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Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model

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COMMENTS

RETRIBUTION'S "HARM" COMPONENT AND THE VICTIM IMPACT STATEMENT: FINDING A WORKABLE MODEL

I. INTRODUCTION

Victim impact statements are an essential part of a retribution sentencing scheme. The growing emphasis on retribution as a sentencing goal explains the increased support for victim's rights in the United States criminal justice system. Congress demonstrated its approval for victims' interests by enacting the Victim and Witness Protection Act of 1982.[1] In addition, both the state legislatures[2] and the United States Supreme Court[3] have also demonstrated their support for the concept of victim recognition.

One way for the criminal justice system to be more attentive to victim concerns is to give victims an active role in sentencing convicted defendants. Although several means of recognizing victim interests ex-

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1. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C. §§ 1512-15, 3146(a), 3579-80 (1988)); FED. R. CRIM. P. 32(c)(2). The Victim and Witness Protection Act (Act) provides that: (1) before sentencing a criminal defendant, the judge must be informed of the crime's impact on the victim, FED. R. CRIM. P. 32(c)(2); (2) one who tampers with or retaliates against a witness, victim, or informant is subject both to severe criminal sanctions and to civil restraints, 18 U.S.C. §§ 1512-14; (3) a defendant must pay restitution to the victim as ordered by the sentencing judge, 18 U.S.C. §§ 3579-80; (4) the Attorney General shall develop guidelines for the fair treatment of victims and witnesses by the criminal justice system, 18 U.S.C. § 1512 notes; and (5) the Attorney General shall report to Congress on the efficacy of any laws necessary to prevent federal criminals from deriving profit from the sale of the story of the crime, 18 U.S.C. § 3579 notes.

2. *See, e.g.*, CAL. PENAL CODE §§ 679, 679.01, 679.02 (West 1988 & Supp. 1992). For a current listing of victim impact statement statutes, see *infra* note 21.

3. Morris v. Slappy, 461 U.S. 1 (1983). Chief Justice Burger stated for the majority: "[I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities . . . ." *Id.* at 14.

ist,[4] one common means has been the use of victim impact statements.[5] Usually taken in presentence reports,[6] victim impact statements provide[7] the sentencing authority, usually either a judge or a jury, with information concerning the level of harm[8] the offender caused the victim and the victim's family to suffer. A system of retribution considers both the harm an offender has caused and his level of culpability[9] when determining the appropriate punishment. Victim impact statements are thus potentially useful tools for achieving the sentencing goal of retribution because they assess the level of harm caused by the defendant's actions.

Although the United States Supreme Court recently acknowledged the level of harm ascertained through victim impact statements as a valid sentencing consideration in *Payne v. Tennessee*,[10] the Court provided no objective means of measuring harm. The potential problems associated with the use of victim impact statements recently surfaced during the Jeffrey Dahmer trial.[11] The *Dahmer* trial presented an un-

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4. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 6(a)(4)(A), 96 Stat. 1248, 1256 (1982). This provision describes one variation which recognizes the need to tell victims when a convicted defendant's sentencing hearing is scheduled. *Id*; *see also* 18 U.S.C. §§ 3663-64 (1988). This statute provides restitution for crime victims who have suffered financial loss as a result of crime. *Id.*

5. See *infra* Section II for a discussion of victim impact statements.

6. A presentence report is a document prepared by a probation officer that contains information for use by a judge or a jury during sentencing.

7. The federal provision for victim impact statements, as it appears in the amended version of Federal Rules of Criminal Procedure 32(c), reads as follows:

(2) REPORT. - The presentence report shall contain -

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

128 CONG. REC. H8465 (daily ed. Oct. 1, 1982).

8. *See* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES chs. 4, 12 (1985). For purposes of this Comment, harm is defined as the injury done or risked by the act. *Id.*

9. *Id.* at ch. 12. Culpability goes to the factors of intent, motive and circumstance that determine the extent to which an offender can be held accountable for an act.

10. 111 S. Ct. 2597 (interim ed. 1991).

11. Jeffrey L. Dahmer was denied the possibility of parole on February 18, 1992, when a judge sentenced him to fifteen consecutive life terms in prison. Rogers Worthington, *Dahmer Says He's Sorry, Gets 15 Life Terms*, CHICAGO TRIBUNE, Feb. 18, 1992, at 3 [hereinafter Worthington]. This "was the maximum sentence the judge, Laurence C. Gram, Jr., of the Milwaukee County Circuit Court, could give Mr. Dahmer for killing and dismembering fifteen boys and young men to fulfill his sexual desires." *Fifteen Life Terms and No Parole for Dahmer*, N.Y. TIMES, Feb. 18, 1992, at A14 [hereinafter *Fifteen Life Terms*]. "If he were to gain parole in one sentence, the next sentence would automatically take effect, making him ineligible for parole for 936 years." *Id.* Gerald Boyle, Mr. Dahmer's lawyer, said no appeal is planned. *Id.*

derstandably hysterical relative of a victim[12] shouting obscenities and physically charging[13] the offender while giving her statement during sentencing.[14] This Comment discusses and describes: (1) the various types of victim impact statements;[15] (2) the shift in the law of sentencing toward the goal of retribution;[16] (3) some underlying principles of retribution;[17] (4) the case law marking the slow acceptance of victim impact statements and reflecting the move towards retribution;[18] and (5) how retribution, through the use of victim impact statements, can work in Ohio's criminal justice system.[19]

II. BACKGROUND

A. *Victim Impact Statements: The Various Types*

Since Congress passed the Victim and Witness Protection Act of 1982,[20] at least thirty-six states have enacted victim impact statement statutes.[21] The federal statute differs considerably from the numerous

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12. The relative's name was Rita Isbell. She was the sister of victim Errol Lindsey. *Fifteen Life Terms, supra* note 11, at A14. Dahmer strangled Lindsey and then proceeded to have anal sex with the corpse. *Id.*

13. Worthington, *supra* note 11, at 3. Isbell's exact words were: "[t]his is how you act when you're out of control." *Id.* "[S]he called him 'Satan,' shouted 'I hate you,' and screamed obscenities at Dahmer." *Id.* Rita Isbell then leaped out from the podium towards Dahmer. Debbie Howlett, *Dahmer Sentencing Explodes in Emotion*, USA Today, Feb. 18, 1992, at 3A [hereinafter Howlett]. Bailiffs restrained Isbell. Dahmer did not flinch throughout the entire incident. *Id.*

14. Nine relatives of Dahmer's victims gave victim impact statements describing the pain they had suffered. *Fifteen Life Terms, supra* note 11, at A14.

"Shirley Hughes, whose son Tony was Dahmer's 12th victim, read a poem written by a friend in Tony's name: 'when you cry place a teardrop outside the windowledge and I'll come by and replace it with one of mine.' " Howlett, *supra* note 13, at 3A.

"Janie Hagen, mourning brother Richard Guerrero, spoke in Spanish, calling Dahmer *'diablo, puro diablo'* — devil, pure devil." *Id.*

Donald Bradehoft, whose brother Joseph died three days before Dahmer's arrest, cried "I hope you go to hell!" *Id.*

" 'You took his life like a thief in the night,' said Stanley Miller, uncle of Ernest Miller, who had lived in Chicago for a while where he planned to study dance." Worthington, *supra* note 11, at 3.

" 'You took my 17-year-old son away from me . . . . You took my daughter's only brother away from her, she'll never have the chance to sing and dance with him again,' said Dorothy Straughter, mother of Curtis Straughter." *Id.*

15. *See infra* Section II, subsection A.

16. *See infra* Section II, subsection B(1).

17. *See infra* Section II, subsection B(2).

18. *See infra* Section II, subsection C.

19. *See infra* Section III.

20. *See supra* note 1 and accompanying text.

21. *See* ARIZ. REV. STAT. ANN. §§ 12-253(4), 13-702(D)(9) (1992); CAL. PENAL CODE § 1191.1 (West 1982 & Supp. 1993); COLO. REV. STAT. § 16-11-102 (West 1973); CONN. GEN. STAT. ANN. §§ 54-91a (West 1985), 54-91c (West 1985 & Supp. 1993); DEL. CODE ANN. tit. 11, § 4331f (1987); FLA. STAT. ANN. § 921.143(2) (West 1988); GA. CODE ANN. § 27-2502.1 (Harrison 1987 & Supp. 1993); IDAHO CODE § 19-5306(b) (1987); ILL. ANN. STAT. ch. 38, para. 1005-

state statutes in many important respects.[22] The Delaware statute, for example, requires a victim's statement to be included in the presentence report, provided that the victim is willing to cooperate.[23] In Iowa, however, a victim impact statement is only prepared upon an order of the trial court.[24] The Nebraska statute gives much leeway to the victim and allows the victim to compose his or her own statement in an unrestricted format.[25] In contrast, the Ohio statute requires a probation officer to write the statement and to give an objective assessment of the degree of harm caused by the crime.[26] California's victim impact

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3-2(b) (Smith-Hurd 1982 & Supp. 1992); IND. CODE ANN. §§ 35-38-1-8 to 1-9 (Burns 1988); IOWA CODE ANN. § 901.3 (West 1985 & Supp. 1993); KAN. STAT. ANN. § 21-4604(2) (1989); LA. CODE CRIM. PROC. ANN. art. 875(B) (West 1988); ME. REV. STAT. ANN. tit. 17-A, § 1257(2) (West 1964 & Supp. 1991); MD. ANN. CODE art. 41, § 4-609(c)(3) (1986); MASS. GEN. LAWS ANN. ch. 279, § 4B, ch. 258 B, § 3(h) (West 1958 & Supp. 1992); MINN. STAT. ANN. § 611A.037 (West 1956 & Supp. 1992); MONT. CODE ANN. §§ 46-18-112, 46-18-242 (1987); NEB. REV. STAT. § 29-2261(a) (1943); NEV. REV. STAT. § 176.145(3) (1986); N.H. REV. STAT. ANN. § 651:4-a (1955); N.J. STAT. ANN. § 2C:44-6(b) (West 1973 & Supp. 1992); N.Y. CRIM. PROC. LAW § 390.30(3) (McKinney 1983 & Supp. 1992); OHIO REV. CODE ANN. §§ 2929.12, 2947.051 (Baldwin 1992); OKLA. STAT. ANN. tit. 22, § 982 (West 1983); OR. REV. STAT. §§ 137.530(2) (1991), OR. REV. STAT. §§ 144.102(h) (1991); PA STAT. ANN. tit. 71, § 180-9.3 (1990 & Supp. 1992); R.I. GEN. LAWS §§ 12-28-3(14), 12-28-4, 12-28-4.1 (1956 & Supp. 1991); S.C. CODE ANN. § 16-3-1550(a) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 23A-27-1.1 (1988); TENN. CODE ANN. §§ 64-13-20(4) (1990); VT. STAT. ANN. tit. 28, § 204(e) (1959); tit. 13, § 7006 (Supp. 1991); VA. CODE ANN. § 19.2-299.1 (1950); WASH. REV. CODE ANN. § 7.69.030(11) (West 1961); W. VA. CODE §§ 61-11A-2, 61-11A-3, 61-11A-6 (1989); WIS. STAT. ANN. §§ 950.04(2m), 950.05 (1)(dm) (West Supp. 1991).

22. See *supra* note 7 for an example of a federal victim impact statute. The federal statutory provision for victim impact statements provides for a report containing information concerning the prior criminal record of the defendant, any circumstances affecting the defendant's behavior, and information concerning any harm (be it financial, psychological, or physical) suffered by the victim as a result of the crime. FED. R. CRIM. P. 32(c). This provision, while giving some attention to the victim, does not go so far as to allow the victim to give his or her opinion of the offender and what he or she feels would be an appropriate punishment. The provision also does not allow a victim to give his or her statement personally during the sentencing of an offender.

In contrast, several state statutes focus to a greater extent upon the concerns of the victim as opposed to those of the defendant. For example, in California any victim may appear personally during sentencing and express his or her views or opinions concerning the crime and the amount of restitution that should be imposed. *See* CAL. PENAL CODE § 1191.1 (West Supp. 1992). In Ohio, the court must consider a victim impact statement in determining the sentence to be imposed upon an offender. *See* OHIO REV. CODE ANN. § 2947.051 (Baldwin 1992). Therefore, state statutes are generally much broader in that they allow a victim not only to express his or her opinion of the offender, but also to give it in person during sentencing.

23. *See* DEL. CODE ANN. tit. 11, § 4331(d)-(g) (1987). If a victim is "ascertain[able], a victim impact statement shall be presented to the court prior to the sentencing" of a person convicted of a felony or a misdemeanor resulting in death. *Id.* § 4331(d). This provision is applicable as long as the victim has "cooperated with the court and with presentence officers." *Id.* § 4331(g).

24. *See* IOWA CODE ANN. § 901.3 (West Supp. 1988).

25. *See* NEB. REV. STAT. § 29-2261 (1985). A presentence report must include "[a]ny written statements submitted to the county attorney or to the probation officer by a victim." *Id.*

26. *See* OHIO REV. CODE ANN. § 2947.051 (Baldwin 1992). In all criminal cases in which a person is convicted of "a felony, the court shall, prior to sentencing of the offender, order the

statute allows the victim to speak at sentencing,[27] a policy that has generated much criticism because of the possibility of unfairly inflaming[28] the jury.[29] For this reason, most victim impact statements utilize a written format.[30]

Regardless of the form of the statement itself, all victim impact statements provide the sentencer with four types of information. The first type of information deals with the circumstances surrounding the crime. During the trial phase, this type of information concentrates primarily upon the circumstances surrounding the crime. During the sentencing phase, however, the focus is upon the "circumstances of the crime and the character of the criminal."[31] This type of testimony is similar to that provided by an eye-witness. A special victim impact statement statute may, therefore, not be necessary to admit this testimony.[32]

The second type of information relates to the identity and characteristics of the victim. The majority of victim impact statement statutes require disclosure of the victim's identity in the statement.[33] Oftentimes, the identity of the victim will be known to the sentencer before

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preparation of a victim impact statement by the department of probation of the county in which the victim of the offense resides, *by the court's own regular probation officer*, or by a victim assistance program" if the offender caused, attempted to cause, or created the risk of physical harm to the victim of the offense. OHIO REV. CODE ANN. § 2947.051(a) (emphasis added). The court shall consider the victim impact statement in determining the sentence to be imposed upon the offender. *Id.*

27. *See* CAL. PENAL CODE § 1191.1 (West Supp. 1988). The statute provides that any victim may "appear personally or by counsel, at the sentencing proceeding and . . . reasonably express his or her views concerning the crime, the person responsible, and the need for restitution." *Id.*

28. *See* FED. R. EVID. 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id. See also* Fed. R. Evid. 403 advisory committee's note which states: " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one." *Id.*

29. *See* Charles J. Ogletree, *The Death of Discretion?*, 101 HARV. L. REV. 1938 (1988) (describing the impact of the testimony of a grief-stricken family member upon a jury).

30. *See, e.g.*, OHIO REV. CODE ANN. § 2947.051(c) (Baldwin 1992).

31. State v. Oliver, 307 S.E.2d 304, 326 (N.C. 1983).

32. This Comment will not focus upon this type of information because it describes both the defendant and the criminal act itself. Such information is irrelevant to an assessment of the "harm" element, which concentrates primarily upon the effect of the defendant's acts with respect to his victim and/or the victim's family. In the sentencing process, an assessment of the harm caused is an integral part of a retribution scheme. This Comment will, therefore, focus upon the three other types of information which go to the issue of the harm caused by the defendant's criminal acts. See generally *infra* notes 79-87 and accompanying text for a discussion of the "harm" element in a system of retribution.

33. *See, e.g.*, MD. CODE ANN. art. 41, § 4-609(c)(3) (1986). "A victim impact statement shall state in writing: (1) the *identity* of the victim of the offense . . . ." *Id.*

sentencing.[34] It is unclear how much information about the victim, other than his identity, should be included in these statements. Most likely, a specific feature of a victim which made him or her especially susceptible to the offender, such as age or a particular handicap, will be considered relevant to establishing the existence of aggravating circumstances during the sentencing process.[35]

A third type of information concerns the level of harm suffered by the victim and the victim's family. The main goal of most victim impact statutes is to provide the sentencer with information concerning the harm caused by the offender's act.[36] In Ohio, for example, this harm may include economic loss, physical injury, harm to the victim's personal welfare and family life, as well as any resulting stress or trauma which forces the victim to seek psychological services.[37]

Although the use of victim harm information during sentencing is now permissible following the United States Supreme Court's decision in *Payne v. Tennessee*,[38] previous decisions disagreed as to whether the level of harm suffered by the victim and the victim's family was a relevant consideration during sentencing. Before the passage of victim impact legislation, one court faced with this dilemma held that "the fact that a victim's family is . . . bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement . . . has no [place in the] sentencing in a criminal case."[39] After legislatures passed victim impact statutes, however, such information was deemed "a sound and realistic measure of the seriousness of the harm occasioned by the particular offense."[40] In the face of the shift towards retribution as a sentencing goal, as well as

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34. For example, the identity of the victim can be disclosed during the trial phase when the manner or circumstances surrounding the crime are disclosed.

35. U.S. DEPARTMENT OF JUSTICE, VICTIMS OF CRIME: PROPOSED MODEL LEGISLATION, II-9 (1986).

36. *See* OHIO REV. CODE ANN. § 2947.051(b) (Baldwin 1992). See *infra* note 37 for the text of this statute.

37. OHIO REV. CODE ANN. § 2947.051(b) (Baldwin 1992). In pertinent part, the text of the statute reads:

> Each victim impact statement shall identify the victim of the offense, itemize any economic loss suffered by the victim as a result of the offense and the seriousness and permanence of the injury suffered by the victim, identify any change in the victim's personal welfare or familial relationships and any psychological impact experienced by the victim or the victim's family . . . and contain any other information related to the impact of the offense upon the victim as the court requires.

Id.

38. Payne v. Tennessee, 111 S. Ct. 2597 (interim ed. 1991). See *infra* notes 179-98 and accompanying text for a thorough discussion of *Payne*.

39. People v. Levitt, 203 Cal. Rptr. 276, 288 (Cal. Ct. App. 1984).

40. Clemens v. State, 680 P.2d 1179, 1188 (Alaska Ct. App. 1984); *see also* Howard v. State, 473 So. 2d 10, 11 (Fla. Dist. Ct. App. 1985).

the Supreme Court's recent decision in *Payne*, more courts will now be willing to use an assessment of the harm caused by the defendant as a sentencing consideration.

A victim's opinion of the defendant and the sentence he should receive is the fourth and final type of victim impact information. A victim's opinion in this regard is probably the most controversial type of victim impact information currently in use.[41] Although California's victim impact statute[42] contains a provision allowing the introduction of victim opinions at sentencing, in *Booth v. Maryland*,[43] the United States Supreme Court held that such information is inadmissible due to its prejudicial nature and its irrelevance in the sentencing proceeding.[44] In summary, victim impact statements can provide a sentencer with different types of information including the victim's identity, the amount of harm the defendant has caused the victim and his family, and even the victim's opinion of the defendant.

B. The Shift Toward Retribution As a Sentencing Goal

Much of the controversy over victim impact statements stems from the historical disagreement over the primary purpose of punishment.[45] The four classic theories of punishment, as set forth in the Sentencing Reform Act of 1984, are: (1) retribution; (2) deterrence; (3) incapacitation; and (4) rehabilitation.[46] In discussing the disagreement surrounding the debate concerning which theory prevails, one commentator has noted that "[a]t different times, different justifications are in ascendancy, but one single justification never entirely determines the imposition of the criminal sanction."[47] Throughout this ever changing and uncertain area of the law, several trends have appeared with re-

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41. This is due to the highly inflammatory nature of such comments and their possible effect on a sentencing judge or jury.

42. *See* CAL. PENAL CODE § 1191.1 (West Supp. 1988). See *supra* note 27 for the text of this statute.

43. 432 U.S. 496 (1987).

44. *Id.* Although Payne v. Tennessee, 111 S. Ct. 2597 (interim ed. 1991), overturned *Booth* with respect to victim impact statements dealing with the effect of the crime on the victim's family and victim characteristics by holding that these statements are admissible, *Booth* still bars statements of victim opinion.

45. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1 (1968) ("any morally tolerable account of [criminal punishment] must exhibit it as a compromise between distinct and partly conflicting principles"); EDMUND PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 1-2 (1966) (noting the theoretically irreconcilable differences between the retributive and utilitarian theories of punishment) [hereinafter PINCOFFS].

46. 18 U.S.C. § 3553(a)(2) (Supp. IV 1986).

47. Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 177, 184 (Spring, 1989) [hereinafter Henderson].

spect to the issue of which theory dominates sentencing in the American criminal justice system.

1. Failure of Rehabilitation and Deterrence Resulting in the Emergence of Retribution

The earliest examples of sentencing law focused upon the goal of retribution.[48] Some of the most notable examples of the importance of this goal are the punishments prescribed by biblical law[49] and the Code of Hammurabi.[50] Prior to 1950, sentencing in the American criminal justice system focused upon retribution.[51] During the 1950s, however, the predominant goals of punishment in the United States shifted from retribution and incapacitation to the theories of deterrence and rehabilitation.[52] During this era, courts rejected retribution's goal of making the punishment fit the crime and instead attempted to make the punishment fit the individual offender.[53]

Underlying the theory of rehabilitation is "the notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare and satisfactions of offenders."[54] The rehabilitative model is

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48. Paul Boudreaux, Comment, Booth v. Maryland *and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177, 184 (1989) [hereinafter Boudreaux].

49. *See Exodus* 21:24-25 (New American 1983). "[An] eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe." *Id.* "[If] a man steals an ox or a sheep and [kills] or sells it, he shall restore five oxen for the one ox, and four sheep for the one sheep." *Id.* at 21:37.

50. CHILPERIC EDWARDS, THE HAMMURABI CODE AND THE SINIATIC LEGISLATION 29, 61 (1904). The Hammurabi code states:

> If a man has stolen an ox, or a sheep, or an ass, or a pig, or a boar, either from a God or a palace, he shall pay thirty-fold. If he is a plebeian, he shall render ten-fold. If the thief has nothing to pay, he shall be slain . . . . If a son has struck his father, his hands shall be cut off. . . . If a man has destroyed the eye of a freeman, his own eye shall be destroyed.

Id.

51. *See* Boudreaux, *supra* note 48, at 182-84.

52. *See* Williams v. New York, 337 U.S. 241 (1949). In this case the Supreme Court stated that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Id.* at 248.

53. *See id.* at 252. In *Williams*, for example, the defendant was convicted of a murder which occurred during a burglary. The jury recommended a life sentence after being presented with a choice between this option and the death penalty. The trial judge, however, decided to impose the death penalty. The judge took several of the offender's characteristics into consideration, including a probation report stating that he was a "menace to society," and concluded that the death sentence was appropriate. *Id.* at 244. The Supreme Court of the United States affirmed the sentence. *Id.* at 252.

54. *See* FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 1, 2 (1981). The rehabilitation model may be based on the assumption that the underlying causes of criminal behavior can be identified. Otherwise, treatment would be ineffective. *See generally* AMERICAN

founded upon the premise that a criminal can be cured of his tendency to commit crime through treatment.[55] Since the focus is upon the criminal, concern for the victim becomes secondary.[56]

The rehabilitative theory has lost much of its following in the United States.[57] One factor influencing this decline is the general view that recidivism is apparently unrelated to the presence or absence of rehabilitative treatment.[58]

Following the decline of rehabilitation and deterrence, retribution has emerged as the most prominent sentencing goal.[59] This "just desert" oriented or proportionalist conception of sentencing makes the severity of the punishment depend principally upon the gravity of the offense.[60] These concepts are present in sentencing schemes in a number of jurisdictions. Several states have adopted sentencing guidelines based, in significant part, on the gravity of the offense.[61] Many courts have acknowledged retribution as a primary goal of criminal sentencing.[62] Finland[63] and Sweden,[64] for example, have enacted sentencing

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FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 36-37 (1971) [hereinafter AMERICAN FRIENDS].

55. AMERICAN FRIENDS, supra note 54, at 36-37; *see also* FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 112, 171-78 (1982). Robert Martinson, *"New Findings, New Views: A Note of Caution Regarding Sentence Reform,"* 7 HOFSTRA L. REV 243 (1979).

56. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

57. *See* PINCOFFS, *supra* note 45, at 1-2.

58. *See, e.g.*, LAWRENCE ROSS, DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL (1982); VON HIRSH, *supra* note 8; ch. 4; *see generally* DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975) (summarizing several studies which have evaluated the effects of various treatment techniques on recidivism).

59. Andrew von Hirsch, *Deservedness and Dangerousness in Sentencing Policy*, CRIM. L. REV. 79 (1986).

60. *See generally* ROBIN A. DUFF, TRIALS AND PUNISHMENTS (1986); RICHARD SINGER, JUST DESERTS (1979); ANDREW VON HIRSCH, DOING JUSTICE (reprint ed., 1985) (1976); VON HIRSH, *supra* note 8; Andrew Ashworth, *Criminal Justice and Deserved Sentences*, CRIM. L. REV. 340 (1989); Andrew von Hirsh, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"*, 1 CRIM. L.F. 259 (1990).

61. For example, Minnesota, Oregon, and Washington adapted guidelines that emphasize proportionality of sentence (retribution). *See* ANDREW VON HIRSH ET AL., THE SENTENCING COMMISSION AND ITS GUIDELINES, chs. 2, 5 and app. (1987).

62. *See* Harris v. Alabama, 352 So. 2d 479 (Ala. 1977) (retribution is a proper and prominent goal of sentencing); State v. DePew, 528 N.E.2d 542, 566 (Ohio 1988) (Wright, J., concurring) (public demands retribution by way of death sentence where facts reveal a brutal and senseless murder); Ohio v. Seiber, No. 87AP-530, 1989 Ohio App. LEXIS 2225 (Ohio Ct. App. 1989) (holding that the primary justification for sentencing is retribution and that the argument that retribution is an improper justification is not valid), *aff'd*, 56 Ohio St. 3d 4 (1990). *But see* Karr v. Alaska, 686 P.2d 1192 (Alaska 1984) (retribution not considered in sentencing scheme). Note that Alaska has no death penalty statute.

63. Finland's law was enacted in 1976. FINNISH PENAL CODE, ch. 6 (1976).

64. Sweden's law was enacted in 1988. SWEDISH CRIMINAL CODE, chs. 29, 30 (1988).

laws in which punishment depends primarily upon the crime's seriousness.[65]

2. Some Underlying Principles of Retribution

Because it is a "just desert" oriented approach, retribution focuses upon the harm caused by the offender, not just upon the offender's characteristics.[66] Under any system of retribution, three common features exist: (1) the punishment focuses upon the individual offender rather than society at large; (2) the gravity of the offense roughly dictates the extent of the sanction; and (3) the offender is punished because he is responsible for evil acts that he could have chosen not to commit.[67] What justifies punishment to a retributivist is not the beneficial consequences of the punishment, but rather the offender's just-desert.[68] Retributive punishment requires proportionality between the gravity of the harm suffered by the victim and the culpability of the offender.[69]

a. Kant's Retribution Theory

Immanuel Kant expounded the theory of retribution upon which many modern day retributivists claim their heritage. Kant believed that the punishment of crime was needed to give the wrongdoer his "just deserts" and to purge the public of the injustice that was created by the criminal act.[70] Thus, under Kant's theory, one who commits murder should be put to death.[71] Kant reasoned that there is not a proportionate relationship between life and death and that there is not a proportionate relationship between the crime of murder and any retaliatory act other than the execution of the criminal.[72] Kant believed that retri-

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65. FINNISH PENAL CODE, ch. 6; SWEDISH CRIMINAL CODE, chs. 29, 30. A crime's seriousness takes into account both the elements of harm and culpability.

66. Leslie Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217, 232 (1982). Professor Sebba discusses the increasing importance of victim harm under a retribution model, thus reflecting a shift away from the prior focus on the offender alone in a rehabilitation scheme. *Id.*

67. CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 39 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

68. MICHAEL S. MOORE, LAW AND PSYCHIATRY 233-43 (1984).

69. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY, "MURDER AND THE PRINCIPLES OF PUNISHMENT: ENGLAND AND THE UNITED STATES" 88 (1988).

70. IMMANUEL KANT, THE PHILOSOPHY OF LAW (West Hastig trans., 1887).

71. *Id.* at 50-77.

72. *Id.* Kant went so far as to say that:

> Even if a civil society resolved to dissolve itself with the consent of all its members - as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves through the whole world - the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the

bution obliged the state to punish an offender.[73] Kant also offered a persuasive reason for placing retribution in a superior position to deterrence:

> Judicial punishment can never be administered merely as a means of promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another, not be [t]reated as though he were subject to the law of property.[74]

Kant's teachings thus provide a foundation for modern retributive theory.

Although most modern retributivists refer to the basic foundations of Kant's approach, they reject his *quid pro quo* concept of inflicting the same injury on the wrongdoer that he has committed.[75] This type of "lex talionis"[76] punishment violates a principle of personhood inherent in modern social retribution which requires that the offender be treated with dignity.[77] Respect for the criminal in social retribution requires that the punishment inflicted not only be in proportion to the crime committed, but also that it be humane.[78]

b. Application of Modern Social Retribution Theory

Application of the modern social retribution model requires a close look at the two basic components of crime: *actus reas* - the harm inflicted by the criminal, and *mens rea* - the criminal's mental state when committing the act at issue.[79] These two respective components must each be considered in determining an appropriate sentence.

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people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.

Id.

73. *Id.*

74. *Id.* (emphasis added). Another example demonstrating why deterrence will not work is: [A]fter rape but before sentencing an offender gets into an accident so his sexual desires are dampened and he presents no further danger of rape. Since he is no longer dangerous, he need not be incapacitated, deterred, or reformed. Nothing would justify punishing him other than a goal of retribution.

Id. at 57.

75. *See supra* note 71 and accompanying text. The modern retributivist would reject the idea of punishing a rapist by raping him.

76. "Lex talionis" is defined as "[t]he law of retaliation, which requires the infliction upon a wrongdoer of the same injury which he has caused to another. . . [as] expressed in the Mosaic law by the formula, 'an eye for an eye; a tooth for a tooth.' "

BLACK'S LAW DICTIONARY 913 (6th ed. 1990).

77. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 32-36 (1987) [hereinafter DRESSLER].

78. *See generally*, JOHN KLEINIG, PUNISHMENT AND DESERT ch. VII (1973).

79. *See* DRESSLER, *supra* note 77, at 34.

The crucial component to a retributivist is the level of harm the defendant has inflicted. "All else being equal, punishment will be proportional to the harm inflicted by the wrongdoer."[80] In calculating a proportional punishment, a retributivist examines the severity[81] of the crime committed and sets the appropriate punishment in relation to the severity of the crime. In ascending the ladder of crimes ranked by severity, each more serious crime is compared to the previous offense, with each corresponding punishment set in proportion to the latter.[82]

The second component to be taken into account is the offender's blameworthiness or culpability in causing the harm.[83] The social retributivist takes blameworthiness into account because this theory is based upon the presumption that the offender has voluntarily chosen to commit the crime.[84] In determining whether the offender's act was truly of his own volition, the sentencer may consider any extenuating circumstances which might relieve the offender of moral responsibility for his act.[85] A sentencer using the blameworthiness component should punish an intentionally and voluntarily committed harm more severely then the same harm committed unintentionally. It follows that "punishment should be mitigated when harm, although intentionally inflicted, is caused by some circumstance for which the actor is not to blame that seriously undermines his ability to act freely or reason rationally."[86]

In sum, the sentencer's upper limit when imposing punishment for an offense is the harm component. The sentencer must next consider any mitigating circumstances which go toward the responsibility of the

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80. DRESSLER, *supra* note 77, at 34.

81. In considering the seriousness of a crime, most Americans generally find violent crimes to be more serious than their nonviolent counterparts. At the very extreme, extinguishing the life of another ranks as the most serious crime. *See* Joshua Dressler et al., *Effect of Legal Education Upon Perceptions of Crime Seriousness: A Response to* Rummel v. Estelle, 28 WAYNE L. REV. 1247, 1294-99 (1982).

82. DRESSLER, *supra* note 77, at 34-35.

83. DRESSLER, *supra* note 77, at 35.

84. For example, a retributivist assumes that a murderer intended to kill his victim.

85. See DRESSLER, *supra* note 77, at 35 for an example of this type of consideration. Professor Dressler notes:

> [In] distinguish[ing] between two intentional killers, compare the contract killer with a father who intentionally kills a negligent automobile driver because the parent was emotionally overwrought from observing his child struck by the vehicle of the driver. Intuition probably tells us that the latter killer is less deserving of blame than the contract killer, although both killed their victims intentionally, because the father committed the homicide under the influence of an emotional condition for which there was a reasonable excuse.

Id.

86. DRESSLER, *supra* note 77, at 36.

offender for the commission of the offense and which adjust the punishment accordingly.[87]

C. Victim Impact Statements and Their Place In The Retribution Scheme

1. Victim Impact Statements as an Assessment of Harm: The Evolving Case Law

In the context of retribution,[88] victim impact statements are relevant because they provide the sentencer with an assessment of the harm component.[89] A retributivist needs to consider harm along with blameworthiness in order to calculate an appropriate sentence.[90] The slow acceptance of victim impact statements by the United States Supreme Court reflects not only the gradual emergence of retribution as a primary goal of criminal sentencing, but also lingering doubts regarding the practical problems associated with an objective assessment of the harm component.

a. Booth v. Maryland

In *Booth v. Maryland*,[91] the United States Supreme Court considered the constitutionality of a Maryland statute which required victim impact statements to be included in presentence reports for capital cases.[92] The Maryland Circuit Court of Baltimore City convicted the defendant in *Booth* of murdering an elderly couple.[93] During the sentencing phase of the trial, the prosecutor read a victim impact statement to the jury.[94] The Maryland Division of Probation had prepared the statement which described the victims as "amazing people"[95] who were "butchered like animals."[96] The statement also gave the family's

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87. *See generally* C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1952).

88. *See supra* notes 59-69 and accompanying text for discussion of the retribution concept.

89. See *supra* notes 80-82 and accompanying text for a discussion of the harm concept.

90. See *supra* notes 83-86 and accompanying text for a discussion of the blameworthiness component.

91. 482 U.S. 496 (1987).

92. *Id.* at 509.

93. Booth v. State, 507 A.2d 1098, 1103 (Md. 1986), *vacated in part*, 482 U.S. 496 (1987), *vacated en banc*, 558 A.2d 1205 (1989). The jury convicted Booth of the first degree murders of Mr. and Mrs. Branstein, and imposed the death penalty. *Booth*, 507 A.2d at 1103.

94. *Booth*, 482 U.S. at 500-01.

95. *Id.* at 510.

96. *Id.* at 512. The victim impact statement also discussed the effect of the murders on an upcoming wedding in the family and upon the daily lives of the victims' family. *Id.* at 509-15.

opinion that the defendant could not be rehabilitated.[97] The defendant appealed the decision contending that the use of the victim impact statement violated his Eighth and Fourteenth Amendment rights.[98] The Maryland Court of Appeals affirmed the decision and held that the victim impact statement was "straightforward and factual" and that the death sentence was not imposed arbitrarily.[99]

i. The *Booth* Majority

The United States Supreme Court reversed the Maryland Court of Appeals' decision and held that the admission of the victim impact statement during the sentencing phase of the trial violated the defendant's Eighth Amendment rights.[100] Justice Powell began the Court's analysis by focusing on the need to limit the information introduced during sentencing to facts related to the defendant's "personal responsibility and moral guilt."[101] He noted that a victim impact statement typically focuses on the victim and not on the defendant.[102] The Court added that people do not commit crimes based upon the effect of the crime on people other than the victim.[103] The only time that such information would be relevant is when an offender commits a crime with knowledge of the consequences because this relates to his state of mind at the time of the crime.[104]

The Court also noted that the composition of the victim impact statement created the risk that the sentencer may arbitrarily impose the death penalty.[105] In *Booth*, the victims' family was very articulate in expressing their grief.[106] The majority questioned what would hap-

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97. *Id.* at 513. The victims' daughter's exact words were that she "doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this." *Id.*

98. Booth v. State, 507 A.2d 1098, 1124 (Md. 1986), *vacated in part*, 482 U.S. 496 (1987), *vacated en banc*, 558 A.2d 1205 (1989).

99. *Id.*

100. *Booth*, 482 U.S. at 509.

101. *Id.* at 502 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

102. *Id.* at 504. Note that such a focus upon only an offender fits into a rehabilitation or deterrence model of punishment. *See supra* Part II, Section B, Subsection 1.

103. *Id.* at 504 n.7. (quoting People v. Levitt, 156 Cal. App. 3d 500, 516-17 (Cal. Ct. App. 1984) (stating that the harm suffered by a victim's family is unrelated to sentencing in a criminal action)).

104. *Id.* at 505. *But see* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1498-1503 (1974) (criminal law imposes punishment based upon actual results and not moral guilt).

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

106. *Id.* at 504-05. The victim impact statement reported that the daughter cried every day. She did not sleep and thought that a part of her had died when her parents were murdered. She also described that she had to clean out her parents' house and that this process took her several weeks. Upon seeing the bloody carpet, knowing her parents had been lying there, she felt like getting down on the rug and holding her mother. *Id.* at 512.

pen if a victim left behind no family, or if the family members were not able to express their grief eloquently.[107] The Court stated that, in this situation, a victim impact statement would not express the amount of grief actually suffered.[108] This would lead, according to the majority, to the imposition of a death sentence based upon a victim impact statement which reflected the ability of the victim's family to express its grief articulately, rather than on the offender's background and the circumstances of the case.[109] Finally, the majority added that the sentencer may only impose the death penalty based on reason and not on caprice or emotion.[110] Allowing the jury to consider emotional factors increases the possibility that the jury will impose a death sentence based upon emotion.[111]

Thus, in terms of a retribution analysis, the majority in *Booth* believed that the level of harm caused by the offender is not relevant to a determination of his moral culpability or blameworthiness. Since the level of harm caused by the defendant's actions was irrelevant to the *Booth* majority, a victim impact statement assessing the harm caused by the offender could not be used in calculating the appropriate sentence.

ii. *Booth* Dissent - Justice White

In his dissent, Justice White asserted that the majority should have respected the Maryland legislature's determination that the harm caused by the defendant, as expressed through a victim impact statement, is relevant during sentencing.[112] He added that a jury's consideration of the harm element is proper and that harm is a relevant factor to be considered during sentencing.[113] Justice White gave an illustrative example of how the offender's level of harm is a relevant consideration during sentencing by citing Title Eighteen, Sections 351, 1111 and 1751 of the United States Code which collectively authorize the death penalty for an offender who murders the head of a governmental agency, a member of Congress, a Supreme Court Justice, the Vice President, or President of the United States.[114] In enacting these statutes, Congress recognized that the level of harm caused by the commis-

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107. *Id.* at 505.

108. *Id.*

109. *Id. But see* Lodowski v. State, 490 A.2d 1228, 1265 n.6 (Md. 1985) (Cole, J., concurring) (victim impact statements are not prohibited by the Constitution and may be relevant during sentencing), *vacated on other grounds*, 475 U.S. 1078 (1986).

110. *Booth*, 482 U.S. at 508 (citing Gardner v. Florida, 430 U.S. 349, 358 (1977)).

111. *Id.* at 506.

112. *Id.* at 515 (White, J., dissenting).

113. *Id.* at 516 (White, J., dissenting).

114. *Id.* at 516-17 nn.1-2 (White, J., dissenting).

sion of certain crimes may dictate whether an offender receives the death penalty. Justice White added that the information provided in the victim impact statement should be used as an aggravating factor to counter the mitigating circumstances which favor the defendant.[115]

Finally, Justice White argued that the admissibility of a victim impact statement should turn upon the content and degree of prejudice elicited by the statement.[116] In sum, Justice White's dissent[117] advocated the consideration of the offender's level of harm, as stated in a victim impact statement, as a factor to be used in calculating an appropriate sentence. His position strongly resembles one of a social retributivist in that he considers both the harm component and the blameworthiness component necessary to arrive at the proper punishment.

2. The Role of Victim Impact Statements Following *Booth*

a. The "Harmless Error" Standard

The lower courts have interpreted the *Booth* decision regarding the admissibility of victim impact statements during sentencing in various ways. One trend can be called the "harmless error" approach.[118] In *People v. Ghent*,[119] for example, the defendant was convicted of first degree murder and sentenced to death.[120] The defendant appealed to the California Supreme Court arguing that the prosecutor had acted improperly during the sentencing phase of his trial because he referred to the impact of the crime on the victim's family.[121] The court, however, stated that the prosecutor had merely observed that the victim's death would have an impact on her family and friends, and that "[her life] is something that can never be replaced for a moment's pleasure on [the defendant's] part."[122] The court found these statements to be "brief and mild" in comparison to the lengthy and specific comments

115. *Id.* at 517 (White, J., dissenting).

116. *Id.* (White, J., dissenting).

117. Justice Scalia also dissented and added that the harm caused by an offender is relevant, along with his blameworthiness, to the sentencing decision. *Id.* at 519 (Scalia, J., dissenting). Chief Justice Rehnquist, and Justices White and O'Connor joined his dissent. *Id.*

118. *See, e.g.*, People v. Rich, 755 P.2d 960, 993-94 (Cal. 1988) (prosecutor's statements made during closing arguments do not constitute reversible error under *Booth* because no evidence was introduced regarding the impact of the victim's death), *cert. denied*, 488 U.S. 1051 (1989); Daniels v. State, 528 N.E.2d 775, 782 (Ind. 1988) (prosecutor's statements during closing argument did not violate *Booth* because the prosecutor only commented on evidence concerning the victim's family's relationship which had been introduced during the guilt phase of the trial), *vacated*, 491 U.S. 902 (1989), *aff'd on remand*, 561 N.E.2d 487 (1990) (refusing to apply the *Booth* standard retroactively to Indiana's statutory capital sentencing scheme).

119. 739 P.2d 1250 (Cal. 1987), *cert. denied*, 485 U.S. 929 (1988).

120. *Id.* at 1255.

121. *Id.* at 1271-72.

122. *Id.* at 1271.

made in *Booth* which presented specific details "regarding the actual impact on the victim's family."[123] Thus, the court affirmed the conviction because the prejudicial effect of the comments was nonexistent. Therefore, the admission of the prosecutor's statement constituted "harmless error."[124]

Similarly, in *People v. Jones*,[125] the Supreme Court of Illinois affirmed the death sentence of a defendant convicted of murder and attempted murder.[126] The defendant appealed claiming that the trial judge had improperly considered a victim impact statement during sentencing.[127] The court looked to language in *Booth* which indicated that information relating directly to the circumstances of the crime might be admissible during sentencing.[128] The court then concluded that the victim impact statement at issue related to the circumstances of the crime. Therefore, the trial judge's consideration of the victim impact statement constituted harmless error.[129]

b. State v. Huertas

Not all lower courts have read *Booth* so narrowly as to follow a "harmless error" analysis which allows victim impact statements to be admitted during the sentencing phase of a trial. For example, in *State v. Huertas*[130] the Ohio Supreme Court refused to apply a "harmless error" standard. In *Huertas*, the defendant, Ediberto Huertas, was convicted of one count of aggravated murder with prior calculation and design and one count of aggravated burglary.[131] Before the sentencing phase, Huertas requested a presentence report pursuant to Ohio Revised Code Section 2929.03(D)(1).[132] The report contained a summary

123. *Id.*
124. *Id.*
125. 528 N.E.2d 648 (Ill. 1988), *cert. denied*, 489 U.S. 1040 (1989).
126. *Id.* at 667.
127. *Id.* at 665.
128. *Id.* at 666.
129. *Id.*
130. 553 N.E.2d 1058 (Ohio 1990), *cert. granted*, 112 S. Ct. 39 (interim ed. 1990), *and cert. dismissed*, 111 S. Ct. 805 (interim ed. 1991).
131. In the early morning hours of June 7th, 1986, Ediberto Huertas stabbed and killed Ralph Harris, Jr. *Huertas*, 553 N.E.2d at 1061. The fight followed a heated disagreement over a woman, Elba Ortiz. *Id.* at 1061. Earlier, Huertas had threatened to kill Harris if he did not stop dating Ortiz. *Id.* Huertas was separated from his wife and dating Ortiz. *Id.* Huertas told Harris that " '[h]e didn't want to end their friendship this way' but he 'was going to waste him' if he didn't stop seeing Ortiz." *Id.* An hour later, after Harris told Huertas that Ortiz did not want to see him anymore, Huertas stated, "I still say I am going to have to waste you. . . . You know, you know I don't do - I don't do it fair, . . . but I'm going to waste you." *Id.* During the evening of June 6th, 1986, after Huertas had consumed a large amount of alcohol, cocaine, and marijuana, he broke into Ortiz's apartment where she and Harris were sleeping, and the fight began. *Id.*
132. The text of this provision reads in part:

of an interview with the victim's parents in which the victim's father, Mr. Harris, expressed his opinion that the defendant should be sentenced to death.[133] Mrs. Harris, the victim's mother, also testified about the victim's good character.[134] The jury determined that the aggravating circumstances outweighed the mitigating factors and recommended a death sentence on both counts.[135] The trial court accepted this recommendation.[136] On appeal, Huertas challenged the use of the victim impact statements during sentencing.[137] The Ohio Ninth District Court of Appeals affirmed both the conviction and the sentence.[138] The Supreme Court of Ohio, however, affirmed the conviction, but vacated the death sentence and remanded the case for the imposition of a life term.[139]

i. The *Huertas* Majority: Justice H. R. Brown

The majority in *Huertas* relied heavily on *Booth*'s holding that the introduction of a victim impact statement during the sentencing phase of a capital trial is unconstitutional.[140] The Ohio Supreme Court focused on Mr. Harris' statement regarding an appropriate sentence and concluded that its consideration at sentencing was unconstitutional.[141] Justice Brown wrote that including the victim impact statement in the sentencing proceedings violated the defendant's constitutional right to have the sentencing decision made by a judge and jury.[142]

The majority followed *Booth's* reasoning that admission of victim opinion information would only serve to distract the jury from its task of determining whether the death penalty is appropriate in light of the record and background of the offender.[143] The court acknowledged

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When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. *When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made, and . . . shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06* of the Revised Code. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to that trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division . . . ."

OHIO REV. CODE ANN. § 2929.03(D)(1) (Baldwin 1992) (emphasis added).

133. *Huertas*, 553 N.E.2d at 1062.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1069.
140. Booth v. Maryland, 482 U.S. 496, 509 (1987).
141. *Huertas*, 553 N.E.2d at 1065.
142. *Id.*
143. *Booth*, 482 U.S. at 507. Note, however, that the Supreme Court of Ohio has held that the admission of victim impact evidence is "harmless in *bench* trials where there was no indication

Booth's finding that evidence of suffering or harm can be relevant to the sentencing determination, but based its holding solely upon the opinion statement of Mr. Harris.[144] By centering its decision on the opinion statement, the court also precluded consideration of how the victim impact statement assesses the offender's harm.[145]

ii. The *Huertas* Dissents: Justices Douglas and Resnick

In his dissent, Justice Douglas condemned the majority's interpretation of *Booth*.[146] He urged the court to interpret *Booth* to require "an automatic vacating of the death sentence anytime victim impact evidence is admitted in the sentencing phase of a capital jury trial."[147] Justice Douglas recommended that *Booth* be read as barring the admission of victim impact statements only when the language of the statement creates a substantial risk that a sentencing determination will be based upon irrelevant or arbitrary considerations.[148] He concluded that the death sentence should be affirmed because the defendant would have been sentenced to death regardless of the victim impact evidence.[149]

Justice Resnick also dissented.[150] She stressed the importance of allowing victim impact statements to assist the jury in making a proper sentencing determination.[151] She stated that a jury cannot make such a determination if it has no information concerning the harm the offender has caused.[152] Thus, both Justice Resnick and Justice Douglas argued in favor of permitting the sentencer to weigh the impact of the

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that the three judge panel relied on the victim impact evidence in arriving at its sentence." *Huertas*, 553 N.E.2d at 1063; *see* State v. Brewer, 549 N.E.2d 491, 497 (Ohio 1990); State v. Sowell, 530 N.E.2d 1294, 1302 (Ohio 1988); State v. Post, 513 N.E.2d 754, 759 (Ohio 1987).

144. *Huertas*, 553 N.E.2d at 1065.

145. *See id.*

146. *Id.* at 1070-71 (Douglas, J., dissenting).

147. *Id.* at 1071 (Douglas, J., dissenting).

148. *Id.* at 1070-71 (Douglas, J., dissenting).

149. *Id.* at 1071 (Douglas, J., dissenting). Justice Douglas was most likely referring to the process by which an appellate court reviews a death sentence when he made the statement that a conviction should be affirmed if the victim impact evidence was not a crucial factor in the determination. *See id.*

150. *Id.* at 1071 (Resnick, J., dissenting).

151. *Id.* at 1072 (Resnick, J., dissenting).

152. *Id.* (Resnick, J., dissenting). Justice Resnick relied on some language found in Justice Scalia's dissent in *Booth*:

> [C]itizens have found one sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced - which (and *not* moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty.

Id. (Resnick, J., dissenting) (citing Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting)).

murder on the victim's family against any mitigating evidence offered by the defendant.[153] This type of application presents a balanced retributivist approach to sentencing by considering the level of harm caused by the defendant as well as the defendant's level of blameworthiness. At this stage in the development of victim impact jurisprudence, however, *Booth* still precluded the recognition of retribution as a primary goal of sentencing.

c. South Carolina v. Gathers: The Application of *Booth* to Victim Impact Statement Information in Capital Cases

In *South Carolina v. Gathers*,[154] the United States Supreme Court once again addressed the issue of the admissibility of victim impact information. In *Gathers*, Demetrius Gathers and three of his friends attacked Richard Haynes, a self-proclaimed minister with a history of mental problems.[155] At the time of the attack, Haynes had several bags of religious items with him which the attackers scattered on the ground during the attack.[156] After knocking Haynes unconscious, Gathers' friends left, but Gathers remained and continued the assault. Later, Gathers returned with a friend and stabbed Haynes to death.[157]

During a trial before the General Session Court of Charleston County, South Carolina, witnesses testified that Haynes was a religious man.[158] All of the religious items found on Haynes' body were introduced into evidence during the guilt and sentencing phases of the trial.[159] The jury found Gathers guilty of murder.[160] During sentencing, the prosecutor read the contents of one of the prayer cards found on Haynes' body to the jury.[161] The prosecutor concluded with a portrayal of the victim as a religious citizen.[162] The jury recommended that Gathers be put to death.[163]

On appeal to the Supreme Court of South Carolina, Gathers argued that the prosecution's reading of the prayer card during sentenc-

153. *See* Susan A. Jump, Comment, Booth v. Maryland: *Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 GA. L. REV. 1191, 1207 (1987).

154. 490 U.S. 805 (1990).

155. *Id.* at 806. Gathers and his friends assaulted Haynes after Haynes refused to speak with Gathers. *Id.* at 807.

156. *Id.* at 815 (O'Connor J., dissenting).

157. *Id.* (O'Connor, J., dissenting).

158. *Id.* (O'Connor, J., dissenting).

159. *Id.* (O'Connor, J., dissenting).

160. *Id.* at 816 (O'Connor, J., dissenting).

161. *Id.* at 808-09.

162. *Id.* at 808-10.

163. *Id.* at 816 (O'Connor, J., dissenting); State v. Gathers, 369 S.E.2d 141 (S.C. 1988).

ing violated his Eighth Amendment rights under *Booth*.[164] The court agreed with Gathers and reversed the death sentence, holding that a sentencing jury should not be permitted to consider the level of harm caused by the defendant.[165] The United States Supreme Court granted certiorari.[166]

i. The *Gathers* Majority

The United States Supreme Court affirmed the decision of the Supreme Court of South Carolina and held that the contents of the prayer card were inadmissible at sentencing.[167] The majority affirmed its prior decision in *Booth* by once again urging that the sole focus during sentencing should be upon the offender's blameworthiness and not upon the harm he has caused.[168] The Court concluded that the contents of the cards were irrelevant because they failed to provide any probative information regarding the moral culpability of the offender.[169] The majority held that the reading of the contents of the cards was sufficiently similar to a description of the victim's personal characteristics - which was held inadmissible under *Booth*.[170]

ii. The *Gathers* Dissent

In her dissent, Justice O'Connor noted the confusion regarding the proper interpretation of *Booth* in the lower courts[171] and urged the Court to overturn *Booth*. The crux of Justice O'Connor's dissent focused upon the need, under the Eighth Amendment, to have the penalty imposed in a capital case be proportional to both the harm caused and the defendant's blameworthiness.[172] She implied that this type of narrow interpretation of the Eighth Amendment comported with the

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164. *Gathers*, 369 S.E.2d at 143.

165. *Id.*

166. *Gathers*, 490 U.S. at 810-12.

167. *Id.* at 811.

168. *Id.* The majority reasoned that the defendant probably did not have knowledge of the contents of the cards and that, therefore, any inferences about the victim the prosecution drew from the cards were irrelevant and not admissible during sentencing. *Id.*

169. *Id.* at 812.

170. *Id.* at 810-12.

171. See *supra* notes 118-29 and accompanying text for a review of the conflicting interpretations of *Booth*.

172. *Gathers*, 490 U.S. at 814 (O'Connor, J., dissenting). In addressing the impact of *Booth* on the scope of the Eighth Amendment, Justice O'Connor noted that, under a broad interpretation of the Eighth Amendment, almost all information relating to the victim would be inadmissible during the sentencing phase. *Id.* In contrast, Justice O'Connor asserted that, under a narrow interpretation of the Eighth Amendment, information relating to the victim would be admissible during sentencing. *Id.*; *see* Mills v. Maryland, 486 U.S. 367, 398 (1988) (Rehnquist, C.J., dissenting) ("I do not interpret *Booth* as foreclosing the introduction of all evidence, in whatever form, about a murder victim . . . . ").

proportionality requirement under the retribution rationale of sentencing. In other words, both the harm caused by the defendant and the defendant's blameworthiness are relevant to the sentencing decision.[173]

Justice O'Connor criticized the present sentencing system as one-sided because a sentencer routinely considers all types of information when analyzing a defendant's background for mitigating circumstances, yet is prevented from considering similar information about the victim.[174] Justice O'Connor asserted that because the sentencer considers all mitigating circumstances in favor of the defendant, he or she should also consider information proffered by the victim or the victim's family as a basis for a stronger punishment regardless of whether such information is directly related to the circumstances of the crime.[175]

Justice O'Connor set forth a strong retributivist argument by stating that the sentencer should consider the offender's harm to the victim and the victim's family because society has long relied on the notion of retribution in reaching a just punishment.[176] Justice O'Connor relied on the Supreme Court's conclusion in *Gathers* that the level of harm caused by a defendant is a component which is properly used to determine the defendant's culpability.[177] In conclusion, Justice O'Connor stated that the appropriateness of the imposition of the death penalty generally increases with the level of harm suffered by the victim and the victim's family. Harm is, therefore, a relevant factor for a jury to consider, despite the possibility that the jury may become inflamed.[178] Justice O'Connor's dissent represents her willingness to move into a system in which the primary focus is retribution. The *Gathers* majority, however, was unwilling to make such a move.

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173. *Gathers*, 490 U.S. at 814, 817-18 (O'Connor, J., dissenting); *see* Lockett v. Ohio, 438 U.S. 586-604 (1978) (the Eighth Amendment requires the court to look at defendant's characteristics and background as well as the circumstances of the crime in capital cases).

174. *Gathers*, 490 U.S. at 817-21.

175. *Id.*

176. *Id.* at 818; *see also* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (capital punishment serves both the retribution and deterrence goals of sentencing); Ogletree, *supra* note 29, at 1940 (discussing the role of retribution versus rehabilitation in federal sentencing guidelines); Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984) (criminal law considers societal and individual harm to fulfill the sentencing goals of retribution and restitution).

177. *Gathers*, 490 U.S. at 818-20 (O'Connor, J., dissenting). In Tison v. Arizona, 481 U.S. 137 (1987), the Court held that the sentencer may impose the death penalty based upon a "reckless indifference to the value of human life" which later results in death to the victim. *Id.* at 157. In addition, the defendants "subjectively appreciated that their acts were likely to result in the taking of innocent life." *Id.* at 152. The sentencer, however, can only impose the death sentence where the "reckless indifference" later led to a loss of life, or a great amount of harm caused. In this case, the harm caused by the defendants was great because the victims were murdered. Therefore, the Court held that the death sentence may be appropriate. *Id.* at 157-58.

178. *Gathers*, 490 U.S. at 818-20.

d. Payne v. Tennessee: The Ultimate Step Towards Retribution

In *Payne v. Tennessee*,[179] the United States Supreme Court took a large step toward the recognition of retribution as a sentencing goal. The *Payne* Court held that the Eighth Amendment does not erect a per se bar which prohibits a capital sentencing jury from considering victim impact evidence "relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family, or precluding a prosecutor from arguing such evidence at a capital sentencing hearing."[180] The defendant in *Payne* was convicted of the first-degree murders of Charisse Christopher and her two-year-old daughter.[181] During the sentencing phase of his trial, Payne offered testimony which served as mitigating evidence.[182] Afterwards, Charisse's mother was called to the stand and gave testimony of how Nicholas, Charisse's son, missed his mother and sister.[183] In his closing argument, the prosecutor commented on the continuing effects of Nicholas' experience, and how "his mother will never kiss him good night or pat him as he goes off to bed."[184] The jury subsequently convicted Payne and sentenced him to death.[185] On appeal, the Supreme Court of Tennessee upheld Payne's conviction and sentence.[186] The Supreme Court of the United States granted certiorari and partially reversed its prior holdings in both *Booth* and *Gathers*.[187]

e. Harm as a Relevant Factor

The majority in *Payne* began its analysis by stating that *Booth* and *Gathers* were based on two false premises: (1) that evidence of

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179. 111 S. Ct. 2597 (interim ed. 1991).

180. *Id.* at 2599-600.

181. *Id.* The crimes were committed in the victim's apartment after Charisse resisted Payne's sexual advances. *Id.* When the police first arrived at the scene, they encountered Payne leaving the building, so covered in blood that he appeared to be "sweating blood." *Id.* at 2601. Inside the apartment, police found Charisse, her daughter Lacie, and son Nicholas lying on the floor. *Id.* at 2602. Charisse and her daughter had each been stabbed many times and were dead. *Id.* Nicholas, however, was saved after seven hours of surgery. *Id.*

182. *Id.* This evidence included testimony of his mother and father, a clinical psychologist and a friend. *Id.* at 2602-03. The friend testified that she had met Payne at church and that he was a very caring person. *Id.* at 2602.

183. *Id.* at 2603. The exact language of the statement was:

> 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.

Id. (citing app. at 30).

184. *Id.*

185. *Id.*

186. *Id.* at 2603-04.

187. *Id.* at 2604-09.

victim characteristics or harm is irrelevant to the issue of blameworthiness; and (2) that only blameworthiness is a relevant sentencing consideration.[188] The Court stated that retribution is reemerging[189] as a primary goal of criminal sentencing and that, consequently, both an offender's blameworthiness and the level of harm caused by his actions are relevant sentencing considerations.[190]

The Court stated that "wherever judges in recent years have had discretion to impose a sentence," the level of harm caused by the crime has been an important factor in the exercise of that discretion.[191] The "first significance of harm" is as a "prerequisite to the criminal sanction."[192] Its second significance, when a judge has discretion, is as a measure of the "seriousness of the offense and therefore as a standard for determining the severity of the sentence that will be meted out."[193] The Court stated that, in a retributive system, a judge or jury should be allowed to consider the harm caused in order to administer a proper sentence.[194] The Court reasoned that a defendant may present his mitigating evidence and that a victim should consequently be allowed to present aggravating evidence showing the extent of the harm caused by the defendant's actions.[195]

The Court, by rendering its decision in *Payne*, vested the states with the primary responsibility for fixing punishments and determining whether to allow the admission of victim impact statements.[196] The states have traditionally been free to experiment with and devise new procedures to meet the needs of their criminal justice systems.[197] Victim impact evidence is simply another way of informing the sentencing authority of the specific level of harm caused by the defendant. The Court added that the Due Process Clause of the Fourteenth Amendment remains the sole safety mechanism which protects a defendant against a victim impact statement that is so unduly prejudicial that it renders the trial fundamentally unfair.[198]

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188. *Id.* at 2605.

189. *Id.* The Court looked to the shifting focus of the federal sentencing guidelines and to their current focus on retribution. *Id.*

190. *Id.* at 2605-06.

191. *Id.* at 2606.

192. *Id.*

193. *Id.* (citing STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 56 (1988)).

194. *Id.*

195. *Id.* at 2608.

196. *Id.*

197. *Id.*

198. *Id.*; see Darden v. Wainwright, 477 U.S. 168, 179-83 (1986).

In the wake of the Supreme Court's decision in *Payne*, a state is now free to choose whether or not victim impact statements which relate to victim characteristics or the level of harm caused by an offender's act should be admitted during the sentencing phase of capital trials.[199] Although one state has since held that such information is inadmissible under its statutory scheme,[200] many states now allow consideration of victim characteristic and harm information during sentencing.[201]

In *State v. Chinn*,[202] an Ohio appellate court rejected the defendant's argument that the jury improperly considered victim impact evidence during the sentencing phase of the trial.[203] The trial court allowed the victim's mother to testify concerning the extent of the harm both she and other members her family had suffered as a result of her son's murder.[204] Applying *Payne*, the *Chinn* court held that such evidence is admissible and is a relevant sentencing consideration.[205] Like the *Chinn* court, other courts that now admit such information hold that this type of evidence is relevant during sentencing.[206] These courts

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199. *See supra* notes 196-97 and accompanying text.

200. *See, e.g.*, New Jersey v. Erazo, 594 A.2d 232 (N.J. 1991). The Supreme Court of New Jersey has consistently held that information pertaining to victim characteristics and the level of harm caused by the defendant are inadmissible under the state's statutory scheme and its due process guarantees. *Id.* States are perfectly free to declare victim impact statements inadmissible because *Payne's* holding and its objective were to allow each individual state to decide whether victim impact information is a proper consideration for a court to consider during sentencing. The *Payne* decision merely holds that the Eighth Amendment erects no per se bar against the admission of such information. *See Payne*, 111 S. Ct. at 2597.

201. *See, e.g.*, Arizona v. Lavers, 814 P.2d 333 (Ariz. 1991) (holding that information relating to victim characteristics and harm is relevant to the sentencing determination), *cert. denied*, 112 S. Ct 343 (interim ed. 1991); People v. Fierro, 821 P.2d 1302 (Cal. 1991) (victim characteristics are relevant during sentencing), *cert. denied*, 113 S. Ct. 303 (interim ed. 1992); State v. Howard, 588 N.E.2d 1044 (Ill. 1991) (consideration of victim harm is relevant during the sentencing phase of capital trials), *cert. denied*, 113 S. Ct. 215 (interim ed. 1992); Benirschke v. Indiana, 577 N.E.2d 576 (Ind. 1991) (court rejected argument of reversible error when attorney referred to victim suffering and harm when urging the jury to impose the death penalty; this type of victim information is relevant to the issues at hand and in making a proper sentencing determination), *cert. denied*, 112 S. Ct. 3042 (interim ed. 1992).

202. No. 11835, 1991 Ohio App. LEXIS 6497, at *47 (Ohio Ct. App. Dec. 27, 1991), *cert. denied*, 61 U.S.L.W. 3479 (U.S. Jan. 12, 1993).

203. *Id.* at *46-47.

204. *Id.* The victim impact statement at issue provided:

> [We] would like for you and everyone to know what a great loss that we have suffered, the pain has been and will be beyond what words could describe. Only another person that has lost a child to such a tragedy could begin to feel the empty, lonely feelings. Needless to say, we have suffered the greatest loss of our entire life. . . . [W]e really do feel very threatened by this defendant and what he might do to our family. . . . [W]e feel that the time has come for him to be punished according to the law in Ohio.

Id.

205. *Id.* at *47-48.

206. *See id*; *see also* sources cited *supra* note 201 and accompanying text.

have, however, given no reason or explanation as to why it is "relevant."[207] One can reasonably assume that these courts, like the *Payne* Court, consider this material to be "relevant" in order to serve the goal of retribution. By allowing victim impact statements to be considered during sentencing, lower courts assume that this information fulfills the purposes of retribution. Assuming that these statements are in tune with a system of retribution, these courts have not addressed one crucial issue which the Supreme Court has also failed to clarify or enunciate.[208] This issue concerns the proper method of obtaining an accurate and objective assessment of harm in practice.

III. ANALYSIS

This analysis will address each of the following issues in turn: (1) why a state should consider the level of harm suffered by a victim's family to be an appropriate sentencing consideration - that is, why victim impact statements serve the goal of retribution; and (2) how a state, using Ohio as an example, can obtain an objective assessment of harm, and apply it in its existing statutory sentencing scheme as an aggravating factor.

A. Why Should a State Consider Harm as an Appropriate Sentencing Consideration?

The shift toward retribution as a goal of criminal sentencing is seen not only by the evolution of the United States Supreme Court cases dealing with victim impact statements,[209] but also by the instantaneous acceptance of victim impact statements following the *Payne* decision.[210] Assuming that many states recognize retribution as a legitimate goal of criminal sentencing, one may still ask why the level of harm suffered by a victim's family is a necessary consideration when punishing criminals.

The two components of retribution, harm and blameworthiness, must be weighed against each other to arrive at a proper sentencing determination.[211] Despite *Booth's* holding to the contrary, the blameworthiness of a criminal's conduct does not and never has depended solely upon the extent of the physical injuries suffered by the victim.

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207. *See* sources cited *supra* note 201 and accompanying text.

208. *See* Payne v. Tennessee, 111 S. Ct. 2597 (interim ed. 1991).

209. *See id.*; South Carolina v. Gathers, 490 U.S. 805 (1989), *rev'd*, 111 S. Ct 2597 (interim ed. 1991); Booth v. Maryland, 482 U.S. 496 (1987).

210. *See* State v. Chinn, No. 11835, 1991 Ohio App. LEXIS 6497 (Ohio Ct. App. 1991) (example of how quickly a court is willing to accept a victim impact statement after the *Payne* decision), *cert. denied*, 61 U.S.L.W. 3479 (U.S. Jan. 12, 1993).

211. *See supra* Section III, subsection B.

Since the early days of the common law, states have recognized that many crimes are more serious because of the emotional damage inflicted by the offender. In Ohio, as well as in many other states, the most common example of this situation is rape.[212] The physical injuries frequently associated with rape are often no greater than those suffered as a result of a misdemeanor battery, and may even be less severe. Yet, in Ohio, as well as in many other jurisdictions, simple battery is a misdemeanor punishable by only six months in prison,[213] while rape is a felony punishable by five to seven years in prison.[214] The difference between the two offenses is the "psychic harm" or the outrage to the person, and the damage to the feelings of the victim.[215] This example illustrates how the law recognizes a particular crime as being more serious because of the amount of harm caused by the offender's acts.

Another illustration further demonstrates this concept. In California, for example, if a person takes a small amount of money from another by stealth, i.e., petty theft, this crime is classified as a misde-

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212. Rape, in Ohio, according to the commentary under § 2907.02 of the Ohio Rev. Code is defined as including:

> [t]he traditional concept of rape as sexual intercourse with a female by force, but expands upon the offense in four important respects. . . . [T]he acts contemplated include anal intercourse, cunnilingus, and fellatio in addition to vaginal intercourse, because any of such acts can result in physical injury of psychic harm to the victim when committed under circumstances amounting to rape.

OHIO REV. CODE ANN. § 2907.02 (Commentary) (Baldwin 1992).

The following is a comprehensive listing of state statutory provisions for rape which are substantially similar to the Ohio provision:

ALA. CODE § 13A-6-60 (1991); ALASKA STAT. § 11.41.410 (1991); ARK. CODE ANN. § 5-14-101 (Michie 1991); CAL. PENAL CODE § 261 (West 1992); DEL. CODE ANN. tit. 11, § 761 (1991); IDAHO CODE § 18-6101 (1991); ILL. REV. STAT. ch. 110, para. 8-802.1 (1991); IND. CODE ANN. § 35-42-4-1 (Burns 1991); KAN. STAT. ANN. § 21-3502 (1990); KY. REV. STAT. ANN. § 510.010 (Baldwin 1991); LA. REV. STAT. ANN. § 14:41 (West 1991); MD. ANN. CODE art. 27, § 462 (1991); MASS. GEN. LAWS ANN. ch. 265, § 22 (West 1992); MICH. COMP. LAWS § 750.316 (1991); MISS. CODE ANN. § 97-3-65 (1991); MO. REV. STAT. § 566.085 (1990); NEV. REV. STAT. ANN. § 200.366 (Michie 1989); N.M. STAT. ANN. § 30-9-11 (1991); N.Y. PENAL LAW § 130.25-35 (Consol. 1992); N.C. GEN. STAT. § 14-27.2 (1991); N.D. CENT. CODE § 12.1-20-03 (1991); OHIO REV. CODE ANN. § 2907.03 (Baldwin 1992); OKLA. STAT. tit. 21, § 1111 (1991); R.I. GEN. LAWS § 11-37-2 (1991); S.C. CODE ANN. § 16-3-651 (1990); S.D. CODIFIED LAWS § 25-22-1 (1991); TENN. CODE ANN. § 39-13-502 (1991); VT. STAT. ANN. tit. 13, § 3201 (1991); VA. CODE ANN. § 18.2-63 (1991); WYO. STAT. § 6-2-301 (1991).

213. In Ohio, simple battery is defined as a first degree misdemeanor. OHIO REV. CODE ANN. § 2903.13(C) (Baldwin 1992). The sentence for a first degree misdemeanor is found in OHIO REV. CODE ANN. § 2929.21(B)(1) (Baldwin 1992); *see also* CAL. PENAL CODE § 243(a) (West 1988). This California statute is very similar to Ohio's statute in that it also provides for six months imprisonment for misdemeanor battery.

214. OHIO REV. CODE ANN. § 2929.11 (Baldwin 1987). Rape is a felony one offense under Ohio statutory law and therefore one convicted of rape must serve a mandatory five, six, or seven year state prison term. *Id*; *see also* CAL. PENAL CODE § 264(a) (1988). This section also provides for a mandatory three, six, or eight year state prison term for rape, which is a felony. *Id.*

215. *See* OHIO REV. CODE ANN. § 2907.02 (Baldwin 1992).

meanor.[216] If the same amount of property is taken by force without inflicting any physical harm, the crime is classified as felony robbery.[217] In the latter instance, the robber is punished more severely because of the psychological and emotional harm he has caused, not only to his immediate victim, but also to society at large.[218] Similarly, the property damage caused by the burglary of a warehouse is, in many instances, the same as that caused by the burglary of a home. The latter, however, is generally recognized as a more serious offense.[219] The major difference between the two is the degree of psychological and emotional harm caused by the invasion of the home.[220] These examples illustrate how retribution is integrated into the sentencing schemes in Ohio as well as various other states.

Consideration of the offender's level of harm is necessary under a system whose main goal is to give the offender his just deserts.[221] In giving an offender his just deserts, the punishment must be proportional to the harm he has caused. Of course, factors which relieve the offender of moral responsibility for his acts must be taken into consideration. Only by looking to the full extent of the psychological or emotional harm the defendant's acts have caused, can punishment be proportioned to the seriousness of the crime.

Victim impact statements which describe victim harm and victim characteristics also have their place in the retribution scheme. They are relevant to a sentencing determination because they indicate the full extent of the emotional and psychological harm caused by the offender's acts. The *Booth* majority called the collateral inquiry of the family members "wholly unrelated to the blameworthiness of a particular defendant."[222] Yet, if capital sentencing is to be discretionary, the entire purpose of the sentencing phase of the trial must be geared toward separating defendants who are more deserving of punishment from those who are less deserving. Additional harm beyond the death itself would seem to be a highly relevant factor to be considered in making this type of separation.

What evidence is more relevant than the degree of additional harm the defendant has caused? In *Boyde v. California*,[223] the defend-

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216. *See* CAL. PENAL CODE §§ 486, 490 (West 1988).

217. *Id.* §§ 211-13.

218. *See* MODEL PENAL CODE § 222.1 cmt. 1 (1980).

219. *See, e.g.*, CAL. PENAL CODE § 460; MODEL PENAL CODE § 222.1.

220. *See generally* Mike Maguire, *The Impact of Burglary Upon Victims*, 20 BRIT. J. CRIMINOLOGY 261 (1980) (discussing the increase in psychological harm following the burglary of the home due to a feeling of violation of that place which is dear to so many).

221. *See supra* text of section II, subsection B.

222. Booth v. Maryland, 482 U.S. 496, 504 (1987).

223. 110 S. Ct. 1190 (interim ed. 1990).

ant introduced evidence that he had won a dance choreography award while in prison.[224] The state was constitutionally required to admit this evidence.[225] Is artistic ability or lack of it more relevant to the determination of what constitutes a proportional punishment than consideration of the harm or lack of harm suffered by third persons as a result of the crime? Most people would believe that the existence or absence of additional harm is more relevant to this determination than artistic ability and, thus, more relevant than the bulk of similar character evidence introduced in capital sentencing proceedings.[226]

An argument against the admission of victim impact statements is that the additional harm caused by an offender is irrelevant to the sentencing determination because, in most cases, it was unintended by the offender.[227] An example illustrates the fallacy of this reasoning. Suppose that a gunman shot a person on a crowded subway and the bullet passed through the victim, killing him and injuring another person. That additional physical injury would certainly be relevant. While the offender may not have intended it, he recklessly created the danger. Other kinds of losses should not be any different. Loss to others is the natural and probable consequence of a death. If the killer acts with disregard of that possibility, it is fair to charge him with the consequences. Not only is it fair to hold him liable for the additional harm he has caused, but it is necessary in order to give the offender a proportional punishment under a retributive model. Therefore, states should allow consideration of victim impact statements as an indicator of this additional harm during sentencing.

B. Proposed Model - Ohio: How to Arrive At An Objective Assessment of Harm

The Ohio Supreme Court has not addressed a victim impact statement issue since the United States Supreme Court's decision in *Payne*.[228] The most recent Ohio case addressing the admissability of victim impact information was the Second District Court of Appeals'

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224. *Id.* at 1199 n.5.

225. *Id.* at 1199; *see also* Skipper v. South Carolina, 476 U.S. 1 (1986).

226. *See* Andrew von Hirsch, *Gauging Criminal Harm*, 25 OXFORD L. REV. 1 (1991). Professor von Hirsch expounds a system of ranking the harm caused by offenders. He explains the necessity of considering such harm along with any mitigating information in order to have a balanced and individualized sentencing process.

227. *See* Booth v. Maryland, 482 U.S. 496, 504-05 (1987) (presenting the argument that an offender's liability should be proportionate to that harm which is reasonably foreseeable when committing the crime).

228. *See* State v. Huertas, 553 N.E.2d 1058, 1063 (Ohio 1990), *cert. granted*, 112 S. Ct. 39 (interim ed. 1990), *and cert. dismissed*, 111 S. Ct. 805 (interim ed. 1991). The *Huertas* case, discussed *supra* in text accompanying notes 130-53, was the Ohio Supreme Court's most recent opportunity to tackle the victim impact statement issue).

decision in *State v. Chinn.*[229] In *Chinn*, the trial court readily accepted the admissability of victim impact information concerning the harm suffered by the victim's family and the victim's personal characteristics.[230] When next confronted with this issue, the Ohio Supreme Court should follow the lead of many other states[231] and accept victim impact characteristic and harm statements as useful tools for achieving the goal of retribution in criminal sentencing. In fact, this is very likely because Ohio courts have accepted retribution as a sentencing goal.[232] If victim impact statements are accepted, however, a question remains with respect to how a sentencer should objectively assess the amount of harm that a family member or loved one has suffered.[233]

This analysis suggests that an objective assessment of harm can be obtained and applied in Ohio by: (1) having a probation officer tape and transcribe the victim impact and characteristic information; (2) reviewing the victim's written statement and applying certain objective guidelines to it so as to arrive at a general assessment of the harm caused; and (3) submitting this general written assessment to the sentencer (either a judge or a jury) who will then use this general assessment as one of the aggravating factors to be weighed against the mitigating circumstances during the sentencing phase of the trial.

First, by having a probation officer tape and transcribe the meeting with the victim's family, the officer will be able to review this written transcript and apply the proposed guidelines to the statement. In Ohio, this can easily be done by applying Section 2947.051 of the Revised Code,[234] under which a probation officer is required to give an objective assessment of the harm caused by the defendant's actions. The state, upon learning that a crime has been committed, should also contact the victim's family and inform them of their statutory right to provide a statement containing information regarding characteristics of the victim and the level of harm caused by the defendant's actions.[235] This type of victim participation could make a criminal justice system, based upon a retributive model, function to its full potential.

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229. See *supra* text accompanying notes 202-05 for a discussion of this case.

230. *See supra* notes 202-05 and accompanying text.

231. *See supra* note 201 for a list of the states following this trend.

232. *See, e.g.*, State v. Bradley, 578 N.E.2d 373 (Ohio 1991) (focus upon retribution as a goal in sentencing); State v. Hughes, 569 N.E.2d 1059 (Ohio 1991) (retribution, along with deterrence, is a sentencing goal); State v. Mapes, 484 N.E.2d 140 (Ohio 1990) (death penalty serves two purposes - retribution and deterrence).

233. This is one issue that *Payne* did not address.

234. See *supra* note 26 for the text of this statutory provision.

235. Presently, only 59 percent of crime victims give victim impact statements. This may be attributable to the fact that people may not be aware of such a right or of its significance. *See generally* Henderson, *supra* note 47, at 937.

Second, principles should be formulated which will guide the probation officer in making an objective assessment of the level of harm caused by the defendant under Ohio Revised Code Section 2947.051. In Ohio, no standardized guidelines currently exist for measuring the level of harm caused by the defendant.[236] In attempting to make such an assessment, the probation officer should look to the following gradations based on the effect the crime has had on the standard of living of the victim's family.[237] A Level One harm should include situations where the victim's relatives have survived the trauma, but are left isolated as a result of the homicide. For example, consider a very young child[238] who has no father, and whose mother has been murdered. This child is left without parents as a result of the offender's acts. This type of consideration is very relevant under a retributive system which needs to assess the harm caused by a defendant's acts. A Level Two harm should include situations where members of the victim's family suffer the loss of a loved one but are not left isolated as a result. This could apply to a mother losing a son, a daughter losing a father, or a grandmother losing her grandchild. This is a lesser degree of harm than a Level One harm only because the family members have not been left isolated.

While this may seem like an oversimplification of the process, one must remember that, at this point in time, no guidelines exist whatsoever. A jury hearing the statement of a grieving mother will, of course, be moved by her emotion and may feel the death penalty is appropriate because of her suffering. This emotion, however, is not in tune with the goal of retribution which is to determine the harm actually caused by the offender and to punish proportionately. The level of harm caused is no doubt greater to a small child who is left parentless as a result of a crime, if only because he is left with no parents to give him emotional support throughout his lifetime.[239] This harm must receive a higher

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236. In the past, the victim impact evidence that has been admitted in most cases is the actual statement given by the victim. The court's probation officer has made no attempt to assess the harm. *See, e.g.*, State v. Huertas, 553 N.E.2d 1058 (Ohio 1990) (victim's actual statement was allowed to go to the jury; not an objective assessment of the harm), *cert. granted*, 112 S. Ct. 39 (interim ed. 1990), *and cert. dismissed*, 111 S. Ct. 805 (interim ed. 1991).

237. This idea is based roughly on a concept expressed in an article depicting a standard for measuring the seriousness of crimes. *See* von Hirsch, *supra* note 226, at 1.

238. This level of harm would work well in the *Payne* situation which presented a very young boy who was left without his mother and his baby sister. *See* Payne v. Tennessee, 111 S. Ct. 2597 (interim ed. 1991).

239. It may be argued that an offender should not be held responsible for this type of harm because it was not foreseeable when he committed the crime. The criminal knew, however, assuming he acted voluntarily, that the foreseeable result of murdering another human being would be harm to third persons. See *supra* text accompanying note 227 for a discussion of this foreseeability argument.

grading to serve the retributivist goal of determining how much harm the offender has caused. Therefore, this basic type of grading system gives some principled guidelines to the sentencer which help him or her ascertain what type or degree of harm the defendant has committed.

Finally, this type of objective assessment should go to the sentencer along with a written report summarizing the victim impact testimony, both of which are then weighed as aggravating factors along with all of the other aggravating and mitigating factors. In Ohio, in order to impose the death penalty, at least one of eight aggravating factors must be found to have existed.[240] These aggravating factors must be weighed against any mitigating factors which exist.[241] The harm assessment, as well as a written report of the statement, should be submitted to the sentencer at this stage so that the sentencer may consider this information as one of the aggravating factors contributing to the imposition of the death penalty. The sentencer should also consider the assessment as a guideline for judging the degree of the harm caused. The written statement[242] must also be admitted in order to allow the sentencer some discretion in determining the extent of the harm done. The objective assessment only serves as a tool to assist the jury in its judgment. Actual information from the statement must also be given to the sentencer because this is still a fact sensitive process.

IV. CONCLUSION

In a system of retribution, it is necessary, in order to calculate an appropriate punishment, to consider the full extent of the harm caused by an offender. Victim impact characteristics and harm statements are one way to receive information concerning the harm suffered by a victim's family. The United States Supreme Court has opened the door for the consideration of victim impact statements, yet has failed to provide any guidance for obtaining an objective assessment of the level of harm caused by the defendant's actions. This Comment proposes guidelines to roughly estimate the range of harm inflicted by an offender in order to provide guidance in administering a sentence. This estimate of

240. OHIO REV. CODE ANN. § 2929.04(A) (Baldwin 1992). The factors look to see if the offense was: (1) the assassination of the President; (2) committed for hire; (3) committed to escape detection; (4) committed while the prisoner was in a detention facility; (5) committed subsequent to a similar offense; (6) committed upon a victim who was a peace officer; (7) committed while the offender was committing, or attempting to commit, kidnapping, rape, arson, robbery or burglary; and (8) committed to silence a victim from ever being a witness. *Id.*

241. *Id.* § 2929.04(B)(1)-(7).

242. The statement submitted to the sentencer should be written, rather than oral testimony, so as to not excite the jury with emotional testimony when they should be attempting to gauge the harm committed. See *supra* notes 27-29 and accompanying text for the general problems encountered when a victim appears personally at sentencing.

harm, along with a written summary of the victim impact statement, should then be used as an aggravating factor during the sentencing phase of a trial.

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