically and personally to his attention that the behavior is condemned. A repetition of the offense following that conviction may be regarded as more culpable, since he persisted in the behavior after having been forcefully censured for it through his prior punishment.

Id. The Model Penal Code offers an alternative rationale: “[p]rior conviction of a felony involving violence to the person suggests ... that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation.”). See *Model Penal Code and Commentaries*, *supra* note 92, at 136.

[FN97]. See, e.g., [Acker & Lanier](#), *supra* note 52, at 116 (“Moreover, an offender's being ‘under sentence of imprisonment’ is a dubious reason to classify a killing as more deserving of capital punishment than other types of murder.”).

[FN98]. See *supra* note 60-61 and accompanying text.

[FN99]. [463 U.S. 939](#) (1983).

[FN100]. *Id.* at 966-67 (citations omitted).

[FN101]. See *id.* at 956.

[FN102]. This is essentially the point of irrefutability, an argument relied upon by the majority in *Booth*. See *Booth v. Maryland*, 482 U.S. 496, 506 (1987) (“Presumably the defendant ... rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered.”); see also *Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (“The *Booth* court reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a ‘mini-trial’ on the victim’s character.”). A similar problem arises with rebutting evidence of impact of the crime on the victim’s family.

[FN103]. See *infra* Part III.E.

[FN104]. 476 U.S. 1 (1986).

[FN105]. *Id.* at 2. The basis for the introduction of this evidence is unclear. The sole aggravating factor relied upon by the State appears to have been murder involving criminal sexual conduct. S.C. Code Ann. § 16-3-20 (C)(a)(1)(a) (2003). Skipper objected.

[FN106]. Skipper, 476 U.S. at 2.

[FN107]. *Id.*

[FN108]. *Id.* at 3.

[FN109]. *Id.* at 5 n.1 (“[I]t is also the elemental due process requirement that a defendant not be sentenced to death ‘on the basis of information which he had no opportunity to deny or explain.’” (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977))); *id.* at 10-11 (Powell, J., dissenting) (“The Court correctly concludes that the exclusion of the proffered testimony violated due process As in *Gardner*, petitioner in this case was not permitted to ‘deny or explain’ evidence on which his death sentence may, in part, have rested.”).

[FN110]. *Id.* at 11.

[FN111]. See *id.* at 12 (“In this case, for the first time, the Court classifies as ‘mitigating’ conduct that occurred after the crime and after the accused has been charged.” (emphasis in original)).

Evidence concerning the degree of the defendant’s participation in the crime, or his age and emotional history, thus bear directly on the fundamental justice of imposing capital punishment. That simply cannot be said of the defendant’s behavior in prison following his arrest. Society’s interest in retribution can hardly be lessened by the knowledge that a brutal murderer, for self-interested reasons, has been a model of deportment in prison while awaiting trial or sentence.

Id. at 13-14.

[FN112]. *Id.* at 4-5 (citations omitted).

[FN113]. *Id.* at 5 (citations omitted).

[FN114]. Derek Parfit, *Reasons and Persons* 326 (1984).

[FN115]. *Id.*

[FN116]. See generally John Kleinig, Philosophical Concept of Desert, in *Encyclopedia of Crime and Punishment* (David Levinson ed., 2003).

[FN117]. Justice Powell expresses such skepticism in his concurrence in *Skipper*. See *Skipper*, 476 U.S. at 13-14 (Powell, J., concurring).

[FN118]. *Id.* at 3.

[FN119]. See *id.* at 4-5 (“[N]or does the State dispute that the jury could have drawn favorable inferences from the testimony regarding petitioner’s character and his probable future conduct if sentenced to life in prison. Although it is true that such inferences would not relate specifically to petitioner’s culpability for the crime he committed, there is no question but that such inferences would be ‘mitigating’ in the sense that they might serve ‘as a basis for a sentence less than death.’” (citations omitted)). The point is reinforced by Justice Powell’s concurrence in which he writes that he would “reverse the judgment below, not because the trial court excluded ‘relevant mitigating evidence’ ... but because petitioner was not allowed to rebut evidence and argument used against him.” *Id.* at 9 (Powell, J., concurring).

[FN120]. In Justice Powell’s view, the evidence is admissible only because the prosecution introduced the issue of future dangerousness. See *id.* at 11-12 (“Nor does [such evidence] say anything necessarily relevant about a defendant’s ‘character or record,’ as that phrase was used in *Lockett and Eddings*.”).

[FN121]. Justice Powell notes, “After today’s decision competent defense counsel in capital cases will instruct their clients to behave like Eagle Scouts while awaiting trial, and particularly while awaiting sentencing.” *Id.* at 15 n.3.

[FN122]. In *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002), the Ninth Circuit vacated a conviction where the California trial court’s instruction did not allow the jury to fully consider the mitigating effect of the defendant’s conversion to Christianity subsequent to the crime.

[FN123]. 477 U.S. 399 (1986).

[FN124]. *Id.* at 401.

[FN125]. *Id.* at 402.

[FN126]. *Id.*

[FN127]. *Id.* at 402-03.

[FN128]. *Id.*

[FN129]. *Id.* at 410 (“Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.”).

[FN130]. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

[FN131]. *Ford v. Wainright*, 477 U.S. 399 (1986).

[FN132]. *Atkins v. Virginia*, 536 U.S. 304 (2002).

[FN133]. See Latzer, *supra* note 90.

[FN134]. In the case of juveniles, their comprehension of the punishment may be greater at the time the punishment is carried out than at the time of their offense.

[FN135]. *Ford*, 477 U.S. at 403.

[FN136]. See, e.g., Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. Rev. 381, 387 (1962) (noting that the community's quest for "retribution"--the need to offset a criminal act by punishment of equivalent "moral quality"--is not served by execution of an insane person, which has a "lesser value" than that of the crime for which he is to be punished).

[FN137]. 498 U.S. 927 (1990) (Marshall, J., dissenting from denial of stay of execution).

[FN138]. *Id.* at 927 (citing Va. Code Ann. § 19.2-264.4(C) (Michie 1990)). This was Evans's second death sentence. He was first sentenced to die in April 1981, also on the basis of future dangerousness. That sentence was vacated after the prosecution admitted that two of seven out-of-state convictions upon which the prosecution based its case were false.

[FN139]. *Id.* at 928.

[FN140]. *Id.*

[FN141]. See *Evans v. Muncy*, 916 F.2d 163, 164 (4th Cir. 1990) (per curiam).

[FN142]. *Id.*

[FN143]. *Evans*, 498 U.S. at 930-31 (Marshall, J., dissenting) (emphasis added).

[FN144]. See Acker & Lanier, *supra* note 52, at 120-21 ("[A]n urgent need exists for the legislatures ... to reconsider the wisdom of permitting capital punishment decisions to rest on such unfathomable predictions."); Kirchner, *supra* note 6, at 371 ("The use of the 'future danger' aggravating factor as a tool for determining who receives the death penalty is highly suspect.").

[FN145]. 506 U.S. 390 (1993).

[FN146]. *Id.* at 417 ("[W]e are mindful that defendants often abuse new trial motions 'as a method of delaying enforcement of just sentences.' Although we are not presented with a new trial motion, per se, we believe the likelihood of abuse is as great--or greater--here." (citations omitted)). The converse would not be true, though. There is no way to present post-trial aggravating evidence.

[FN147]. See *id.* at 398-99.

A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent person. In capital cases, we have required additional protections

because of the nature of the penalty at stake.

Id. (citations omitted).

[FN148]. See Kirchmeier, *supra* note 6, at 374. (“If courts were to permit consideration of post-sentence evidence, executions would never occur because people continuously change. Courts constantly would be forced to reevaluate death sentences.”).

[FN149]. Most states do not specify who qualifies as a victim. Some courts have permitted friends, coworkers and even members of the community who did not know the victim to testify. See Wayne A. Logan, [Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials](#), 41 *Ariz. L. Rev.* 143, 154-55 (1999). But victim impact evidence is most frequently presented by members of the victim's family. See Greenberg, *supra* note 6, at 1350 n.7.

[FN150]. See, e.g., [Okla. Stat. tit. 22, § 984 \(2003\)](#) (“‘Victim impact statements’ means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim, or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated and the victim's opinion of a recommended sentence.”); *id.* § 984.1 (“Each victim, or members of the immediate family of each victim or person designated by the victim or by family members of the victim, may present a written victim impact statement or appear personally at the sentence proceeding and present the statements orally.”). This is similar to a classification scheme offered by Wayne Logan. See Logan, *supra* note 149, at 168-70.

[FN151]. [South Carolina v. Gathers](#), 490 U.S. 805, 806-07 (1989).

[FN152]. *Id.* at 808-10.

[FN153]. [Payne v. Tennessee](#), 501 U.S. 808, 814-15 (1991).

[FN154]. Some courts have interpreted Payne to prohibit the defendant from offering negative victim impact evidence. See, e.g., [State v. Southerland](#), 447 S.E.2d 862, 867 (S.C. 1994) (“Southerland contends that the trial judge should have allowed him to introduce evidence of the victim's bad character in mitigation of his sentence. Payne prohibits this use of comparative character analysis.”).

[FN155]. See, e.g., [Ga. Code Ann. § 17-10-1.2\(c\)](#) (1997) (“The court shall allow the defendant the opportunity to cross-examine and rebut the evidence presented of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community.”).

[FN156]. [Payne](#), 501 U.S. at 819.

[FN157]. *Id.*

[FN158]. *Id.* at 823.

[FN159]. [Booth v. Maryland](#), 482 U.S. 496, 506 n.8 (1987).

[FN160]. [Payne](#), 501 U.S. at 823.

[FN161]. See supra note 154.

[FN162]. Barring, perhaps, resentencing on remand.

[FN163]. See supra notes 86-90 and accompanying text.

[FN164]. See infra Part IV.B.

[FN165]. Arguably, the Court tacitly acknowledges this by its emphasis on symmetry in Payne. See supra Part II.

[FN166]. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing *Booth v. Maryland*, 482 U.S. 469, 517 (1987) (White, J., dissenting)).

[FN167]. It is not entirely clear that it does.

[FN168]. This is identical to the distinction between contra-mitigating evidence and pre-crime defendant-based aggravating evidence. An interesting question is raised by what might be termed family impact mitigating evidence. Say the mother of a defendant is allowed to testify that her son's execution will cause her great pain and to beg that the jury spare his life. It is not clear whether *Lockett* would require that this evidence be admitted. If it does, it raises a host of issues since this is forward-looking testimony by someone other than the defendant--not entirely unlike family impact evidence.

[FN169]. See supra Part III.C. Skipper evidence may be admissible for the forward-looking inference that the defendant is a greater threat by virtue of his post-crime conduct. If so, the symmetrical response would be to allow post-crime defendant-based aggravating evidence for both the forward- and backward-looking inferences that might be drawn from it.

[FN170]. See supra notes 130-36.

[FN171]. 497 U.S. 639, 673 (1990) (Scalia, J., concurring).

[FN172]. *Ariz. Rev. Stat. Ann. § 13-703(G)* (West Supp. 2003). The five specified factors were:

(1) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution. (2) The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution. (3) The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution. (4) The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person. (5) The defendant's age.

Id.

[FN173]. *Id.* § 13-703(C).

[FN174]. *Walton*, 497 U.S. at 684 (Blackmun, J., dissenting).

[FN175]. *Id.* at 650.

[FN176]. *Id.* at 673 (Scalia, J., concurring) (“Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.”).

[FN177]. The Texas death sentencing statute is such a statute.

[FN178]. See generally Kirchmeier, *supra* note 6, at 375-76 (“The federal government and some states allow the sentencing authority to consider nonstatutory aggravating factors ...”); see also *Barclay v. Florida*, 463 U.S. 939, 967 (1983) (“[T]he Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime.” (citations omitted)).

[FN179]. Claire Finkelstein calls this the “proportionate penalty” theory. Claire Finkelstein, *Death and Retribution*, 22 *Crim. Just. Ethics* 12 (2002); see also John Kleinig, *Punishment and Desert* 124 (1973) (“In relating punishments to offences, we simply reserve the mildest punishment we can reasonably give for the least serious wrong, the most severe punishment for the most wicked deed, and scale other wrongs and punishments in between, in accord with the pattern of scaling described above.”).

[FN180]. Of course whether this determination is fair or not is another matter. David McCord offers an objective method to determine whether a sentence is underserved: a sentence is underserved--or “overinclusive”--if similarly culpable defendants are sentenced to die less than ten percent of the time. See David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 *Fla. St. U. L. Rev.* 545, 580 (1997). As Professor McCord acknowledges, the cutoff is arbitrary; the point is that it may be possible to construct an objective method of assessing desert.

[FN181]. See, e.g., Alfred Ewing, *The Morality of Punishment* 39 (Kegan Paul, Trench, Trubner & Co. 1929) (“[P]unishment should be just, and every excess over the just amount must be in the same ethical position as punishment of ‘the innocent,’ an injustice which seems much worse than non-punishment of the guilty.”). For Ewing, the injustice of disproportionate punishment and the impossibility of achieving precision in the calculation of desert is imposing:

[I]t is certain that either this injustice or the opposite one of inflicting too slight a penalty will be perpetrated in nine cases out of ten, nay in 999 cases out of a thousand, so great are the difficulties in the way of securing the right proportion between the punishment and the guilt of the offender.

Id.

[FN182]. The distinction between Type I and II error parallels the distinction Professor David McCord draws between “overinclusion”--the application of the death penalty to an undeserving defendant--and “underinclusion”--sparing defendants for no legitimate reason. See McCord, *supra* note 180, at 549. Overinclusion is analogous to Type I error, underinclusion to Type II. Professor McCord argues that the Supreme Court's primary concern has been minimizing overinclusion. See *id.* at 593 (“The best available evidence shows that the Court's regulatory death penalty jurisprudence has been successful in decreasing overinclusion, which is the primary vice that the Court has seen in death penalty systems for the last quarter of a century.”). Underinclusion may not be a concern at all. See *id.* at 572 (“[T]he Court has not been concerned with prosecutorial underinclusion ... [and] has sought to preserve the power of ... sentencers to exercise merits-based underinclusion ...”).

[FN183]. Ralph Waldo Emerson, *Self-Reliance* (1841).

[FN184]. For example, the Federal Rules of Evidence make it harder to admit prior convictions against criminal

defendants testifying at trial than against ordinary witnesses. See [Fed. R. Evid. 609\(a\)](#) (“[E]vidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.”).

[FN185]. See, e.g., [In re Winship](#), 397 U.S. 358, 364 (1970) (“Due process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the factfinder of his guilt.” (citation omitted)).

[FN186]. Justice Stevens argues against a blind adherence to symmetry in his dissent in [Payne. Payne v. Tennessee](#), 501 U.S. 808, 860 (Stevens, J., dissenting) (“The premise that a criminal prosecution requires an even-handed balance between the State and the defendant is ... incorrect. The Constitution grants certain rights to the criminal defendant and imposes special limitations on the State designed to protect the individual from overreaching by the disproportionately powerful State.”); see also Susan Bandes, [Empathy, Narrative, and Victim-Impact Statements](#), 63 U. Chi. L. Rev. 361, 402 (1996) (“[T]he Bill of Rights is designed to level the playing field between the defendant and the state; its provisions afford extra protections to the former to counteract the awesome power of the latter.”); Greenberg, *supra* note 6, at 1380 (“[T]rying to correct a perceived imbalance between the rights of victims and defendants is a goal irrelevant to a capital sentencing hearing.”).

15 Stan. L. & Pol'y Rev. 471

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